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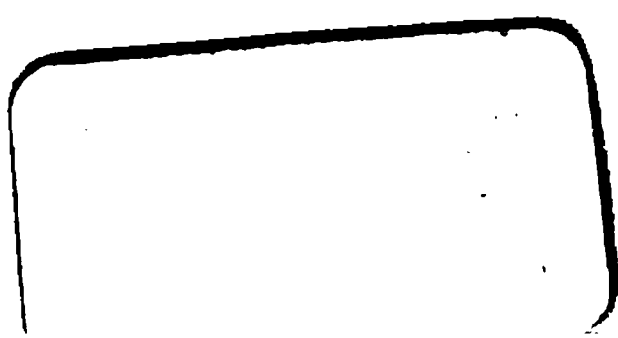
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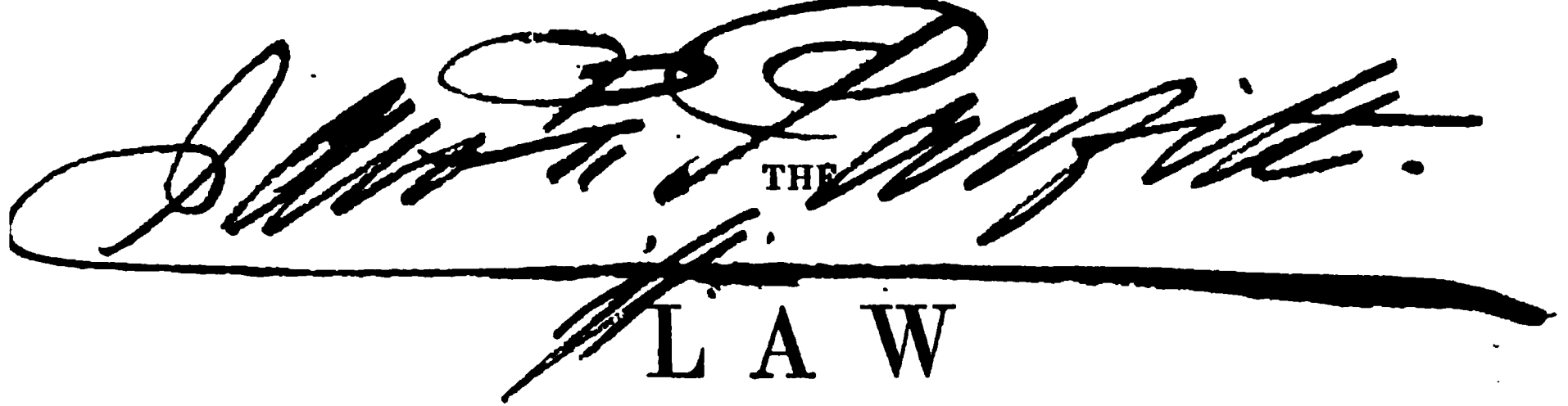
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THE

LAW

OF

NISI PRIUS,

EVIDENCE IN CIVIL ACTIONS,

AND ARBITRATION & AWARDS :

WITH

AN APPENDIX

OF

THE NEW RULES,

THE STATUTES OF SET-OFF, INTERPLEADER, & LIMITATION,

AND THE DECISIONS THEREON.

By ARCHIBALD JOHN STEPHENS,

BARRISTER AT LAW.

IN THREE VOLUMES.

VOL. II.

LONDON:

LONGMAN, BROWN, GREEN, AND LONGMANS,

PATERNOSTER-ROW.

1842.

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CARRIERS DEFINED.

Conveyance of goods for all persons for hire, constitutes a carrier.

Distinction between a private person undertaking the carriage of goods and a common carrier.

Difference as to the degrees of care between a mandatary and a carrier.

Persons usually denominated carriers.

1. CARRIERS DEFINED.

Any person undertaking for hire to carry the goods of all persons indifferently, is, as to the liability to be imposed, to be considered a common carrier (1); and in order to charge a person as a common carrier, it is not necessary, that a specific sum should be agreed on for the hire; for, if none be agreed on, he is entitled to a reasonable compensation. (2) But a carrier's obligation is founded more upon a public duty, than the particular consideration for his undertaking. (3)

The distinction between a common carrier and a private person undertaking the carriage of goods is, that the former is obliged to undertake the charge, which the latter is not compellable to do; the former is responsible for injuries arising out of acts against which he could not provide, a liability at common law to which the latter is not subject; but both are equally answerable for a *misfeasance*. (4)

The difference between the degrees of care demanded in one contract and the other is, that a common mandatary, which such a person becomes, is bound by the rule of good faith, the carrier by the unqualified rule of the common law. A mandatary not being by profession skilful in the business undertaken, is not liable to an action if he perform his commission *bond fide*, and to the best of his ability. (5)

Persons usually denominated common carriers, are the proprietors of stage waggons and stage coaches, which ply between different places and carry goods for hire (6); truckmen, carters, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town or city to another; the owners and masters of ships and steam boats, lightermen, hoymen, barge owners, ferrymen, canal boatmen, and others employed in the transportation of goods for hire. (7)

(1) *Gisbourn v. Hurst*, 1 Salk. 249. *Charter v. Peeler*, Cro. Eliz. 596.

(2) *Bastard v. Bastard*, 2 Show. 81. *Lo-vett v. Hobbs*, *ibid.* 129.

(3) *Ansell v. Waterhouse*, 2 Chitt. 1.

(4) *Jeremy on Carriers*, 6, 7. *Coggs v. Bernard*, 2 Ld. Raym. 919.

(5) *Shiells v. Blackburne*, 1 W. Black. 158. *Jones on Bailments*, by Theobald, 52—54.

(6) *Coggs v. Bernard*, 2 Ld. Raym. 909. 918. *Hyde v. Navig. Comp. from Trent to Mersey*, 5 T. R. 389. *Forward v. Pittard*, 1 T. R. 27. 2 Bac. Abr. Carriers (A.), 1, 2.

(7) 2 Bac. Abr. Carriers (A.), 1, 2. *Mors v. Sluce*, 1 Mod. 85. 1 Vent. 190. 238. 2 Lev. 69. 1 Rol. Abr. 2. Action sur Case (C.) pl. 1, 2, 3, 4. *Dale v. Hall*, 1 Wils. 281. *Jones on Bailments*, by Theobald, ii.

CARRIERS
DEFINED.

The proprietors of stage coaches, whose exclusive employment is to carry passengers, are not deemed common carriers (1); but if the proprietors of a stage coach for passengers carry goods also for hire, they are with respect to such goods to be deemed common carriers (2); and there is no distinction between mails and coaches. (3)

Proprietors of mails and stage coaches.

Where the owners and masters of ships are deemed common carriers, such ships are employed as general ships, or for the transportation of merchandise for persons in general; as vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination. But the commander of a king's ship bringing home bullion at the usual freight, is liable to an action for not carrying it safely and delivering it, although this seems to be more upon the implied contract, than from any common law liability. (4)

Owners and masters of ships.

Hackney coachmen are not common carriers, and are not charged for the loss of a passenger's goods, unless by special agreement and the carriage hire of the goods paid. (5)

Hackney coachmen.

A person who receives and forwards goods, taking upon himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or waggons by which they are transported, and no interest in the freight, is not to be deemed a common carrier, but a mere warehouseman and agent. (6) So likewise where A., B., C., and D., being in partnership as carriers, entered into an agreement with S. and Co. to carry goods for them from London to Frome, where they were to be deposited in the warehouse of A., the resident partner, till S. and Co. should be ready to receive them into their own; and the goods, having been forwarded, were, after they had been deposited in A.'s warehouse, destroyed there by fire: — It was held, that the liability of A., B., C., and D., as carriers, ceased on the arrival of the goods at Frome; and that when they were deposited in A.'s warehouse, they could only be considered as warehousemen; and that A. having paid over the amount of the loss of S. and Co., could not recover a proportion from B., C., and D. (7)

Distinction between carriers and warehousemen.

The postmaster-general is not liable for the loss of letters or their contents by the negligence of those employed by him. He enters into no contract, either expressed or implied; receives no hire, the post office being a branch of the public revenue and a branch of police, created by act of parliament, each governed by different officers; and what in a common carrier would be only a breach of trust, it is in them declared by statute to be a capital felony (8); in fact, the office is erected for intelligence, and not for insurance; for promotion of trade in procuring speedy dispatches, and not an absolute security for the dispatches themselves; the offending party is himself a substantial officer, and liable for his own acts; and because from the very nature of letters being in themselves missive,

Postmaster-general not a common carrier.

(1) 2 Bac. Abr. Carriers (A.), 1, 2.

(2) *Lovett v. Hobbs*, 2 Show. 128. *Upshare v. Aides*, 1 Com. 25. 2 Bac. Abr. Carriers (A.), 1, 2., sed vide *Middleton v. Fowler*, 1 Salk. 287. *Clark v. Gray*, 4 Esp. N. P. C. 177.

(3) *White v. Boulton*, Peake's N. P. C. 113. *Harris v. Costar*, 1 C. & P. 636.

(4) *Hodgson v. Fullarton*, 4 Taunt. 787.

(5) *Upshare v. Aides*, 1 Com. 25.

(6) *Jones on Bailments*, by Theobald, iii. iv.

(7) *In re Webb*, 2 Moore, 500. 8 Taunt. 443.

(8) *Jeremy on Carriers*, 14.

**CARRIERS
DEFINED.**

Postmaster and inferior officers responsible for personal negligence.

Deputy postmaster liable for the non delivery of a letter.

Town carman not a common carrier.

and transient from hand to hand, they are impossible to be secured by the postmaster himself, and the statute under which it was erected, styling it only a letter office, did not intend it to be considered as a mode of conveyance for treasure. (1)

Upon these principles an action does not lie against the postmaster-general for a bank note stolen by one of the sorters out of a letter delivered into the post office; but it was decided, that the postmaster and all his inferior officers were responsible for their own personal negligence. (2)

A deputy postmaster was consequently considered liable for the non delivery of a letter (3), it not being beyond the limits of his delivery. (4)

It seems from *Brind v. Dale* (5), that a town carman, whose carts ply for hire between the wharfs, and who lets them by the hour, or day, or job, is not a common carrier. "It is very difficult," observes Dr. Storey (6), "to distinguish between the case of a carman and that of a hoyman, or lighterman, or bargeman, plying between different parts of the same town, or taking jobs by the hour or the day; and yet it does not seem to have been doubted, that such hoymen, lightermen, and bargemen are common carriers. (7) What substantial distinction is there in the case of parties, who ply for hire in the carriage of goods, for all persons indifferently, whether the goods are carried from one to another, or from one place to another within the same town? Is there any substantial difference, whether the parties have fixed *termini* of their business or not, if they hold themselves out, as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town or in different towns? Is a ship engaging in general freighting business, or let out generally for hire for any voyage which the freighter may require, less a common carrier than a regular packet ship, which plies between different ports?" (8)

2. GENERAL EXTENT OF LIABILITY.

GENERAL EXTENT OF LIABILITY.

Expression "act of God" defined.

By a delivery of goods to a carrier, who is in the nature of an insurer, to be conveyed for hire, the law charges the person so intrusted as responsible at all events, for every injury arising in any other way but from the "act of God," or from the "king's enemies." (9)

The expression "act of God" denotes a natural necessity, and which arises *inevitably*, as winds, storms (10), a sudden gust of wind. (11) It means something in opposition to the act of man; for every thing may be said to

(1) *Lane v. Cotton*, 1 Salk. 17. 1 Ld. Raym. 646. 5 Mod. 455. 12 ibid. 482. Carth. 487., *vide etiam* Co. Litt. 89. F. N. B. 93. Molloy, 209. 1 Com. Dig. 239. *Morse v. Slue*, 2 Lev. 69.

(2) *Whitfield v. Le Despencer* (Lord), Cowp. 754.

(3) *Rowning v. Goodchild*, 3 Wils. 443. 2 W. Black. 906. *Smith v. Powdich*, Cowp. 182. *Smith v. Dennis*, Loft, 753.

(4) *Stock v. Harris*, 5 Burr. 2709. *Barnes v. Foley*, ibid. 2711.

(5) 8 C. & P. 207.

(6) *Law of Bailments*, 323. n.

(7) *Lyon v. Mells*, 5 East, 439.

(8) *Rich v. Kneeland*, Cro. Jac. 330. 1 Rol. Abr. 2. *Action sur Case* (C.), pl. 1, 2, 3, 4. *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693. 1 Bell. Com. 5th ed. 467, 468. *Whalley v. Wray*, 3 Esp. N. P. C. 74.

(9) *Coggs v. Bernard*, 2 Ld. Raym. 919. *Dale v. Hall*, 1 Wils. 181. *Forward v. Pittard*, 1 T. R. 27. *Hyde v. Trent and Mersey Navig. Comp.* 5 ibid. 389. 1 Esp. N. P. C. 36.

(10) *Proprietors of Trent Navig. Comp. v. Wood*, 3 Esp. N. P. C. 131.

(11) *Amies v. Stevens*, Str. 128.

be the act of God, which acts by his permission, every thing by his knowledge.

The law therefore presumes against a carrier in every case, except such act as could not happen by the intervention of human means; and he has been held liable, where the injury arose from a fire which raged with unextinguishable fury, and originated at a distance from the carrier's premises. (1)

By the "king's enemies" is to be understood enemies at open war, and not merely robbers, thieves, or other private depredators, however much they may be deemed, in a moral sense, at war with society; yet, if they were not excepted, confederacies would be formed between carriers and desperate villains with little or no chance of detection. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations and violence of mobs, rioters and insurgents, and other felons, are not deemed losses by enemies; but losses by pirates on the high seas are so deemed; for pirates are the common enemies of all mankind. (2)

Where goods are transferred from the original contracting carrier, his liability continues, if such transfer be only accessory to the discharge of his own duty, or the terms of his own contract; and all such intermediate persons employed, are only regarded as his agents, as porters, wharfingers, warehouse keepers, &c.; and in that case his liability continues, until the goods are actually delivered. (3)

But where his own undertaking or duty is complete and ended, and the goods have passed, according to the directions, out of his hands, the owner must look to such third persons for a due discharge of all the duties incident to their relative situations, as in the cases of intermediate independent carriers or shippers, receivers, wharfingers, &c. on delivery of the goods to whom, the contract on the part of the carriers is entirely determined. (4)

Under stat. 11 Geo. 4. s. 1. and 1 Will. 4. c. 68. there must be an express formal declaration of the value of pictures, &c. to the value of more than 10*l.*, sent by a carrier; and it is not enough that the carrier had a conviction as to what the contents of a package were. (5)

GENERAL EXTENT OF LIABILITY.

The law presumes against carriers, except such acts as could not happen by the intervention of human means.
King's enemies.

Intermediate carriers.

An express declaration of the value of articles intrusted to a carrier must be given.

(1) *Forward v. Pittard*, 1 T. R. 33. *Hyde v. Trent and Mersey Navig. Comp.* 5 *ibid.* 389.

(2) *Jones on Bailments*, by Theobald, 104.; vii. *Proprietors of Trent Navig. Comp. v. Wood*, 3 Esp. N. P. C. 131. *Gibbon v. Paynton*, 4 Burr. 2298.

(3) *Hyde v. Trent and Mersey Navig. Comp.* 5 T. R. 389.

(4) *Jeremy on Carriers*, 20, 21.

(5) *Boys v. Pink*, 8 C. & P. 361. *Quare*, Whether this act protects carriers in cases of gross negligence, and what it is that amounts to gross negligence? *Ibid.*

The form of plea adopted under this statute in *Boys v. Pink*, *ibid.* is as follows:—

"And for a further plea the defendants say, that the said prints and coloured prints in the declaration mentioned, at the time of the said delivery thereof to the defendants, were engravings; and that the said delivery in the declaration mentioned, of the said box containing the said goods and chattels, was a

delivery thereof to the defendants, as common carriers by land of goods for hire, to a certain servant of the defendants, and at a certain office and receiving house of the defendants, situate at Bristol aforesaid; and that the value of the goods and chattels contained in the said box at the time of the said delivery thereof as aforesaid exceeded the sum of 10*l.*, and amounted to wit to the said sum of 200*l.* in the said declaration mentioned. And the defendants further say, that at the time of the said delivery of the said box and its contents as aforesaid, for the purpose of their being carried as aforesaid, the value and nature of the said goods and chattels were not declared by the plaintiff or the person sending or delivering the same; nor was such increased charge as is hereinafter mentioned, nor any engagement to pay the same, accepted by the defendants, or either of them, or by the person receiving the said box and its contents aforesaid: and the defendants further say, that before the time when the said box and its contents aforesaid

GENERAL
EXTENT OF
LIABILITY.

NEGLECT.

Certain standard or degrees of care.

There are infinite shades of care or diligence, from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable to practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or a seal.

The degrees, then, of care, in relation to the present subject, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive, that the generality of rational men use nearly the same degree of diligence in the conduct of *their own* affairs: and this care, therefore, which every person of common prudence, and capable of governing a family, takes of his own concerns, or the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them, is the proper measure of that, which would uniformly be required in performing every contract, if there were not strong reasons for exacting in some of them a greater, and permitting in others a less, degree of attention.

Here then we may fix a determinate point, on each side of which, there is a series consisting of variable terms tending indefinitely towards the above mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be favourable, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care, which every man of common sense, though absent and inattentive, applies to his own affairs; in the second, the measure will be that attention, which a man, remarkably exact and thoughtful, gives to the securing of his personal property.

The fixed mode or standard may be called "ordinary;" the degrees on each side of the standard being indeterminate, need not be distinguished by any precise denomination; the first may be called "less," and the second "more than ordinary" diligence. (1)

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance: and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect; but it is very different, both in reason and policy, when one only of the contracting parties derives advantage from the contract.

were so delivered to, and received by the defendants as such carriers as aforesaid, the defendants had caused to be affixed, and there was at that time affixed, in the said office and receiving house, according to the form of the statute in such case made and provided, in legible characters, in a public and conspicuous part of the said office and receiving house, a notice, whereby they, the defendants, stated and notified that certain increased rates of

charge therein mentioned, specified, and stated, were required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater trouble and care to be taken for the safe conveyance of a parcel or package containing engravings of a value exceeding 10*l.*, and this the defendants are ready to verify," &c.

(1) Jones on Bailments, by Theobald, 5.

If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than good faith were exacted from such a person, that is, if he were to be made answerable for less than gross neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the bailee alone is benefited or accommodated by his contract, it is not only reasonable, that he who receives the benefit should bear the burden; but, if he were not obliged to be more than ordinarily careful, and bound to answer even for slight neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

A mandatary as well as a depositary can bind himself by a special agreement to be answerable even for casualties; but neither the one nor the other can exempt himself by any stipulation from responsibility for fraud, or its equivalent, gross neglect. (1)

Responsibility
for gross neg-
lect.

It seems that a carrier forfeits the protection of stat. 11 Geo. 4. and 1 Will. 4. c. 68. when guilty of gross negligence (2); but it is the province of the jury to determine, whether the facts presented to them amount to gross negligence; and where, in an action against a carrier for the loss of a parcel, it had been left to the jury, whether, under the circumstances, the carrier had been guilty of gross negligence; and they having found that he had, the court of Common Pleas refused to grant a new trial, which was moved for on the grounds, 1. That the plaintiffs had corresponded by letters with the defendant after the loss, requesting him to apprehend the person to whom the parcel had been delivered as a swindler; 2. That the intimation of the value of the parcel was not given to the defendant at the time it was delivered at his office, according to a notice which was there affixed, limiting his responsibility to 5*l.*, except the value of the parcel was specified when delivered; and lastly, that the property in the goods contained in such parcel had passed from the plaintiffs to the consignee. (3)

Province of the
jury to deter-
mine the ques-
tion of "gross
negligence."

A carrier was held liable for gross negligence, although the goods were above the value mentioned in his public notice, and although they were not specially entered and insured (4); but to render a carrier liable for the loss of a valuable parcel of plate, in a case where the defendant relied on the usual defence of notice, it is necessary to establish a case of gross negligence. (5)

What is negli-
gence.

Carriers and proprietors of coaches have been held responsible for "negligence:" — where a parcel was sent by coach from Worcester to London, directed to be delivered at the latter place; but upon its arrival in London was taken from the coach-office in a cart, under the direction of one person

(1) *Jeremy on Carriers*, 7. cit. *Shiells v. & B.* 177. *Batson v. Donovan*, 4 B. & A. *Blackburne*, 1 Hen. Black. 158. *Jones* 21.
on Bailments, by Theobald, 54.

(2) *Owen v. Burnett*, 2 C. & M. 353. 4 not S. P. 1 Chitt. 633. *Beck v. Evans*, 16 Tyrw. 133. East, 244. 3 Camp. 267.

(3) *Duff v. Budd*, 6 Moore, 469. 3 B. (5) *Lowe v. Booth*, 13 Price, 329.

GENERAL
EXTENT OF
LIABILITY.Drunkenness
of coachman.Goods im-
properly se-
cured;improperly
guarded;forwarded by
the wrong
coach.Where loss has
not arisen from
a tortious con-
version.

only, for the purpose of delivery, and lost (1):—where the stage waggon in which a painting was sent had seven horses, but *only one waggoner* (2):—where a bank parcel sent by a stage coach was lost, and the book-keeper, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it or look into the coach for it, the driver being in liquor on his arrival (3):—where a common travelling trunk of a large size, containing apparel and jewels, was lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely (4):—where goods were sent packed in a box by the defendant's waggon, which was placed with its lid outwards at the tail of the waggon, and left during several hours in the night standing in the road opposite an inn where the waggoner stopped, without any person to watch it, and in consequence its contents were abstracted (5):—where a parcel, containing property exceeding 5*l.* in value, was delivered to A. and B. to be carried by their mail coach, accepted by them to be so carried, put into the mail, and carried therein a short distance, and then taken out of the mail by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but B. was not, and the parcel lost (6):—where a paper parcel, containing notes of country bankers to the amount of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to a carrier without any notice of its value, and booked to be carried by the mail, and accepted by him to be so carried, but was sent by a different coach, and stolen or lost. (7)

But where one delivered goods of above 5*l.* value to common carriers to carry by the mail, paying no extra price, and by a public notice which had before reached the owner, the carriers had declared, they would not be accountable for any package above the value of 5*l.* unless insured and paid for accordingly:—It was held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5*l.*, as by the terms of the notice the carriers stipulated not to be answerable at all for goods above 5*l.* value, unless paid for accordingly. (8)

And where the plaintiff received a parcel from G. to book for London at the office of defendants, common carriers, and instead of obeying his instruction, put the parcel into his bag, which the defendants lost, intending to take it to London himself:—It was held, that the plaintiff could not recover damages from them in respect of the parcel. (9)

(1) *Smith v. Horne*, 2 Moore, 18. 8 Taunt. 144. Holt's N. P. C. 643.

(2) *Beckford v. Crutwell*, 5 C. & P. 242. 1 M. & Rob. 187.

(3) *Bodenham v. Bennett*, 4 Price, 31.

(4) *Brooke v. Pickwick*, 4 Bing. 218. 12 Moore, 447.

(5) *Langley v. Brown*, 1 M. & P. 583.

(6) *Garnett v. Willan*, 5 B. & A. 53.

(7) *Sleat v. Fagg*, 5 *ibid.* 342., et vide *Wright v. Snell*, *ibid.* 350. *Quære*, Whether the intrusting valuable property to a servant,

of whose character the carrier gave no account at the trial, was sufficient to authorise the jury to find that the carrier had been guilty of that degree of negligence, which would deprive him of the protection of a proper notice? *Macklin v. Waterhouse*, 2 M. & P. 319. 5 Bing. 212.

(8) *Nicholson v. Willan*, 5 East, 507. 2 Smith, 107.

(9) *Miles v. Cattle*, 6 Bing. 743. 4 M. & P. 630.

In *Davis v. Garrett* (1) the defendant received on board his barge certain lime to be conveyed for the plaintiff from Bewly Cliff to London. The master deviated from the usual and customary voyage, without any justifiable cause, and whilst the barge was so out of her course she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged, that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay, or hindrance in the same," and averred the loss to be by reason of the deviation and departure, and delay and deviation out of such usual and customary course and passage:—It was held, first, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant, to form the subject of an action; secondly, that the declaration was sufficient to support a judgment for the plaintiff.

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LIABILITY.**

Destruction of goods from having deviated from the usual voyage, without justifiable cause.

A stage-coachman is responsible for the loss of a parcel which he insures to carry without reward, if it be lost through gross negligence on his part. (2)

Coachmen carrying without reward.

If a person who is not a common carrier agree to carry goods for hire, he thereby agrees to make good, losses arising from the negligence of his own servants, although he is not liable for any loss from thieves, or from any taking by force, or if the owner accompany the goods to take care of them, and be himself guilty of negligence. (3)

Person not a common carrier agreeing to carry goods for hire.

The goods should be properly packed when delivered to the carrier; but the carrier cannot absolve himself from liability, where he has the means of observing the risk he runs in accepting the commodity to be carried in the state it is presented to him (4), and with such knowledge gives a receipt, as in the case of a dog. (5)

Carrier cannot absolve himself from responsibility, where he has the means of observing the risk.

The owner of a ship was not liable beyond the value of the ship and freight, under stat. 7 Geo. 2. c. 15. s. 1. in the case of a robbery, in which one of the mariners was concerned, by giving intelligence and afterwards sharing the spoil. (6)

**CARRIERS BY
WATER.**

Owners of vessels, &c. have been held responsible for "negligence:" thus, on the navigation between A. and C., the owners of vessels having given public notice, that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l. per cent.* unless extra freight were paid; the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B: the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C., without any want of care in the master, the shipowners were held responsible for the entire loss. (7) Where a man undertook to carry goods from London to Amsterdam, and a puncheon of rum was accidentally damaged in their being let down into the

(1) 4 M. & P. 540.

(2) *Beauchamp v. Powley*, 1 M. & Rob. 38.

(3) *Brind v. Dale*, 8 C. & P. 207.

(4) *Beck v. Evans*, 16 East, 244.

(5) *Stuart v. Crawley*, 2 Stark. 323.

(6) *Sutton v. Mitchell*, 1 T. R. 18., *sed vide* stat. 26 Geo. 3. c. 86.

(7) *Ellis v. Turner*, 8 T. R. 531.

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**Improper
stowage.**

hold of the ship (1): and where damage was done to the cargo of a steam vessel, by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost, the shipowners were held liable for the entire loss. (2)

In an action against the proprietors of a steam vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it be left in doubt, what the cause of the injury was, or if it may as well be attributable to the perils of the seas as to negligence, the plaintiff cannot recover; but if the perils of the seas required that more care should be used in the stowing of the goods on board, than was bestowed on them, that will be negligence, for which the owners of the vessel will be answerable. But whether in such a case on the arrival and detention by foul weather, of the vessel, at a place from which the goods could be conveyed by land to their destination, the captain of the vessel is bound to give notice to the consignee of the fact, to enable him, if he think proper, to obtain the goods earlier by sending for them, is questionable. (3)

**STATUTORY
RESTRICTIONS
ON THE LIABILITY OF CARRIERS BY LAND.**

Previously to stat. 11 Geo. 4. and 1 Will. 4. c. 68., a carrier was held to be an insurer of the goods which he carried; he was obliged for a reasonable reward to carry any goods to the place to which he professed to carry goods, which were offered him if his carriage would hold them, and he was informed of their quality and value; he was not obliged to take a package, the owner of which would not inform him what were its contents, and of what value they were; if he did not ask for this information, or if, when he asked, and was not answered, he took the goods, he was answerable for their amount, whatsoever that might be; he might limit his responsibility as an insurer by notice, but that notice would not protect him against the consequences of a loss by gross negligence. (4)

It had become a prevalent practice for coach proprietors and carriers to circulate notices, limiting their responsibility for goods of more than 5*l.* value, unless entered and paid for accordingly; but this was productive of legal controversies, and frequently inefficacious from the difficulty of fixing the consignor with a knowledge of the notice.

Such circumstances were productive of stats. 11 Geo. 4. and 1 Will. 4. c. 68., under which mail contractors, coach proprietors, and carriers, are not to be liable for the loss of certain goods above the value of 10*l.* unless delivered as such, and increased charge accepted. (5)

(1) *Goff v. Clinkhard*, 1 Wils. 282.

(2) *Siodet v. Hall*, 4 Bing. 607. 1 M. & P. 561.

(3) *Muddle v. Stride*, 9 C. & P. 380.

(4) *Macklin v. Waterhouse*, 2 M. & P. 319. 5 Bing. 212. *Riley v. Horne*, *ibid.* 217. 224. 2 M. & P. 391.

(5) The provisions of stat. 11 Geo. 4. and 1 Will. 4. c. 68. are as follow. —

S. 1. "That from and after the passing of this act no mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any

precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value

A carrier is not entitled to the benefit of these enactments until he causes a notice to be fixed up in his booking office, stating the increased rates

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LIABILITY.

Where carrier
entitled and

of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

S. 2 "When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

S. 3. "When the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as herein-before mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

S. 4. "That from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail

contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss of or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

S. 5. "For the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carrier shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

S. 6. "That nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandises.

S. 7. "That where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

S. 8. "That nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

S. 9. "That such mail contractors, stage coach proprietors, or other common carriers

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LIABILITY.**

not entitled to the protection of stat. 11 Geo. 4. and 1 Will. 4. c. 68.

Common law liability cannot be qualified by a public notice.

Carrier can enter into a special contract.

What is not considered "fur" under stat. 11 Geo. 4. and 1 Will. 4. c. 68.

Looking-glass within the meaning of stat. 11 Geo. 4. and 1 Will. 4. c. 68.

Judgment of Mr. Baron Bayley in *Owen v. Burnett*.

required as a compensation for the carriage of the hazardous articles, nor unless, upon receiving the increased rate, he gives, if asked for it, a receipt for the parcel, acknowledging the insurance; and it is immaterial whether the owner of the goods has any knowledge of such notice.

As to every other description of goods not specifically mentioned in the first section, of whatever value; and as to the description of goods therein mentioned, when not exceeding the value of 10*l.*, the common law liability of the carrier continues, which liability the carrier cannot limit or qualify by any public notice, as he could have done previously to stat. 11 Geo. 4. and 1 Will. 4. c. 68.

The fourth section leaves the carrier still at liberty to make a special contract in the usual form of entering into contracts; and it merely nullifies any inference of a special contract from the publication or receipt of a general notice.

It has been held, that bodies which are made partly of the soft substance, which is taken from the skins of rabbits, and partly from the wool of sheep, do not come under the description of furs in the foregoing statute (1); but that its provisions extend to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in small compass." (2)

To entitle a party to recover for loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article. Thus, where a looking-glass exceeding the value of 10*l.* was packed up in a case and sent to a carrier's office, to be conveyed from A. to the house of S., near L.; in which office a notice was fixed up in the office, pursuant to 11 Geo. 4. and 1 Will. 4. c. 68. s. 2. The words, "plate glass," "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from L. to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken:—It was held, that the carrier was not responsible; Bayley B. observing, We are all of opinion, that a looking-glass of the dimensions in question, is an article within the meaning of the act. In the first place, it falls within the express words of the first section, viz. as "glass." If it was the intention of the legislature to confine the act to 'articles of great value in small compass,' as set forth in the preamble, I should expect to find these words in the enacting clause; "the word 'glass' is unqualified and unlimited; and I cannot see

for hire shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence that the mail contractors, stage coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

8. 10. "That in all actions to be brought

against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action."

(1) *Mayhew v. Nelson*, 6 C. & P. 58.

(2) *Owen v. Burnett*, 2 C. & M. 353. 4 Tyrw. 133.

that we are justified in saying, it applies to glass in small compass only, and not of every description. The object is, that the party shall be put upon his guard, not only against theft, but against the ordinary accidents of the road; and as some articles, and amongst them glass, require peculiar care, it is provided, that the carrier shall not be responsible, unless the value and nature of such articles or property shall have been declared, and the increased charge, or engagement to pay the same, have been accepted by the person receiving the parcel or package. Now it seems to me, that the object of the act is twofold; first, it is, that the party receiving the article may be apprised of the nature of the article, in order that he may give it the greatest degree of protection; and, secondly, that, as he incurs an additional danger and risk, he should have an increased compensation. It seems to me, that by the terms of the act, the plaintiff was required to give a specific notice, that the package contained glass of the value he seeks to recover; and that, as he did not do that, the defendant was not responsible."

"As for the cases of what is called 'gross negligence,' which throws upon the carrier the responsibility, when, but for that, he would have been exempt, I believe that in the greater number of them it will be found, that the carrier was guilty of misfeasance. There is no question that here, the carrier would not have been justified in dashing the glass to the ground, because that would have been acting as a wrong-doer. In one case the parcel was delivered to a wrong person (1); in another it was carried beyond the place of delivery (2); and in another a different mode of conveyance was substituted. (3) In *Smith v. Horne* (4) the carrier's cart was left standing in the street unprotected, whilst the porter went to deliver another parcel. In all these instances there was misfeasance. Here, it seems to me, there was no misfeasance or gross degree of negligence. The negligence imputed was, the carrying of the glass along a hard smooth road on a truck. If the carrier had been apprised of the contents of the case, it might not have been so prudent a mode of conveyance; but it was the ordinary mode of carriage, and, to induce him to exercise more than ordinary care and diligence, he was entitled to notice." Mr. Baron Vaughan concurred; but said, "If gross negligence were made out it would be different, but that was not established here:" and Mr. Baron Gurney said, "I think the declaration of nature and value is a condition precedent, and that there ought to be a nonsuit."

It may be observed, that the defence set up in this case, namely, that the value of the goods was not declared, must now be specially pleaded; it cannot be given in evidence under the general issue.

In *Syms v. Chaplin* (5) the plaintiff sent a parcel directed to a person in London, to the postmaster of Bradford, to be forwarded to Melksham. The postmaster received 2*d.* to book the parcel, and sent it by a mail cart to the King's Arms inn at Melksham. He was accustomed so to take in parcels for the mail cart. The innkeeper at M. booked the parcel to London, charging 2*d.* for "booking" for his own trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail coach, of which the defendants were pro-

What is considered a receiving house under stat. 11 Geo. 4. and 1 Will. 4. c. 68.

(1) *Duff v. Budd*, 3 B. & B. 177. 6 Moore, 469. *Birkett v. Willan*, 2 B. & A. 356. (3) *Nicholson v. Willan*, 5 East, 507. *Sleat v. Fagg*, 5 B. & A. 342.

(4) 8 Taunt. 144. 2 B. Moore, 18.

(2) *Ellis v. Turner*, 8 T. R. 531.

(5) 5 A. & E. 634.

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prietors, to London. Several coaches used to stop at the King's Arms; the mail pulled up there, but did not change horses. The innkeeper had no express authority from defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking office was kept at the King's Arms. The parcel was lost:—It was held, first, that for the purpose of taking in the above parcel, the King's Arms was a receiving house of the defendants, within stats. 11 Geo. 4. and 1 Will. 4. c. 68.; secondly, that the plaintiff might properly sue the defendants on a contract to carry from Melksham to London. The defendants pleaded *non assumpsit*, and that the parcel contained property within the stats. 11 Geo. 4. and 1 Will. 4. c. 68. s. 1. above the value of 10*l.*; that it was not delivered at a receiving house of the defendants, but to their servant; and that plaintiff did not at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate or charge for it. Replication *de injuriâ*. The jury found that the house was a receiving house of defendants, and it appeared, that no notice was affixed there pursuant to sect. 2. of the statute. The defendant in moving for a new trial contended that, independently of the enactments in those sections, the plaintiff could not recover, not having declared the value of the parcel to their servant, and such declaration being by sect. 1. a condition precedent to the recovery of damages for loss of any goods there mentioned exceeding 10*l.* in value:—It was held, that on the third plea, and on the finding of the jury, this objection could not be maintained; and that, since the new rules of pleading, Hilary Term, 4 Will. 4., such defence was not open on *non assumpsit*.

Responsibility
limited beyond
the common
law exception.

A carrier can limit his responsibility, where stat. 11 Geo. 4. and 1 Will. 4. c. 68. does not apply; but if the exception be beyond the common law exception, it must be specially proved, as in an undertaking to carry safely certain goods by water, with an exception of all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of seas, rivers, and navigation of what nature and kind soever. (1)

A carrier is liable for damage occasioned by running against an anchor to which no buoy appeared to be fastened (2); but where there is an exception in a charter-party of "perils of the sea," a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea. (3)

Loss not oc-
casioned by a
neglect of the
common and
ordinary duty
of defendant.

On a declaration against a lighterman in the common form for negligence, the plaintiff cannot recover, if it appear, that the loss was not occasioned by a neglect of the common and ordinary duty of the defendant. (4)

Liability of
wharfinger si-
milar to that of
a carrier.

The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters, is similar to that of a carrier. (5)

STATUTORY
RESTRICTIONS
ON THE LIA-
BILITY OF CAR-
RIERS BY
WATER.

Stat. 7 Geo. 2.
c. 15.

Several acts have been passed to limit the responsibility of shipowners. By stat. 7 Geo. 2. c. 15. after reciting the liability of the owners of vessels for the loss of goods shipped on board their vessels, although the loss was occasioned by the master or mariners, without the knowledge or privity of the owners, it was enacted (s. 1.), "That the owners shall not be liable for any loss or damage by reason of any embezzlement, parting or making

(1) *Richardson v. Sewell*, 2 Smith, 205.,
vide *Trent Navig. Comp. v. Wood*, 3 Esp.
N. P. C. 127. 4 Doug. 287. *Forward v.*
Pittard, 1 T. R. 28. n.

(2) *Ibid.*

(3) *Buller v. Fisher*, 3 Esp. N. P. C. 67.

(4) *Whalley v. Wray*, *ibid.* 74.

(5) *Maving v. Todd*, 1 Stark. 72. 4 Camp.
225.

away with (by the master or mariners) of any gold, silver, diamonds, jewels, precious stones, or other goods shipped, taken in, or put on board any vessel, or for any act, matter or thing, damage or forfeiture, done, occasioned, or incurred by the master or mariners, without the privity of the owners, further than the value of the vessel with her appurtenances, and the full amount of freight due or to grow due for the voyage."

The second section provides the mode of distributing the indemnity in case the loss exceeds the value of the ship and freight. In that case the several claimants are to be paid by average, according to the proportion of their losses. The third section empowers the owners to file a bill for the discovery of the total amount of the losses, requiring of them at the same time to pay the value of their ship and freight into court.

The first section of this act was held to apply to a case of robbery by pirates on the Thames, to which one of the mariners was accessory, by giving the robbers intelligence. (1)

By stat. 26 Geo. 3. c. 86., after reciting, that the former act was confined to the single case of a loss happening with the privity or through the fault of the master or mariners, the owners, in sect. 2., are exempted from responsibility in case of loss or damage by fire; and by sect. 3. from all loss in any case whatever in respect of gold, silver, diamonds, watches, jewels, or precious stones, unless the owner or shipper thereof, at the time of shipping the same, should insert in his bill of lading, or otherwise declare in writing, their true nature, quality, or value. Stat. 26 Geo. 3. c. 86.

The first of these two statutes applies only to the case of a loss happening by the fault of the master or mariners. It would, therefore, not extend to the case of a loss which should happen by the fault or act of any person not being either a master or a mariner. But by stat. 53 Geo. 3. c. 159. (2), the relief of the former act is extended to "part owners," and to the case of "any loss or damage arising or taking place by reason of any act, neglect, matter, or thing, done, omitted, or occasioned," without the privity of the owners. Each of these acts reserves the common law remedies against the master and mariners; and by the last it is declared, that it shall not extend to lighters, or vessels used solely in inland navigation, nor to any ship not duly registered. Though the master through whose fault a loss arises is himself a part owner, the other owners are entitled to the benefit of the statute. (3) Stat. 53 Geo. 3. c. 159.

Stat. 6 Geo. 4. c. 125. regulates the pilotage of vessels on certain days, and within certain limits; and that the owners shall not be liable for any loss arising in consequence of there being no pilot on board, unless it shall appear, that there was a *refusal* to take a pilot (according to the requirement of the act), or that the master wilfully neglected to use all practicable means of having a pilot; but in any case under that act, the owners are not to be liable to a greater amount than the value of the ship and freight, and are not to be liable at all if the loss happens through the incompetency of the pilot. Stat. 6 Geo. 4. c. 125.

With respect to goods in a carrier vessel, which are shipped to be stowed on deck, as they are, from their situation, liable to be thrown overboard to lighten the vessel in case of distress, if they are necessarily so thrown over- Goods stowed on deck.

(1) *Sutton v. Mitchell*, 1 T. R. 18.

(3) *Ibid.*

(2) *Wilson v. Dickson*, 2 B. & A. 2.

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EXTENT OF
LIABILITY.

FRAUD OR
CONCEALMENT.

Acts which
have been
deemed a
fraudulent con-
cealment.

board, the carrier is exonerated, and the owner of the goods must bear the loss without contribution. But, if such goods are, without the consent of the owner, or a general custom binding him, stowed on deck, and, on that account, ejected in tempestuous weather, the carrier will be chargeable with the loss. (1)

If the rules of commercial policy impose upon a carrier the responsibilities of an insurer, his reward ought to correspond with the greater warranty undertaken, and additional precautions necessary to be provided by him. (2) Wherever therefore the mover of goods has been guilty of a fraudulent representation, such fraud has been held to excuse the carrier. The fraud may be effected either by withholding the true contents when demanded, concealing it in part, or in not communicating it, when the carrier has publicly given notice that he will not take charge of goods of a certain value, unless an extraordinary premium be paid for them.

Where a carrier gave notice by printed proposals, that he would not be answerable for certain valuable goods, if lost, "of more than the value of a specified sum, unless entered and paid for as such;" and goods of that description were delivered to him by A., who knew the conditions, but, concealing the value, paid no more than the ordinary price of carriage and booking: on a loss, the carrier was held, before the statute, to be neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking. (3)

Where, on the delivery of a box to the carrier, he asked what was in it, and the owner answered a book and tobacco, and in fact so there was, but there was also 100*l.* besides, and the carrier was robbed; Rolle C. J. is reported to have held at Nisi Prius, that the defendant was answerable, for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance. (4) But where a carrier received two bags of money sealed up, and was told they contained 200*l.* and a receipt was given, charging 10*s. per cent.* for carriage and risk, and the bags of which the carrier was robbed contained 400*l.*, it was held, that the plaintiff could not recover more than 200*l.* (5) It is, however, questionable, whether the whole contract ought not to have been avoided as fraudulent. (6)

A carrier who has given notice that he will not be answerable for money sent by him, is nevertheless responsible if it be stolen by his servants. But if the party sending the parcel has given no notice of the value, but has attempted to disguise it, and has done so sufficiently to prevent the carrier from taking particular care of the parcel, yet not sufficiently to conceal its nature effectually from the carrier's servants, he can maintain no action against the carrier for the value, if the parcel be stolen. (7)

A parcel containing 200 sovereigns, inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach pro-

(1) Jones on Bailments, by Theobald, xiii.

(2) *Gibson v. Paynton*, 4 Burr. 2301. *Nicholson v. Willan*, 5 East, 513.

(3) *Clay v. Wilkin*, 1 Hen. Black. 298. *Izett v. Mountain*, 4 East, 370.

(4) 2 Bac. Abr. (B.) 4., et vide *Moghen v. Eames*, 1 C. & P. 550.

(5) Bull. N. P. 71. 2 Bac. Abr. (B.) 4.

(6) 2 Stark. Ev. 207.

(7) *Bradley v. Waterhouse*, M. & M. 154. 3 C. & P. 318.

prietors limiting their responsibility to 5*l*. The parcel was stolen by one of the porters of the coach, while it was standing in the street, at a manufacturing town in the course of its journey. In an action to recover the value from the coach proprietors, the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care. (1)

Where a carrier gave notice, that he would not be answerable for parcels of value, unless entered and paid for as such, and the plaintiffs, with a knowledge of this circumstance, delivered a parcel containing bank notes to a large amount, without informing the carrier of its contents, which was afterwards stolen:—It was held, that the question, whether the plaintiffs had been guilty of unfair concealment by not informing the carrier of the nature and value of the parcel, was properly left for the determination of the jury. (2)

The law contemplates no other bailment than that between the owners, or parties interested, and the original carrier; consequently common carriers are not only responsible for their own acts, but for those of their servants, porters, warehouse-receivers, &c. who are considered as the carrier's servants employed by him in execution of the principal undertaking; and no agreements between these parties affect third persons; and carriers cannot exonerate themselves from their common law liability to the owner, in case of undue delivery, or other injuries occasioned by the default of their servants.

LIABILITY FOR.
SERVANTS.Carriers responsible for
the acts of their
servants.

Under these principles, if a carrier direct goods to be sent to a particular booking-office, he is answerable for the negligence of the booking-office-keeper. (3)

Booking-
office-keeper.

A booking-office-keeper, who also keeps a wine vault, is guilty of negligence, if he allow goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar behind the counter. (4)

Where a parcel is delivered to a driver of a stage coach to be carried, the master, and not the servant, is responsible. (5)

Coachmen.

A parcel delivered to the guard of a mail coach, and by him to the porter of the inn where the mail stops, whose business is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for earriage, does not make such porter personally responsible for its loss. (6).

Guards.

By stat. 11 Geo. 4. and 1 Will. 4. c. 68. s. 8., carriers are responsible for losses arising from the felonious acts of their servants. The defendant, a carrier, was sued to recover the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel: on a verdict found for the plaintiff, a new trial was refused, on the ground, that the defendant ought to have called the servant as witness. (7)

Stat. 11 Geo. 4.
and 1 Will. 4.
c. 68. s. 8.
Felonious acts
of servants.

(1) *Bradley v. Waterhouse*, M. & M. 154. 3 C. & P. 318. *v. Eames*, 5 D. & R. 484. 3 B. & C. 601. 1 C. & P. 550.

(2) *Batson v. Donovan*, 4 B. & A. 21., et vide *Clay v. Willan*, 1 Hen. Black. 298. *Quare*, Whether the person sending a parcel containing 87*l* by a stage coach, by writing the word "mourning" on it, does not commit such a fraud on the coach proprietors as to exonerate them from liability? *Mayhew*

(3) *Colepepper v. Good*, 5 C. & P. 380.

(4) *Dover v. Mills*, *ibid.* 175.

(5) *Williams v. Cranston*, 2 Stark. 82.

(6) *Cavenagh v. Such*, 1 Price, 328.

(7) *Boyce v. Chapman*, 2 Bing. N. C. 222 2 Scott, 365.

**GENERAL
EXTENT OF
LIABILITY.**

Acceptance of a carrier must be either actual or constructive, to render him responsible.

Not responsible for goods, unless carried for his immediate profit.

Carrier not responsible for his servants, except within the scope of their situations.

**RIGHTS AND
LIABILITIES OF
PARTNERS.**

Although the liability of carriers attaches from the time of their acceptance of the goods, whether that acceptance be special, or according to the usage of their business, yet an acceptance in some way, either actual or constructive, is indispensable. (1)

Where goods are actually put into the waggon or barge of a carrier, he will not be chargeable, if it appear, that there is no intention to trust him with the custody, as, if the owner be uniformly in the habit of placing his own servant on board as a guard, who exclusively takes upon himself the management and custody of them. (2) But, the mere fact that the owner or his servant goes with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not, of itself, exempt him from responsibility. (3)

But if a parcel be given to a waggoner for hire to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. (4)

If a common carrier demand a certain sum for booking, and refuse to take charge of goods unless such sum be paid, he is not liable to an action, if they be left without being paid for and are lost. (5)

A carrier is not responsible for the acts of his servants, if such acts are not within the general scope of their situations; and where a promise was made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, it was held not to be binding upon the carrier, unless the book-keeper be shewn to be his general agent. (6)

But if, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk, who is transacting the business there, 2s. 6d. per cwt., and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved, that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates, in which 3s. 6d. per cwt. was set down for goods of the sort in question. (7)

With respect to what constitutes a partnership, the following cases will afford an illustration.

A. and B. are partners in the business of public carriers; by contract between them, A. finds horses and drivers for certain stages, and B. supplies them for the remaining stages. But, notwithstanding this division of the concern between them, they were held responsible for the misconduct and negligence of their drivers and servants throughout the whole distance; and that it was no defence to B., that the servant by whom an injury was committed, was the special servant of A., and hired and paid by A. alone. (8)

Where the plaintiff and defendant ran a stage coach from Bath to London, the former providing horses for one part of the road, and the latter for another, and the profits of each party were calculated according to the number of miles his horses went; and the plaintiff received the fares of the

(1) *Dale v. Hall*, 1 Wils. 281. *Boehm v. Combe*, 2 M. & S. 172.

(2) *E. I. Comp. v. Pullen*, Str. 690. Jones on Bailments, by Theobald, xv.

(3) *Cobban v. Downe*, 5 Esp. N. P. C. 41.

(4) *Butler v. Basing*, 2 C. & P. 613.

(5) — *v. Jackson*, Peake's Add. Cas. 185.

(6) *Olive v. Eames*, 2 Stark. 181.

(7) *Winkfield v. Packington*, 2 C. & P. 599.

(8) *Weyland v. Elkins*, Holt's N. P. C. 227. S. C. nom. *Waland v. Elkins*, 1 Stark. 272.

passengers, and gave a weekly account thereof to the defendant:—It was held a partnership. (1)

A special contract made by one of several joint coach proprietors for the carriage of parcels, is binding upon them all, though some of them became proprietors after the contract was made. (2)

And where A., the keeper of a coach-office, and a part owner in several coaches, made a contract with B. for the carriage of parcels which he was in the habit of sending from that office to various places:—It was held, that this bound the owners of all the coaches in which A. was a part owner, and as well those who became partners after the making of the contract, as those who were so before. (3)

But where two persons contracted to assist the defendant with their respective horses, but to give in their accounts separately:—they were held to be separate contracts. (4)

A., B., &c. were common carriers from L. to F., a separate portion of the road being allotted to each, and it was also stipulated, that no partnership should exist between them. A., for himself and the other parties, agreed with the Mint to carry coin from L. to F., and afterwards made another agreement with the Mint to carry other coin to places on the road:—It was held, that the parties were entitled to share in the profits of this agreement. (5)

If several persons, with their several property, horse with horses the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. (6)

If a party recover damages in case, against one of two joint proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial, that he was not personally present, when the accident happened. (7)

GENERAL EXTENT OF LIABILITY.

Responsibility
of persons who
become part-
ners, after the
making of the
contract.

Participation
in profits.

Joint contri-
bution.

3. CONVEYANCE OF GOODS.

Common carriers are bound to receive and carry the goods of the subject for a reasonable reward (8); but if the waggon be full, and goods are forced on the carrier, he is released from responsibility. (9)

CONVEYANCE
OF GOODS.

(1) *Fromont v. Coupland*, 9 Moore, 319.
2 Bing. 170. 1 C. & P. 275.

(2) *Helsby v. Mears*, 8 D. & R. 289. 5
B. & C. 504.

(3) *Ibid*.

(4) *Smith v. Taylor*, 2 Chitt. 142.

(5) *Russell v. Anstwick*, 1 Sim. 54.

(6) *Barton v. Hanson*, 2 Taunt. 49. 2
Camp. 97.

(7) *Wooley v. Batte*, 2 C. & P. 417., *sed*
vide Merryweather v. Nizan, 8 T. R. 186.

(8) 1 Rol. Abr. 2. Action sur Case (C.)
pl. 1. *Harris v. Packwood*, 3 Taunt. 264.
Batson v. Donovan, 4 B. & A. 39. *Hyde v.*
Proprietors of Trent & Mersey Navig. Comp.
1 Esp. N. P. C. 37.

(9) *Lovett v. Hobbs*, 2 Show. 127. The
defendant, a common carrier to and from
B., through W. to R., employed distinct
boats to carry to and from B. to R., and to
and from B. to W., which passed on different
days; the plaintiff knowing this, and having
corn at W., which was threatened to be
seized by a mob, writes to defendant at B.,
to send a private boat quickly, on account of
the state of the country, to take the corn to
B., to which the defendant not returning
any answer, and plaintiff fearing to wait till
the defendant's boat would, in the usual
course of employment, go from W. to B.,
stopped the boat passing by from R. to B.,
and without disclosing the circumstances to

CONVEYANCE
OF GOODS.

Carriers must also take due care of goods *in transitu*; they must deliver them safely, and in as good condition as they were received; or in default, they must make compensation, for any loss or damage to them while in custody. (1)

Duties of carriers are created by the possession of the goods.

It is the possession of the goods which raises the duty, and in order to charge a particular carrier, some proof is necessary, that the goods were received by an authorised agent on his behalf, and that he is in the exercise of such public employment; for an actual or constructive acceptance of the goods is indispensable. (2) Thus, evidence that at the door of a booking office, there was a board on which was painted "conveyances to all parts of the world," and a list of names of places, was considered not to be sufficient proof, that the owner of the office was a common carrier, so as to charge him for the loss of a box that was booked there. (3)

DELIVERY OF
GOODS BY
CONSIGNOR TO
CARRIER.

Where goods are to be conveyed by a common carrier, they should be regularly left at the usual booking office, and entered there and paid for (4); because the mere leaving of goods at an inn-yard, from whence a carrier sets out, is no delivery to the carrier (5). The delivery of a parcel to the driver of a stage coach, is a sufficient delivery to render the master liable (6), drivers of coaches, porters, and warehouse-receivers, even though they receive a separate charge for their trouble, being the carrier's servants. (7)

Where, in an action for the loss of a parcel, the shopman of the consignee proved, that he did not know of the delivery of the parcel, and believed that it could not have been delivered without his knowledge:—It was held, to be *prima facie* evidence of non delivery, or at all events, sufficient to call on the plaintiff to prove a delivery to the carrier. (8)

So where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, this was held not a sufficient delivery to charge him either as wharfinger or carrier with the custody of the goods. (9)

Liability of
carrier for the
safety of goods,
attaches immediately upon
delivery.

The liability of the carrier for the safety of goods attaches immediately upon delivery (10), and continues until the property is vested in the hands of the consignee by actual delivery, either by custom or contract, or that the goods have arrived at their destination, and no further duty remains to

the boatman, prevailed on him to take the corn on board, and then dispatched him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant, negating that the corn was delivered in the usual course of dealing as a common carrier:—It was held, that the verdict might be sustained either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob, or because it did not appear that the boatman, whose ordinary employment was between R. and B., had authority from the defendant to accept the goods at W. for B., much less to accept them in that manner. *Edwards v. Sherratt*, 1 East, 604.

(1) 1 Rol. Abr. 2. Action sur Case (C.)

pl. 1. *Golden v. Manning*, 3 Wils. 429. 2 W. Black. 916. Bull. N. P. 70. (a.) n. b.

(2) Jones on Bailments, by Theobald, xv.

(3) *Upston v. Stark*, 2 C. & P. 598., vide etiam *Selway v. Holloway*, 1 Ld. Raym. 46. *Buckman v. Levi*, 3 Camp. 414. *James v. Jones*, 3 Esp. N. P. C. 27. *Cobban v. Downe*, 5 ibid. 41. *Hawkins v. Rutt*, Peake's N. P. C. 186. *Packard v. Getman*, 6 Cowen's Rep. 757. *Robinson v. Dunmore*, 2 B. & P. 419.

(4) *Buckman v. Levi*, 3 Camp. 414.

(5) *Selway v. Holloway*, 1 Ld. Raym. 46.

(6) *Williams v. Cranston*, 2 Stark. 82. *Gouger v. Jolly*, Holt's N. P. C. 317.

(7) *Hyde v. Trent & Mersey Navig. Comp.* 1 Esp. N. P. C. 36.

(8) *Griffiths v. Lee*, 1 C. & P. 110.

(9) *Selway v. Holloway*, 1 Ld. Raym. 46. *Buckman v. Levi*, 3 Camp. 414.

(10) *Thomas v. Day*, 4 Esp. N. P. C. 262. *Cobban v. Downe*, 5 ibid. 43.

be performed by the carrier (1); or that the property is resumed by the consignor in pursuance of his right of stoppage *in transitu*:—and the law contemplates no other bailment, than that between the owners or parties interested and the original carrier.

CONVEYANCE
OF GOODS.

Where a common carrier between A. and B. (employed to carry goods from A. to B. to be forwarded by a distinct conveyance to C.) carried them to B., and there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them:—It was held, he was not answerable for the loss, because upon the arrival of the goods at B. his duty as carrier terminated, and he became a mere warehouseman (2); not undertaking for their further transportation.

A carrier is bound to deliver goods, when any special contract or local custom or usage exists, or that it be the general course of his trade so to do. (3) And it seems the carrier is bound generally to make a delivery to the owner, if no custom or contract exist to the contrary (4); but it is the duty of all carriers to give notice of the arrival of the goods to the consignee, whether bound to deliver them or not. (5)

DELIVERY OF
GOODS BY
CARRIER.

Where and to
whom, carrier
bound to de-
liver goods.

If a carrier deliver goods to a wrong person, though by mistake, he thereby becomes an actor, and is guilty of a conversion for which trover will lie. (6)

Delivery to a
wrong person.

And it seems, that a carrier is not discharged by delivering the goods to a wharfinger, whose wharf he uses, but continues to be liable, until they are received by the party. (7)

In *Stephenson v. Hart* (8) goods were sent by a carrier, who could not discover the consignee at the place to which they were directed, but received letters from a stranger ordering them to be sent elsewhere, which he did. The transaction being fraudulent on the consignor by some person unknown, the consignor recovered against the carrier, the latter having been guilty of negligence in so delivering the goods. And on a motion for a new trial, it was held rightly left to the jury to say, whether the defendant had delivered the parcel according to the due course of business; and that it was not requisite to be left to the jury, whether it was delivered to the person to whom it was consigned.

A carrier is bound to deliver a parcel at the place to which it is directed; and where a parcel of goods was directed to "Mr. James Parker, High Street, Oxford," who, on being applied to, said, that he expected no such parcel, and it was afterwards delivered to a person who called at the defendant's office, claiming it as his, and who paid the carriage for it, the carrier was held responsible. (9)

Parcels must
be delivered in
accordance
with their
directions.

A carrier is likewise bound to deliver goods entrusted to him, at the

(1) *Storr v. Crowley*, 1 M. & Cl. & Y. 129. (2) *Garside v. Trent Navig. Comp.* 4 T. R. 581. (3) *Golden v. Manning*, 2 W. Black. 916. 3 Wils. 429. *Hyde v. Trent Navig. Comp.* 5 T. R. 389. *Catley v. Wintringham*, Peake's N. P. C. 202. *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693. *In re Webb*, 8 Taunt. 443. (4) *Duff v. Budd*, 3 B. & B. 177. 6 Moore, 469. *Bodenham v. Bennett*, 4 Price, 31. *Birkett v. Willan*, 2 B. & A. 356. *Garnett v. Willan*, 5 ibid. 58. *Storr v. Crowley*, 1 M. & Cl. & Y. 129. *Stephenson v. Hart*, 1 M. & P. 357. 4 Bing. 476. (5) *Golden v. Manning*, 2 W. Black. 916. (6) *Youl v. Harbottle*, Peake's N. P. C. 49. *Syeds v. Hay*, 4 T. R. 260. *Ross v. Johnson*, 5 Burr. 2825. (7) *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693. (8) 1 M. & P. 357. 4 Bing. 476. (9) *Duff v. Budd*, 6 Moore, 469. 3 B. & B. 177.

**CONVEYANCE
OF GOODS.**

Goods to be delivered in a particular manner.

place to which they are addressed ; and if he deliver them elsewhere, trover lies against him. (1)

Where an order is given to a carrier, antecedently to the delivery of goods, who assents to deal with them when delivered in a particular manner, a duty is imposed on him, on the receipt of the goods, to deal with them according to the order previously given ; and the law implies a promise by him to perform such duty. (2)

If a consignee of goods require goods to be delivered to himself on board of the ship, and directs them not to be landed on a wharf, it is said, the master must obey the request ; for the wharfinger has no right to insist upon the goods being landed at his wharf, although the vessel be moored against it. (3)

If A. send goods by B., who says, " I will warrant they shall go safe ;" B. is liable for any damage sustained by the goods, notwithstanding A. send one of his servants in B.'s cart to look after them. (4)

Loss by fire.

If common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unloaded, but which does not belong to them, they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the carriage to another person, and that circumstance was known to the consignee. (5)

Delivery to guardians.

Guardians of a female under age, who had eloped, are justified in detaining her clothes ; and a carrier to whom they had been delivered for the purpose of conveyance, is justified in delivering them over to the guardians. (6)

Delivery at booking office is a delivery to the carrier.

If in an action against a carrier, it appear that the agent of the plaintiff went to the carrier's booking office, and desired that a man should be sent to the agent's house to fetch a package, and one of the carrier's men accordingly fetch the package from the agent's house, and bring it to the booking office, this is a delivery by the plaintiff to the carrier, as for this purpose, the carrier's man is to be considered as the plaintiff's servant. (7)

What is not a delivery of goods to a carrier.

If goods be delivered to a carrier under a modified contract, that the owner should go with them, and take care of them, that is not a delivery of the goods to the carrier as a common carrier. (8)

4. CONVEYANCE OF PERSONS.

**CONVEYANCE
OF PERSONS.**

A carrier's contract to carry passengers (9) commences upon payment of the fare (10) ; and he is bound upon a tender of the fare to accept the individual as a passenger, provided his vehicle can afford accommodation. (11)

(1) *Stephenson v. Hart*, 1 M. & P. 357. 4 Bing. 476.

(2) *Streeter v. Horlock*, 7 Moore, 283. 1 Bing 34.

(3) *Syeds v. Hay*, 4 T. R. 260.

(4) *Robinson v. Dunmore*, 2 B. & P. 416.

(5) *Hyde v. Trent & Mersey Navig. Comp.* 5 T. R. 389. 1 Esp. N. P. C. 36.

(6) *Barker v. Taylor*, 1 C. & P. 101.

(7) *Boys v. Pink*, 8 *ibid.* 361.

(8) *Brind v. Dale*, *ibid.* 207.

(9) Stat. 2 & 3 Will. 4. c. 120. is that by which the duties, licenses, number of passengers, luggage, &c. as regards stage carriages are now regulated.

(10) *Ker v. Mountain*, 1 Esp. N. P. C. 27.

(11) Jones on Bailments, by Theobald, xxvi. *Bretherton v. Wood*, 3 B. & B. 54. 9 Price, 408. 6 Moore, 141. *Ansell v. Waterhouse*, 2 Chitt. 1. *Massiter v. Cooper*, 4 Esp. N. P. C. 260.

The distinction between a contract to carry goods, and one to carry passengers is, that for the safety of the goods the carrier is liable at all events, except where it arises from the act of God or the king's enemies; but he does not warrant the safety of the passengers; his undertaking as to them goes no farther than this, that as far as human care and foresight can go, he will provide for their safe conveyance. (1) But where the breaking down or overturning of a coach is proved, negligence in some proper precaution is always implied on the part of the owner, and it is cast upon him to rebut the presumption. Thus, in an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff travelling by it as a passenger was hurt: — It was held, that if *prima facie* evidence were given of the coach having broken down, it would raise the presumption of negligence (2), and it then became incumbent upon the defendant to shew "that the coach was as good a coach as could be made; that the driver was as skilful a driver as could any where be found;" and that "the damage arose from what the law considers a mere accident." (3)

But proof that at the time of the accident there were more passengers than the statute allows, is conclusive evidence of negligence. (4)

Coach proprietors are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to such journey; and if they do not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietors for negligence, though the coach might have been examined previous to the second journey before the accident, and though it might have been repaired at the coachmaker's only three or four days before: the owner is also liable if an accident happen from a defect in the original construction, although the defect be out of sight, and not discoverable upon ordinary examination (5): and where a coach had no iron railing upon the roof between the passengers and the luggage, and by a sudden jolt one of the passengers broke her leg, the defendant was held responsible for negligence, the jury stating, that they found for the plaintiff on account of the improper construction of the coach and of the luggage being on the seat. (6)

So likewise, if through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation, as to render it prudent for him to leap from the coach, whereby he suffers bodily hurts, the proprietor will be responsible in damages, although the coach was not actually overturned. (7)

CONVEYANCE OF PERSONS.

Distinction between a contract to carry goods and one to carry passengers.

Negligence is implied where a coach is overturned.

Illegal number of passengers.

Proper carriages must be provided.

Defective construction.

Passenger placed in a perilous situation.

(1) By stat. 2 & 3 Will. 4. c. 120. s. 48., if the driver, or conductor, or guard, of any stage carriage, or any other person having the care thereof, shall through intoxication or negligence, or by wanton and furious driving, or by or through any other misconduct, endanger the safety of any passenger or other person, or shall injure or endanger the property of the owner or proprietor of such stage carriage, or of any other person, every such person so offending will forfeit 5*l*.

(2) *Christie v. Griggs*, 2 Camp. 79.

(3) *Per* Sir James Mansfield, C. J. *Ibid*.

(4) *Israel v. Clark*, 4 Esp. N. P. C. 259.

By stat. 2 & 3 Will. 4. c. 120. s. 34., a penalty of 5*l*. is incurred by any proprietor of a stage carriage for every passenger conveyed above the number authorised by the license.

(5) *Bremner v. Williams*, 1 C. & P. 414. *Crofts v. Waterhouse*, 11 Moore, 133. 3 Bing. 321. *Jones v. Boyce*, 1 Stark. 493. *Christie v. Griggs*, 2 Camp. 80. *Sharp v. Grey*, 9 Bing. 457. 2 M. & Sc. 620.

(6) *Curtis v. Drinkwater*, 2 B. & Ad. 169. By stat. 2 & 3 Will. 4. c. 120. s. 42., stage carriages must have a separate division for luggage on the roof, under a penalty of 5*l*.

(7) *Jones v. Boyce*, 1 Stark. 493.

**CONVEYANCE
OF PERSONS.**

Coach laden
with passengers
or luggage
above its
strength.

Competency
and duties of
coachmen.

Customary
rules for driv-
ing.

Proprietors an-
swerable for the
negligence of
drivers.

Deviation from
the road.

Where an accident is occasioned by a stage coach being loaded with a greater number of passengers than its strength or construction will allow it to bear, it is no excuse, that the number does not exceed the statute allowance. (1)

Coach proprietors are also bound not to overload the coach with luggage, and to take care that the weight is suitably adjusted, so that the coach is not top-heavy and made liable to upset (2); but they are bound to receive and to take care of the luggage customarily allowed to passengers to carry. (3)

The coachman, either of a mail or stage coach, must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens." (4)

The customary rules of driving are, first, that in meeting, each party shall bear or keep to the left; secondly, that in passing, the foremost person bearing to the left, the other shall pass on the off side; thirdly, that in crossing, the driver coming transverse shall bear to the left hand, so as to pass behind the other carriage. (5)

The proprietor of a stage coach is answerable for the negligence of the driver, from the usual place of taking passengers, not only till the coach arrives at its destination, but till the passengers are safely set down (6); and if, when dangers occur, the driver of a stage coach does not take the safest course, the owner is responsible for the mischief which ensues (7); and he cannot, in such case, insist upon the fact, that he kept to his own side of the road. (8)

A coachman is not justified, when no obstruction exists, in deviating from the road: thus, where the driver of a stage coach gathered a bank, and upset the coach, having passed the spot where the accident happened twelve hours before, but in the interval a landmark had been removed. In an action for a consequent injury, the judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the court granted a new trial on the ground, that the jury should

(1) *Israel v. Clark*, 4 Esp. N. P. C. 259.

(2) *Long v. Horne*, 1 C. & P. 612.
Israel v. Clark, 4 Esp. N. P. C. 259. *Aston v. Heaven*, 2 ibid. 533. *Heard v. Mountain*, Feb. 26. 1826, K. B. cit. 5 Petersdorf. Abr. 54. By stat. 2 & 3 Will. 4. c. 120. s. 43., luggage on the top of any stage carriage drawn by four horses must not exceed 10 feet 9 inches in height from the ground; and if drawn by 2 or 3 horses, must not exceed 10 feet 3 inches from the ground, under a penalty of 5*l.*; and by sect. 44. of the foregoing statute, if any person sit or be carried upon any luggage placed on the roof of any stage carriage, or upon that part of the roof allotted for luggage, he will forfeit 5*l.*, and

the driver of such carriage at the time when such offence shall be committed will also forfeit 5*l.*

(3) *Robinson v. Dunmore*, 2 B. & P. 419.
Clark v. Gray, 4 Esp. N. P. C. 177.

(4) *Per Best C. J.* in *Crofts v. Waterhouse*, 3 Bing. 321. 11 Moore, 133. *Waland v. Elkins*, 1 Stark. 272. *Christie v. Griggs*, 2 Camp. 79. *Harris v. Costar*, 1 C. & P. 636.

(5) *Wayde v. Carr*, 2 D. & R. 255. 5 Petersdorf. Abr. 55. n.

(6) *Dudley v. Smith*, 1 Camp. 167. *White v. Boulton*, Peake's N. P. C. 81., et vide *Brucher v. Fromont*, 6 T. R. 659.

(7) *Jackson v. Tollett*, 2 Stark. 37.

(8) *Mayhew v. Boyce*, 1 ibid. 423.

have been directed to consider, whether or not the deviation was the effect of negligence. (1)

If the driver of a coach hold his reins so loose, that he cannot govern his horses (2); or before passing through any place that is dangerous, does not inform the passengers of the full extent of the danger, the proprietor is liable for any injury that occurs. (3)

Coach owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver. (4) And where there is no other carriage on the road, the driver may keep in the middle of the road, and is not bound to keep on the left-hand side of the road, even though the accident might have proceeded from the coach not being on the proper side. (5)

As passenger carriers are under obligations to carry passengers, and cannot properly refuse them when they have accommodation, so on the other hand, they are entitled to be secure of their reward or compensation. They have therefore a right to demand their fare at the time the passenger engages his seat; and if he refuse, they may fill up his place with other passengers. If a person take a place in a stage coach, and pay at the time only a deposit, as half the fare for example, and is not at the inn ready to take his place when the coach is setting off, the proprietors are at liberty to fill up his place with another passenger; but if at the time of taking his place, he pay the whole of his fare, in such case the proprietor cannot dispose of his place, but he may take it at any stage of the journey he thinks fit. (6)

They have also a lien upon the baggage of a passenger for his fare, but not on his person, nor on the clothes he is wearing. (7) But if a party having a lien on goods, does not, when they are demanded of him, insist on his lien, but rests his refusal to deliver the goods on other grounds, it is evidence of a waiver of his lien. (8)

If a person go to a coach office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but, if the party merely leave the portmanteau, while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien. (9)

If coach proprietors take more than the legal number upon the coach, a passenger may refuse to occupy his seat, and sue for expenses incurred (10), for the contract entered into by them must be performed *in terms*. (11) So also if places be taken for several persons to go inside a coach *together*, it is a breach of the contract if the owner only provide *distinct* seats for them. (12)

The proprietors of a coach are bound to convey a passenger to the usual place at which the coach stops; if, therefore, it has been customary to

CONVEYANCE OF PERSONS.

Driving with loose reins and not acquainting passengers of danger.

Non liability for accidents.

Not keeping on the left-hand side of the road.

RIGHTS AND LIABILITIES OF PASSENGERS.

Fare;

and lien upon luggage for its amount.

Passenger can refuse going with an illegal number of passengers.

Passenger has a right to be conveyed to the

(1) *Crofts v. Waterhouse*, 3 Bing. 319. 11 Moore, 133.

(2) *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(3) *Dudley v. Smith*, 1 Camp. 167.

(4) *Aston v. Heaven*, 2 Esp. N. P. C. 533. *S. P. Christie v. Griggs*, 2 Camp. 79. *Crofts v. Waterhouse*, 11 Moore, 133. 3 Bing. 319.

(5) *Jeremy on Carriers*, 29. 5 Petersdorff, Abr. 55 a. *Jones on Bailments*, by Theobald, xxix.

(6) *Ker v. Mountain*, 1 Esp. N. P. C. 27.

(7) *Wolf v. Summers*, 2 Camp. 631.

(8) *White v. Gainer*, 2 Bing. 23. *Boardman v. Sill*, 1 Camp. 410.

(9) *Higgins v. Bretherton*, 5 C. & P. 2.

(10) *Long v. Horne*, 1 ibid. 610.

(11) *Ibid*.

(12) *Ibid*.

**CONVEYANCE
OF PERSONS.**

termination of
journey.

Periods for re-
freshment.

drive the coach into an inn-yard, a passenger cannot be compelled to alight at the inn-gateway. (1)

They are likewise bound to allow the accustomed periods for refreshment on the road; and if from accident or other causes, the coach be unable to proceed, they are bound to provide another conveyance; and if a passenger be left improperly upon the road, he can maintain an action for his fare, or such other damages as he may have in consequence incurred. (2)

5. LIEN AND REMUNERATION.

**LIEN AND RE-
MUNERATION.**

Extent of a
carrier's lien.

Carriers seek-
ing to retain
for a general
balance.

No usage of
particular indi-
viduals will
release a car-
rier from re-
sponsibility.

Carrier cannot
make one con-
signee pay
freight for what
was delivered
to another.

Whenever any one is obliged to receive goods, to perform any duty respecting them, he has a lien on them at common law; for as that imposes the burden, it also gives him the power of retaining for his indemnity. (3)

The lien of a carrier extends only for the carriage price of the particular goods on which the hire is due; and any lien on a general balance, must be founded either upon contract or a general usage of trade. (4)

Where a carrier seeks to retain for a general balance, both parties must have consented to the alteration; but usage of trade is evidence of such contract: and where such usage is general, and has been long established, it is concluded, that the parties contracted with reference to it; but very strict proof is required of such general usage, because it trenches upon the common law right of the subject. (5)

No usage of particular individuals can bind other parties, unless it were so general as to warrant a conclusion, that the consignor contracted with the carrier under such an understanding. (6)

And where a consignor has, by the usage of trade, always paid the carriage, the carrier will not be allowed to set up a lien on a general balance due from the consignee against the former, if the hire on the particular goods carried be tendered him; for although the property becomes vested in the consignee immediately on delivery to the carrier (7), yet it will not operate to defeat the equitable right, which the consignor has of stopping *in transitu*, or charge him with a lien founded on an agreement between the carriers and third persons (8): neither can a carrier, who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, retain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. (9)

Where a part of the goods has been delivered to different persons, as under an indorsement or transfer of part of a bill of lading, the carrier cannot retain the residue, so as to make one consignee pay freight, for what was delivered to another, although the goods formed originally but one entire

(1) *Dudley v. Smith*, 1 Camp. 167.

(2) Though a postmaster cannot be compelled to let a chaise, yet, if he do so, and the passenger take his seat in it, the postmaster must proceed if his fare be tendered. *Mas-siter v. Cooper*, 4 Esp. N. P. C. 260.

(3) *Skinner v. Upshaw*, 2 Ld. Raym. 752.

(4) *Jeremy on Carriers*, 70.

(5) *Rushforth v. Hadfield*, 6 East, 519. *Aspinall v. Pickford*, 3 B. & P. 44. n.

(6) *Jeremy on Carriers*, 71. *Rushforth v. Hadfield*, 6 East, 519. 2 Smith, 624., et vide *Whitehead v. Vaughan*, 6 East, 523. n. *Holderness v. Collinson*, 7 B. & C. 212. 1 M. & R. 55. *Rushforth v. Hadfield*, 7 East, 224. 3 Smith, 221.

(7) *Dawes v. Peck*, 8 T. R. 330.

(8) *Jeremy on Carriers*, 73.

(9) *Butler v. Woolcott*, 2 N. R. 64.

consignment. (1) But when the whole is to be delivered to one person, under a single consignment, then, although a part has been delivered, he may retain the residue until the freight for the whole be paid him. (2)

LIEN AND REMUNERATION.

Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any general balance due from their respective owners; and goods were sent by the carrier addressed to the order of J. S., who was merely a factor: — It was held, that the carrier had not any lien as against the real owner, for a balance due from J. S. (3) And if a carrier receive goods from a consignor, he is precluded from questioning his title, or shewing a property in any other person. (4)

Cannot question the title of consignor.

A carrier is not justified in making a charge, where no duty has been performed; and therefore, where goods are taken by the owner from the waggon, the carrier or warehouseman has no claim for booking or warehouse room. (5) So where goods are brought to an inn, &c. by any waggon, &c. and the consignee is there ready to receive them and tenders the price of carriage, he cannot be made subject to warehouse charges, or for booking, &c.; nor can any lien be insisted on by the warehouseman, until such are paid. (6)

Not justified in making a charge, where no duty has been performed.

6. LIMITATION OF SUIT—NOTICE OF ACTION—RESTRAINT ON ACTION.

Whether this action be considered as founded in contract or *tort*, the remedies by actions upon the case, or *assumpsit*, still fall within the general class of actions, which in the Statute of Limitations (7) are called actions upon the case, and must therefore be prosecuted within the period prescribed by that statute, which limits the commencement of such actions to within six years from the time such causes of action accrued.

LIMITATION OF SUIT—NOTICE OF ACTION—RESTRAINT ON ACTION.

The declaration stated, that the defendants were the owners of a certain railway, and of certain engines and carriages for the conveyance of passengers, cattle, goods, &c.; that the plaintiff caused to be delivered to the defendants certain horses, to be safely and securely carried and conveyed by the said railway from Liverpool to Birmingham, and then to be delivered to the plaintiff; but that the defendants took so little care about carrying and conveying the horses of the plaintiff, that the carriages containing them were thrown off the railway and down an embankment, and one of the horses was killed and the residue greatly injured, &c. The company was incorporated by act of parliament for the purpose of making a railroad, and the act contained a clause, enabling them to carry passengers, goods, cattle, &c. if they should think fit. There was also a clause requiring fourteen days' notice of action, for "any thing done or omitted to be done" in pursuance of the act. It appeared, that the horses in question were

NOTICE OF ACTION.

Where notice not requisite for damage to horses upon a railway.

(1) *Sodergren v. Flight*, cit. 6 East, 622.

(2) *Jeremy on Carriers*, 74.

(3) *Wright v. Snell*, 5 B. & A. 350. *Quare*, Whether, if he had given notice that all goods to whomsoever belonging should be subject to a lien for any general balance that might be due, from the persons to whom

they were addressed, he would have any right to retain goods for a balance due from J. S.? *Ibid*.

(4) *Dict. Gould J.* in 3 Esp. N. P. C. 115.

(5) *Lambert v. Robinson*, 1 *ibid*. 119.

(6) *Ibid*.

(7) Stat. 21 Jac. 1. c. 16. s. 3.

**LIMITATION OF
SUIT, &c.**

delivered to the defendants to be carried on the railroad from Liverpool to Birmingham, and that whilst the train was proceeding at its usual rate, it was thrown off the rail in consequence of coming in contact with a horse which had strayed from an adjoining field, and had laid down on the railroad. It appeared that the fence which separated the field from the railroad was removed by some labourers of the company : — It was held, first, that the defendants having elected to become carriers, the carriage of the horses was an act done by them in pursuance of their duty as common carriers, and not by virtue of the act of parliament, and therefore no notice of action was necessary ; second, that any objection to the declaration should have been taken at the trial, in which case it might have been amended. (1)

**RESTRAINT ON
ACTION.**

Where proceedings at law will not be restrained during the pleading of an equity suit.

Where an action has been brought and a verdict obtained by the proprietor of injured goods, against the owner of a vessel in which the injury has accrued to the goods, and the owner has filed his bill for relief in equity, pursuant to stat. 53 Geo. 3. c. 159. s. 7., the court will not, under s. 6. of that act, during the pendency of the equity suit, restrain the plaintiff from proceeding. (2)

7. BY WHOM AND AGAINST WHOM, AN ACTION CAN BE MAINTAINED.**BY WHOM AND
AGAINST WHOM,
AN ACTION CAN
BE MAINTAINED.**

Carriers, when guilty of a dereliction of their duties, can be sued, either in *assumpsit*, for a breach of contract ; in case, on their common law liability ; or in *trover*, for a wrongful delivery or abuse of trust.

The party in whom the legal interest is vested, is the proper party to an action against a carrier, "for he is the person who has sustained the loss by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured." (3)

**Vestment of
goods considered absolute
from delivery.**

If a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the consignee ; the whole property immediately vests in him, he alone can bring an action for any injury done to the goods ; and if any accident happen to the goods, it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor may stop them *in transitu*. This vestment of the property is considered so absolute from the instant they are delivered, that where goods were delivered to a carrier a day before, and reached the consignee a day after he came of age, it was held, he was not liable for the price as being an infant. (4)

What is considered a delivery by vendor to vendee.

A delivery of goods by the vendor, on behalf of the vendee, to a carrier, is a delivery to the vendee, though the particular carrier be not named by the vendee (5) ; even though the carrier is to be paid by the vendor. (6)

Goods consigned to a merchant in a foreign country, vests the property

(1) *Palmer v. The Grand Junction Railw. Comp.* 7 Dowl P. C. 232.

(2) *Thiseldon v. Gibbons*, 8 *ibid*, 419.

(3) *Per Lord Kenyon in Dawes v. Peck*, 8 T. R. 392.

(4) *Griffin v. Langfield*, 3 Camp. 254.

(5) *Dutton v. Solomonson*, 3 B. & P. 582, et vide *Jacobs v. Nelson*, 3 Taunt. 423.

(6) *King v. Meredith*, 2 Camp. 639.

in the consignee from the time they were put on board the ship, though stated in the bill of lading to be shipped by order and account of the consignee. (1)

BY WHOM AND
AGAINST WHOM,
AN ACTION CAN
BE MAINTAINED.

Where the consignor of goods delivers them to a particular carrier by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; the action can only be brought by the consignee. (2)

Delivery to a
particular
carrier.

If a consignee order goods to be sent to him, "on an insurance being effected, and on the terms of three months' credit from the time of arrival," he is the person to sue, because the actual arrival of the goods is not a condition precedent to the vendee's liability to pay for them; and the vendor having complied with the stipulations as to insurance, had invested the vendee with all his rights of action against the shipowner, as they became the property of the consignee the moment they were sent off. (3)

If goods by a bill of lading are consigned to A., he is *prima facie* the owner, and must bring the action against the master of the ship if they be lost; but if the bill be special to deliver to A. for the use of B., the latter should bring the action. (4)

It is however only an assumption of law that the goods absolutely vested in the vendee upon the delivery to the carrier; and if the goods did not become the property of the vendee, and he was not at any risk with regard to the goods until they actually reached him, the vendor should be the plaintiff. Thus, when goods are forwarded for sale on approval, the consignor is the party to sue the carrier. (5)

It is only an
assumption of
law, that the
goods have been
absolutely
vested in the
vendee.

An agent in England, shipping goods to the foreign principal and paying the freight, can maintain an action on the bill of lading, if it express that the goods were shipped by the agent, and that the freight was paid here, because a privity of contract is established between the parties by means of a bill of lading. (6) A privity of contract also exists between the consignor and carrier, where the consignor has paid the carriage (7); and the carrier having so received the goods from the consignor, is precluded from questioning his title, or shewing a property in another person.

Privity of con-
tract between
consignor and
carrier.

Where by a bill of lading the captain is to deliver the goods for the consignor, and in his name, to the consignee, and the latter, at the time of the shipment, has no property in the goods, the consignor should be the plaintiff against the carrier, although the consignee had at his own expense previously insured the goods. (8) And where the plaintiffs consigned goods, according to an order received, to a person they did not know, and who afterwards appeared to be a swindler, but who got possession of them by the carrier's negligence: — It was held, that they might maintain an action against the carrier, as the property had not passed to the consignee. (9)

If a carrier, by mistake, deliver to B. goods consigned and sold to C.,

(1) *Brown v. Hodgson*, 2 Camp. 36.

(6) *Joseph v. Knox*, 3 Camp. 320.

(2) *Daves v. Peck*, 8 T. R. 330. 3 Esp. N. P. C. 12.

(7) *Hart v. Sattley*, *ibid.* 528. *Moore v. Wilson*, 1 T. R. 659. *Davis v. James*, 5 Burr. 2680.

(3) *Fragano v. Long*, 4 B. & C. 219.

(8) *Sargent v. Morris*, 3 B. & A. 277.

(4) *Evans v. Marlett*, 1 Ld. Raym. 271. *Sargent v. Morris*, 3 B. & A. 282. 1 Chitt. Pl. 6.

(9) *Duff v. Budd*, 6 Moore, 469. 3 B. & B. 177., *et vide Stephenson v. Hart*, 4 Bing. 476. 1 M. & P. 357.

(5) *Swain v. Shepherd*, 1 M. & Rob. 223.

BY WHOM AND
AGAINST WHOM,
AN ACTION CAN
BE MAINTAINED.

Bailee sending
goods to bailor.

Where con-
signor should
sue.

A parent send-
ing a present
to his child.

Action can be
supported by
an agent, where
he has any be-
neficial interest
in the perform-
ance of the con-
tract.

Stat. 11 Geo. 4.,
and 1 Will. 4.
c. 68. s. 5.
Non joinder of
co-proprietor
or co-partner.

and B. appropriate the goods, and the carrier on demand, without action, pays C. their value, the carrier may recover it against B. as money paid to B.'s use; but not as the price of goods sold and delivered to B. (1)

The bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. (2)

Where goods are forwarded on approval, the consignor is the proper party to sue the carrier for the loss. (3)

If a father send a present to his child by a carrier, and it be lost, the father cannot maintain an action as owner; but the action must be brought in the name of the child.

In *Hunter v. Westbrook* (4), a father gave his son a watch, some printed books, and several articles of wearing apparel: — It was held, that though the son was under age, viz. about sixteen years old, the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son; and Abbott C. J. observed, "I believe it has been held that things stolen from a child may be laid to be the property of the parent; but I think that has been the case in *very young children*." So also in *Smith v. Smith* (5) it was held, that if a father make to a son under age an absolute gift of an article of dress or ornament, e. g. a watch, he cannot afterwards, without that son's consent, reclaim the gift; Mr. Justice Vaughan observing, "If the father had made an absolute, solemn, and irrevocable gift of the watch to his son the plaintiff, and the plaintiff had accepted it, the law would not allow the father, without the consent of his son, afterwards to reclaim the gift."

In general a mere servant or agent, with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon. (6) But where an agent has any beneficial interest in the performance of the contract, as for commission, &c. or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract; as in the case of a factor or a broker (7), or a warehouseman, or carrier, or a policy broker whose name is on the policy (8), or the captain of a ship for freight. (9)

It seems, that in an action against stage coach proprietors for an injury done by mismanagement of the coach, whereby a person was struck by the luggage on the coach, the proprietors and the coachman may be sued jointly. (10)

By stat. 11 Geo. 4., and 1 Will. 4. c. 68. s. 5., any one or more of mail contractors, stage coach proprietors, or common carriers, may be sued by his, her, or their name or names only; and no action or suit for damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner.

(1) *Brown v. Hodgson*, 4 Taunt. 189.
(2) *Freeman v. Birch*, 1 N. & M. 420.
(3) *Swain v. Shepherd*, 1 M. & Rob. 223.
(4) 2 C. & P. 578.
(5) 7 *ibid.* 401.
(6) *Evans v. Evans*, 1 H. & W. 239.
(7) *Grove v. Dubois*, 1 T. R. 112. *At-
kins v. Amber*, 2 Esp. N. P. C. 493. *Grant
v. Gould*, 1 Hen. Black. 82. *George v. Cla-*

gett, 7 T. R. 359. *Johnson v. Hudson*, 11
East, 180. *Sadler v. Leigh*, 4 Camp. 195.
(8) *Park on Ina* 403. *Grove v. Dubois*,
1 T. R. 114.
(9) *Shields v. Davis*, 6 Taunt. 65. *Brown
v. Hodgson*, 4 *ibid.* 189.
(10) *Whitmore v. Waterhouse*, 4 C. & P.
383.

A person having a special property in goods, can support trover against a stranger, who takes them out of his actual possession; therefore a carrier (1), factor, warehouseman (2), consignee or trustee (3), or any person who is answerable over to his principal (4), can maintain trover; in fact, the bare possession of goods without any strict legal title, confers a right of action against a mere wrong-doer, having no right, and not clothed with any authority from the real owner. (5)

BY WHOM AND AGAINST WHOM, AN ACTION CAN BE MAINTAINED.

A person having a special property in goods can support trover against a stranger.

8. ASSUMPSIT — CASE — TROVER.

If the aggrieved declare in *assumpsit*, he can unite to the special count those common counts for which he has causes of action applicable, but a count in trover cannot be joined.

ASSUMPSIT —
CASE —
TROVER.
ASSUMPSIT.

By stats. 11 Geo. 4. and 1 Will. 4. c. 68. s. 5., a plea of abatement will not lie for not joining all the parties. It is, however, sometimes inexpedient to declare in *assumpsit*, because a set-off and bankruptcy can be pleaded.

Plea of abatement for non joinder will not lie.

When the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the pleadings, the foundation of the action fails, since the contract is entire and indivisible.

If the contract, therefore, for the breach of which the action is brought, was in the alternative, at the option of the defendant, as to deliver *this* or *that* quantity of goods at one time, and the remainder at another, it ought to be so stated; for if the declaration state an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, although the defendant may have determined his option. (6)

Contract ought to be proved as laid.

The declaration may be on an executed consideration, in consideration of plaintiff having delivered the goods. Thus, where a count in a declaration against a carrier by water, alleged, that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the defendant's vessel, a quantity of wheat, to be carried to a certain place for freight, to be therefore paid to the defendant, he undertook to carry the wheat safely, and deliver it for the plaintiff on a given day; but it appeared, that the defendant's undertaking to carry, was made before the whole of the wheat had been shipped on board the vessel: — It was held, that the count might be supported, although it was objected, that the consideration for the promise was executory. (7)

Declaration may be on an executed consideration.

If the carrier except his liability from loss occasioned by fire or robbery, &c. it must be stated in the declaration. (8)

(1) 1 Rol. Abr. 4. Action sur Case (1) pl. 1. *Arnold v. Jefferson*, 1 Ld. Raym. 276. Bull. N. P. 33. 2 Saund. 47. (b.) n.

(2) *Martini v. Coles*, 1 M. & S. 147.

(3) *Booth v. Wilson*, 1 B. & A. 59.

(4) Ibid. 2 Saund. 47. (b, c, d.) *Croft v. Alison*, 4 ibid. 590. *Dean v. Branthwaite*, 5 Esp. N. P. C. 35.

(5) Ibid. 2 Saund. 47. (c, d.)

(6) *Penny v. Porter*, 2 East, 2., et vide *Fate v. Willan*, ibid. 134. *Cooke v. Munstone*, 1 N. R. 351. Phillip's Ev. 855.

(7) *Streeter v. Horlock*, 7 Moore, 283. 1 Bing. 34.

(8) *Latham v. Rutley*, 2 B. & C. 20. Where a carrier received a parcel of bank notes to be carried from London to Dover, under a contract to deliver them the next day (fire and robbery excepted), and the parcel, which had been deposited by one of the defendants in a desk at their office in London, was missing a short time after he left the office: — It was held, not to be a loss within the exception in the contract, as

**ASSUMPSIT —
CASE —
TROVER.**

If the carrier give a notice that he will not pay any thing for a loss of goods which exceed 5*l.* in value, the exception must be set out in the declaration; but if the notice be, that he will not pay more than 5*l.* for the loss of any goods, such exception need not be noticed. (1)

**Misdescription
of the termini.**

A misdescription of the *termini* is fatal in *assumpsit* against a carrier for the loss of goods. Thus, where the conveyance of goods was averred to be from W. in the county of Middlesex to T. in Essex, but the contract proved, was a conveyance of goods from Aldgate to the City of London, the variance was fatal. (2)

**Averment to
carry goods
from London
to Bath, sup-
ported by evi-
dence of a con-
tract to carry
from Westmin-
ster to Bath.
Plea of non as-
sumpsit.**

But an averment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath; London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to the city only. (3)

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request; and in actions against agents for not accounting, the plea of *non assumpsit* will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment, as would raise a promise in law to the effect alleged, but not of the breach.

**Goods destroy-
ed by fire in a
wharf.**

To a declaration on a contract by the master of a steam vessel, to convey goods from Dublin to London, and to deliver the same to the port of London, to the plaintiff or his assigns; a plea that, after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes; that before a reasonable time for delivery elapsed, they were destroyed by a fire which broke out there by accident: — It was held ill. (4)

CASE.

**Statement of
contract, or
particular duty
from which the
liability results.**

In "case," the declaration must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded (5); and a variance in the description of the contract, or the particular duty or consideration from which the liability results, and on which it is founded; though in an action *ex delicto*, may be as fatal, as in an action in form *ex contractu*. (6) The declaration in such case usually begins with a statement of the situation of the defendant and his retainer, and consequent duty or liability.

But the declaration will be defective, if it do not shew that by express contract, or by implication of law in respect to the defendant's character or situation, &c. stated by the plaintiff, the defendant was bound to do or omit the act in reference to which he is charged (7): care should also be taken in declaring in case, that the count be not framed as in *assumpsit*, laying a promise, &c.

it could not be considered to be a loss by robbery. *Latham v. Stanbury*, 3 Stark. 143.

(1) *Clarke v. Gray*, 6 East, 564. 569. 2 Chitt. Pl. 228.

(2) *Tucker v. Cracklin*, 2 Stark. 385.

(3) *Beckford v. Crutwell*, 1 M. & Rob. 187. 5 C. & P. 242.

(4) *Galliffe v. Bowne*, 4 Bing. N. C. 314.

(5) *Max v. Roberts*, 12 East, 89.

(6) *Ireland v. Johnson*, 1 Bing. N. C. 162. *Bretherton v. Wood*, 6 Moore, 94. 3 B. & B. 54. 9 Price, 408.

(7) *Max v. Roberts*, 12 East, 89. *Rex v. Everett*, 8 B. & C. 114. *Edwards v. Bennett*, 6 Bing. 235.

When the declaration is for the non observance of the general obligation of law, from negligent driving, &c. it is sufficient to state concisely the defendant's possession, and his consequent obligation or duty, the non observance of which, is complained of.

In actions against carriers for a breach of duty, their particular character or situation, and consequent liability, must be stated. (1)

In *Pozzi v. Shipton* (2) the declaration stated, that plaintiff delivered to defendants, and they accepted and received from him, goods to be taken care of, and carried and conveyed by defendants from L. to B., and there delivered to P. P. for the plaintiff for reasonable reward to the defendants in that behalf; and thereupon it became the duty of defendants to take due care of such goods while they so had the charge thereof, for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid; yet defendants, not regarding their duty in that behalf, but contriving, &c. did not nor would take due care, &c. but, on the contrary, whilst they had the charge, &c. took such bad care, &c. that the goods were injured to the plaintiff's damage, &c. To this declaration, not guilty, and traverse of the delivery and acceptance *modo et formâ*, was pleaded. On the trial the plaintiff gave no proof of an express contract, but endeavoured to shew that the defendants were common carriers. No objection was taken to the course of evidence. The case was proved as to one defendant only, and a verdict was taken against him and for the other defendant. On motion to enter a nonsuit, on the ground, that the action was founded on contract, and therefore that a verdict could not pass against one defendant only:—It was held, that the declaration might, and therefore must, after verdict, be read as a declaration against carriers on the custom of the realm, and consequently, that the verdict was maintainable. (3)

In an action of case against a carrier for the loss of a trunk it was held, that the *terminus a quo* was immaterial, as the gist of the action was, the non delivery at the place it ought to have gone to. (4)

A declaration in case stated, that plaintiff delivered a trunk to defendant, to be put in a coach at Chester, in the county of Chester, to wit, at &c. A delivery at Chester, in the county of the city of Chester, was proved:—but it was held to be no variance, there being no other place of the same name. (5)

In an action on the case against the proprietor of a stage coach, for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage coach for the conveyance of passengers from London to Blackheath, and that the plaintiff had agreed to become a passenger, and the defendant to receive him as such passenger, to be carried from London to Blackheath; and the evidence was, that the words "London and Blackheath" were painted on the coach door; that the coach was licensed to run from Charing Cross only, and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields:—It was held, that

ASSUMPSIT
— CASE
— TROVER.

Non observance of the general obligation of law.

Breach of duty. Where declaration after verdict will be read, as one against carriers on the custom of the realm.

Where *terminus a quo* immaterial.

(1) *Max v. Roberts*, 12 East, 89. *Rex v. Everett*, 8 B. & C. 114. 1 Chitt. Pl. 385. against carriers on the custom would have been sufficient on special demurrer?

(2) 8 A. & E. 963.

(4) *Woodward v. Booth*, 7 B. & C. 303.

(3) *Quere*, Whether such declaration

(5) *Ibid*.

ASSUMPSIT
— CASE
— TROVER.

Averment of negligence.

as Charing Cross and St. George's Fields are both in common parlance styled "London," the variance was immaterial, and the allegation sufficiently proved. (1)

An averment that the defendant so "carelessly and negligently behaved and conducted himself," is a sufficient averment to admit proof of gross negligence (2); but an allegation that the servants of the defendants negligently "drove, conducted, and managed the coach," is not supported by proof of negligence in sending out an insufficient coach. (3)

If, in an action on the case, against coach proprietors, for an injury received by the overturning of a coach, it be averred, that it was their duty to carry the plaintiff safely for a certain hire, it does not mean to carry safely at all events, but will be sufficiently supported by proof of the want of due care. (4)

Averment of reward.

A general averment that defendant, "in consideration of a certain reward," is sufficient, without shewing what reward. (5)

PLEADINGS.
Not guilty.

In this form of action against a carrier, the plea of "not guilty" will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received.

The defendant can plead in excuse, that the loss was occasioned by the act of God or the king's enemies; or in an action for negligence in driving a carriage, or navigating a vessel, &c. that the accident happened by the negligence or default of the plaintiff, or his servants.

TROVER.
Where trover can be supported.

Trover can be supported against a carrier (6) or a wharfinger (7), who by mistake (8), or under a forged order (9), delivers goods to a wrong person; or against a person who illegally makes use of a thing found or delivered to him (10); or a bailee employed merely to keep or carry the goods, and having no beneficial interest, who misuses a chattel entrusted to him (11); or against a carrier who draws out part of the contents of a vessel, and fills it with water (12); or a carrier or wharfinger, &c. who improperly breaks open a box containing goods or sells them. (13)

Trover cannot be supported for a mere omission.

For a mere omission or nonfeasance against a party who was lawfully possessed of the goods, trover cannot in general be supported (14); and if a carrier or other bailee by negligence lose goods entrusted to his care, case or *assumpsit* is the proper action. (15) A mere non delivery of goods by a carrier is not a conversion (16), unless the goods be in his possession, and he refuses to deliver them on demand. (17) His false assertion, that he had delivered the goods to the consignee, is not a conversion. (18)

(1) *Ditcham v. Chivis*, 1 M. & P. 735. 4 Bing. 706.

(2) *Smith v. Horne*, 2 Moore, 18. 8 Taunt. 144.

(3) *Mayor v. Humphries*, 1 C. & P. 251.

(4) *Harris v. Costar*, *ibid.* 636.

(5) 2 Chitt. Pl. 228., cit. 13 East, 114. n. (a.) 2 N. R. 458. 2 Ld. Raym. 115.

(6) *Youl v. Harbottle*, Peake's N. P. C. 68. *Stephenson v. Hart*, 4 Bing. 476. 482, 483.

(7) *Devereux v. Barclay*, 2 B. & A. 702.

(8) *Ibid.* *Stephenson v. Hart*, 4 Bing. 483.

(9) *Lubbock v. Jaglis*, 1 Stark. 104. *Stephenson v. Hart*, 4 Bing. 476.

(10) *Mulgrave v. Ogden*, Cro. Eliz. 219. *Nicholson v. Chapman*, 2 Hen. Black. 254.

(11) *Ibid.*

(12) *Richardson v. Atkinson*, Str. 576., vide *Granger v. George*, 5 B. & C. 149. 7 D. & R. 729.

(13) *Hartford v. Jones*, 2 Salk. 655. *Barton v. Williams*, 5 B. & A. 401.

(14) *M'Combie v. Davis*, 6 East, 540. *Devereux v. Barclay*, 2 B. & A. 704.

(15) *Ross v. Johnson*, 5 Burr. 2825. 2 Saund. 47. (f.)

(16) *Severin v. Keppell*, 4 Esp. N. P. C. 157.

(17) *Dewell v. Moron*, 1 Taunt. 391.

(18) *Atterool v. Briant*, 1 Camp. 409. 1 Chitt. Pl. 155.

9. EVIDENCE.

The plaintiff must prove a contract express or implied, the delivery of the goods, and the defendant's breach of promise or duty. EVIDENCE.

Where an express contract exists, it must be relied upon and proved; for, where there is an express contract, none can be implied. (1) The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier, as alleged in the declaration, and that the goods in question were delivered to one acting as his agent at the office, warehouse, or other place of business, or to an agent conducting his coach or waggon in its usual course. (2) A declaration in *assumpsit*, stating that goods had been delivered to the defendants as carriers, to be conveyed by them for a reasonable reward, and that they undertook to carry them safely and securely, and deliver them accordingly, and assigning for breach, that they had lost the same, is sufficient to admit proof that they had been guilty of gross negligence (3): but, it seems the injury itself is a sufficient proof of negligence, for every thing is a negligence, which the law does not excuse. (4) Implied contract.

Where the defendant is not a common carrier, it is necessary to prove what the terms of the defendant's undertaking were. If, although he was not a carrier, he expressly undertook to carry the goods safely and securely, he will be liable for any damage which they sustain. (5) Express contract.

If any receipt was given on the delivery of the goods, it should be produced; and if an entry were made in the defendant's book, notice should be given to produce it, and also the way bill, if the goods were sent by the coach. It should also be proved, what orders were given at the time, as to the carriage of the goods, and place of destination, and what was the written direction upon them (6); and it is the common practice to admit servants and carriers to prove the payment of a receipt of money, or the delivery of goods on behalf of their master or principal (7); or to prove the state in which goods were delivered. (8) Production of receipt.

It is sufficient to prove a delivery either to an agent of the defendant's at the usual place of receipt, or to an agent who has authority to receive them, driving the coach or waggon on the course of conveyance. (9) Orders which were given at the time of delivery to carrier.

The plaintiff having proved the defendant's receipt of goods, on a contract to deliver them safely at some other place, it seems to be incumbent on the defendant to prove the performance of his promise. To support an averment of loss, it is enough for the plaintiff to shew, that the goods in fact have not arrived. (10) Delivery to agent.

(1) *Latham v. Rutley*, 2 B. & C. 20.

(2) 2 Stark. Ev. 199.

(3) *Smith v. Horne*, 2 Moore, 18. 8 Taunt. 144. Holt's N. P. C. 643.

(4) *Dale v. Hall*, 1 Wils. 281. *Aston v. Heaven*, 2 Esp. N. P. C. 533. *Israel v. Clark*, 4 ibid. 259.

(5) *Robinson v. Dunmore*, 2 B. & P. 416.

(6) 2 Stark. Ev. 200.

(7) *Per Holt C. J.* in 11 Mod. 262.

Bull. N. P. 289., vide *Green v. New River Comp.* 4 T. R. 589, 590. *Matthews v. Haydon*, 2 Esp. N. P. C. 509. *Spencer v. Goulding*, Peake's N. P. C. 129. *Adams v. Davis*, 3 Esp. N. P. C. 48.

(8) *Colepepper v. Good*, 5 C. & P. 380.

(9) *Gouger v. Jolly*, Holt's N. P. C. 317.

(10) *Tucker v. Cracklin*, 2 Stark. 385., vide *Roskell v. Waterhouse*, 2 Stark. 461., post, 997.

EVIDENCE. Proof of ownership of a stage coach.	<p>The inscription on a stage coach of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings (1); but an entry in the register book at Somerset House, if not signed by the defendants, stating the defendants were the licensed coach proprietors is not sufficient, without proving their connection. (2)</p>
EVIDENCE OF NOTICE.	<p>The declarations of a coachman respecting the loss of a parcel are evidence against the carrier. (3)</p> <p>A carrier is an insurer of the goods which he carries. He is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value. He is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are: but if he do not ask for this information, or if, when he asks and is not answered, he take the goods, he is answerable for their amount, whatever that may be. He may limit his responsibility as an insurer by notice; but a notice will not protect him against the consequences of a loss by gross negligence. (4)</p>
To whom stat. 11 Geo. 4. and 1 Will. 4. c. 68. s. 4. does not extend.	<p>By stat. 11 Geo. 4. and 1 Will. 4. c. 68. s. 4., no notice will limit or in any wise affect the liability at common law of carriers by land, in respect of any articles to be conveyed by them, unless such as are mentioned in that statute, and to which it extends; but it does not apply to other carriers; — which will account for the insertion of some of the following cases. (5)</p>
Notices by carriers are required to be strictly proved.	<p>The courts have construed the notices of carriers strictly, and have required strict proof of their publicity; and if a carrier be allowed to limit his responsibility, he must take care that every one who deals with him, is fully informed of the limits to which he confines it (6); and where the carrier's agent told a female servant of the owner of a parcel above the value of 5<i>l.</i> that it ought to be insured: — It was held not to be a sufficient notice of the limitation of the carrier's responsibility. (7)</p>
Notice to the principal, is notice to the agent.	<p>Notice to the principal is, in law, notice to all agents: therefore, where stage coach proprietors had given the usual 5<i>l.</i> notice to principals in London in the month of January, and their traveller, who proved, that he was ignorant of such notice, sent them from Downham a parcel containing 87<i>l.</i> he had received for them in the month of February, by a coach belonging to these coach proprietors, and it was lost, the coach proprietors were held not to be responsible, the notice given to the principal, being considered in law, as notice to all their agents. (8)</p>
Parcels carried free of expense.	<p>Where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free of expense, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice, that they would not be accountable for parcels above the value of 5<i>l.</i> unless entered and paid for, &c.: — It was</p>

(1) *Barford v. Nelson*, 1 B. & Ad. 571.(2) *Strother v. Willan*, 4 Camp. 24.(3) *Mayhew v. Nelson*, 6 C. & P. 58.(4) *Per Best C. J. in Riley v. Horne*, 5 Bing. 225.(5) *Ants*, 970, 971, provisions of stats. 11 Geo. 4. and Will. 4. c. 68. in not.(6) *Butler v. Heane*, 2 Camp. 415. *Kerr**v. Willan*, 6 M. & S. 150. 2 Stark. 53.(7) *Macklin v. Waterhouse*, 5 Bing. 212.

2 M. & P. 319.

(8) *Mayhew v. Eames*, 4 D. & R. 484. 3

B. & C. 601. 1 C. & P. 550.

EVIDENCE.

held, that the defendants were not liable for the loss of a parcel above the value of 5*l.* sent by the plaintiff under this agreement, of the value of which, no notice had been given to the defendants (1); because the object of requiring notice is, first, to obtain a larger premium for the conveyance of valuable parcels; and, secondly, to put the proprietors on their guard.

A keeper of a booking house could not set up a notice, that he would not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants. (2)

Notice will not excuse negligence.

A notice by carriers, that they would not be accountable for the loss or damage of goods, unless the terms of the notice were complied with, protected them as well against a loss by robbery, as against an incidental loss. (3)

Notice was a protection against robbery or loss.

In an action against a carrier for not taking care of and safely conveying goods according to his promise, it appeared, that he had limited his responsibility as such, by means of a notice of which the plaintiff was cognisant:—It was held, that having declared against the defendant as a carrier in the usual form, he could not insist, that the goods were lost from the defendant's warehouse, before the actual carriage of the goods commenced. (4)

Where goods lost before the commencement of the actual carriage.

A notice stuck up in the office, to be of any avail, must be in such large characters, that a person delivering goods at the office cannot fail to read it, without gross negligence (5); and if a carrier receive goods at a distance from his office, he must prove, that the special terms on which he deals were communicated to the owner of the goods through some other medium than a notice stuck up in the office. (6)

Publication of notice in the offices.

"If a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it" (7); therefore, it is not sufficient notice to paste upon the door of the office a bill blazoning the advantages of his conveyances, and stating in small characters at the bottom of it, that he will not be answerable for goods above the value of 5*l.* unless entered as such, and paid for accordingly. (8)

Limitation of responsibility published in small characters.

It is not sufficient to shew, that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, if in fact he had never read it. (9)

It has been holden by Lord Kenyon, that "notices at the *termini* of a journey were not sufficient to protect carriers with respect to goods taken in, at intermediate receiving houses." (10)

Notices at the *termini* of a journey.

"Carriers should be cautious that their notices corresponded in all places where they were affixed, or their liability would be affected by a variance." (11)

Variance in notices.

(1) *Bignold v. Waterhouse*, 1 M. & S. 255.

(2) *Newborn v. Just*, 2 C. & P. 76.

(3) *Covington v. Willan*, Gow, N.P. C. 115.

(4) *Roskell v. Waterhouse*, 2 Stark. 461.,
vide etiam in re *Webb*, 2 Moore, 500. 8 Taunt.
443.

(5) *Clayton v. Hunt*, 3 Camp. 27.

(6) Ibid. *Gouger v. Jolly*, Holt's N. P. C.
317.

(7) Per Lord Ellenborough in *Butler v. Heane*, 2 Camp. 415.

(8) Ibid.

(9) *Kerr v. Willan*, 2 Stark. 53. 6 M. &
S. 150. *Davis v. Willan*, ibid. 279.

(10) Per Gibbs C. J. in *Gouger v. Jolly*,
Holt's N. P. C. 317.

(11) Ibid.

EVIDENCE.**Extent of notice.****BY ADVERTISEMENT IN NEWSPAPERS.**

It seems, that when carriers run a coach from A. to B. and back, a notice that they limited their responsibility on the carriage of parcels from A. to B., was notice, that they limited it likewise from B. to A. (1)

An advertisement in a newspaper, in which a carrier limits his responsibility, will bind a customer, if it can be proved, that the customer was owner of the contents of such advertisement. Thus, in *Rowley v. Horne* (2), in order to fix a plaintiff with knowledge of a general notice, by which a coach proprietor had limited his responsibility, it was proved, that the plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the court refused a new trial.

In an action against a carrier for negligence, the defendant cannot read in evidence the advertisement in a newspaper, by which he limits his responsibility, unless he first prove, that the plaintiff was in the habit of reading that paper. (3) But it seems, that an advertisement in the Gazette may be read without such preparatory proof, but without such proof of reading, the evidence is weak. (4)

KNOWLEDGE OF VALUE IN CASES TO WHICH STAT. 11 GEO. 4. AND WILL. 4. C. 68. IS NOT APPLICABLE.

Previous to stat. 11 Geo. 4. and 1 Will. 4. c. 68., the usual notice given by carriers exempted them from their liability for the loss of goods above the value of 5*l.*, unless the appearance of the goods necessarily indicated that they were above that value (5); but notice was not defeated by proof that the book-keeper, who received the goods, was conscious of, or might have inferred, their value. (6)

A public notice given by carriers, that they will not be answerable for certain specified articles, or any other goods of what nature or kind soever above the value of 5*l.*, if lost, stolen, or damaged, unless a special agreement is made, and a premium paid, and such value to be entered at the time of delivery, seems not to extend to goods which do not fall within any of the specified articles, and which from their bulk and quality communicated to the carriers at the time of delivery, must be known to them to exceed the value of 5*l.*: and therefore it seems they will be liable for any damage to the goods arising from the carriage, although no special agreement be made, nor any premium paid; but at all events they will be liable for damage arising from gross negligence notwithstanding such notice (7); Le Blanc J. observing, "Carriers are exempted from liability when the goods are of a much larger value than from a knowledge of their bulk or quality they could possibly guess them to be. But that cannot apply to goods of a large bulk and known quality, where the value must be obvious." (8)

Where a parcel was delivered by the plaintiff's agent at W. to the defendant, to be carried to the plaintiff, who resided in London; it was sufficient for the defendant to prove, that the plaintiff in London had received notice, that the defendant would not be responsible for goods exceeding 5*l.* in value, unless entered and paid for, without proving any notice to the agent in the country, especially if the terms of the notice extended to deliveries to agents in the country as well as in London; and the mere circum-

(1) *Riley v. Horne*, 5 Bing. 217. 2 M. & P. 331.

(2) 3 Bing. 2. 10 Moore, 247.

(3) *Leeson v. Holt*, 1 Stark. 186.

(4) *Ibid.*

(5) *Down v. Fromont*, 4 Camp. 40., ante, 970.

(6) *Levi v. Waterhouse*, 1 Price, 280
Marsh v. Horne, 5 B. & C. 322.

(7) *Beck v. Evans*, 16 East, 244. 3 Camp. 267.

(8) Vide etiam *Thorogood v. Marsh*, Gow, N. P. C. 105.

stance that the defendant's agent received the parcel, after notice that its value was considerable, did not amount to a waiver of such notice (1); Abbott C. J. observing, that "there was no case in which it had been decided, that the effect of a notice had been done away with by the mere circumstance, that the carrier knew the value of the contents of the parcel."

Notwithstanding a notice by carriers, that they will not be accountable for goods of a particular description above the value of 5*l*. "unless specified and paid for as such when delivered," it was held, that they were liable for damage done to an article of this description, much above the value of 5*l*., although not paid for as such when delivered, their book-keeper having been then informed of its value, and desired to charge for it what he pleased, which should be paid provided it was taken care of. (2)

Before stat. 11 Geo. 4. and 1 Will. 4. c. 68. it was held, that a carrier might not only limit, but exclude all responsibility by notice. (3)

Where a carrier gave notice that he would not be liable for goods lost, beyond the value of 5*l*., it was held, such notice extended to the property of passengers going by the coach or other carriage, and not to goods sent to be carried only. (4)

A carrier, who gave two notices limiting his responsibility, was bound by that which was least beneficial to himself. (5) Thus, where a carrier placed a board in his office, giving notice that he would not be answerable for jewels, however small their value, unless entered as such; but circulated handbills, stating generally, that he would not be answerable for any article above the value of 5*l*. unless entered as such:—It was held, that he was answerable for the loss of jewels not entered as such, if under the value of 5*l*. (6)

If a carrier give notice, that he will not be accountable for goods above the value of 20*l*. unless entered, and an insurance paid, over and above the price charged for carriage, according to their value: a person who enters silk exceeding the value of 20*l*. and does not pay the insurance, cannot recover any part of the value of the goods if lost (7); because, as observed by Mr. Justice Lawrence, "there is nothing unreasonable in a carrier requiring a greater sum, when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood, that carriers are at liberty by law to charge whatever they please: a carrier is liable by law to carry every thing which is brought to him, for a reasonable sum to be paid for the same carriage, and not to extort what he will;" although the price he agrees to pay for the carriage of the silk is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles (8); and although the carrier does not prove that the loss happened by any of those accidents against which, the law makes him an insurer. (9)

EXTENT OF
LIABILITY OF
CARRIER BY
NOTICE PRE-
VIOUS TO STAT.
1 WILL. 4.
c. 68.

Carrier issuing
two notices,
bound by one
least beneficial
to himself.

Carrier not
responsible,
when not paid
in proportion,
to the value.

(1) *Alfred v. Horne*, 3 Stark. 136.

(2) *Wilson v. Freeman*, 5 Camp. 527.

(3) *Maving v. Todd*, 1 Stark. 72. 4
Camp. 225. *Hyde v. Trent & Mersey Navig.*
Camp. 5 T. R. 989. 1 Esp. N. P. C. 36.

(4) *Clarke v. Gray*, 6 East, 564. 2
Smith, 622. 4 Esp. N. P. C. 177.

(5) *Munn v. Baker*, 2 Stark. 255.

(6) *Cobden v. Bolton*, 2 Camp. 108.

(7) *Harris v. Packwood*, 3 Taunt. 264.

(8) Ibid.

(9) Ibid.

EVIDENCE.

Effect of notice from carriers by water.

A carrier by water contracting to carry goods for hire, impliedly promises, that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage; and this, though he had given notice "that he would not be answerable for any damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l.* *per cent.* upon such damage, so as the whole did not exceed the value of the vessel and freight;" for a loss happening by the personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law, for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. (1)

10. DAMAGES—PAYMENT OF MONEY INTO COURT.

DAMAGES—
PAYMENT OF
MONEY INTO
COURT.

By stat. 11 Geo. 4. and 1 Will. 4. c. 68. s. 7., where any parcel or package which has been delivered, and, the value being declared, the increased rate of charges paid, has been lost or damaged, the party entitled to recover damages in respect of such loss or damages, is entitled to recover back the increased charges so paid, in addition to the value.

And by s. 9., carriers are not to be concluded by the declared value, but are only to be liable to such damages as are proved, not exceeding the declared value, together with the increased charges.

Criterion by
which the
amount of
damages can
be ascertained.

The amount of damages to be recovered depends, therefore, upon the extent of the carrier's liability being established to answer for the whole value, or only to the extent to which he has succeeded in limiting his responsibility by the terms of his notice. In the former case, the plaintiff will be entitled to recover the entire actual value of the goods lost, or damages proportionable to the injury sustained, and it does not differ from the common case of goods sold and delivered. (2)

If the declaration allege any particular damage or inconvenience suffered, independent of the loss, and arising in consequence of the breach of duty or contract of the carrier, this, like all actions arising from the misfeasance of another, will be proper matter for the jury to consider, for giving proportionate damages. In an action against a carrier for not delivering goods at a specified time, the defendant pleaded payment of money into court, and the plaintiff replied, he had sustained more damages; the amount paid in, was the cost price of the goods, the defendant having offered them in specie to the plaintiff two days only after they ought to have been delivered; but the plaintiff proved, that he had sustained inconvenience and loss by not having the goods delivered at a proper time: the jury, however, found for the defendant, and the court refused to set aside the verdict. (3)

When no fraud has been proved on the part of the carrier, the presumption will be against the demand of the plaintiff, unless he clearly

(1) *Lyon v. Mells*, 5 East, 428. 1 Smith, 418.

(2) *Hutton v. Bolton*, 3 Doug. 59.

(3) *Evans v. Lewis*, 3 Dowl. P. C. 819 Tidd's N. P. 317.

prove the value of the goods lost. (1) But if the conduct of the carrier be at all tinctured with fraud, the presumption will be in favour of the plaintiff's demand.

Where a box was sent by a carrier and lost, the judge recommended the jury to give the fair value of it in damages, although the particular articles contained in the box could not be proved (2); Mr. Baron Garrow observing, "with regard to the amount of the damages in case a verdict passes for the plaintiff, it is right that I should tell you, that here is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of the damages, because the articles contained in it cannot be distinctly proved. It very often happens, that persons, more especially those in the station of life in which the plaintiff is [a servant], pack their own clothes, and in such cases it must be always impossible to give evidence of the precise contents of their boxes or portmanteaus. I should therefore recommend you, if you find for the plaintiff, to give damages proportioned to the value of the articles which you in your judgment think the box might and did fairly contain." (3)

By stat. 11 Geo. 4. and 1 Will. 4. c. 68. s. 10., money can be paid into court in all actions for loss or injury.

DAMAGES —
PAYMENT OF
MONEY INTO
COURT.

Where the particular articles contained in a box, cannot be proved.

PAYMENT OF
MONEY INTO
COURT.

(1) *Channes v. Pezzey*, 1 Camp. 8.

(2) *Butler v. Basing*, 2 C. & P. 613.

(3) As to joint contribution, vide *Woolley*

v. Batte, 2 C. & P. 417., *ante*, 979., et vide *Knight v. Hughes*, 3 C. & P. 467.

CASE.

1. GENERALLY, pp. 1003—1005.

Distinctions between the remedies of trespass and case — Where an injury is considered as immediate — Judgment of Lord Ellenborough in Leame v. Bray — Legality or illegality of the original act — Motive, intent, or design, of wrong-doer.

2. WHERE CASE OR TRESPASS MAY BE MAINTAINED, pp. 1005, 1006.

3. WHERE CASE OR COVENANT MAY BE MAINTAINED, p. 1006.

4. WHERE CASE OR ASSUMPSIT MAY BE MAINTAINED, pp. 1006—1008.

5. WHERE CASE WILL LIE, pp. 1008—1019.

I. *Where damage or injury consequential — Judgments of Mr. Justice Blackstone, Mr. Justice Gould, and Chief Justice De Grey in Scott v. Shepherd — Case, given by statute — Against magistrates — Landlords — Public companies — Splitting cause of action — Vexatious suits — Disobedience to a subpoena — Enticing a female covert — Infringement of copyright — Deceit — Unlawful trading — Injuries to health and reputation — Neglect of commissioners under a local act — INEVITABLE ACCIDENT, pp. 1008—1011.*

II. *INJURIES TO OR FROM REAL PROPERTY — Watercourses — Tithes — Reversionary interest — Buildings — Judgment of Chief Justice Tindal in Vaughan v. Menlove — Excavating land adjoining the house of another — Judgment of Lord Tenterden in Walters v. Pfeil — Mutual appointment of agents to superintend the pulling down of party walls — Digging so near the gable end of an ancient house as to cause its destruction — Damage done to a building which is not ancient — Judgment of Lord Tenterden in Wyatt v. Harrison — Frightening away wild-fowl from a decoy pond, by which the owner was deprived of a profit in their sale — Frightening away game and disturbing a rookery, when not actionable — Destruction of a weir — Fixing a spout whereby water is cast upon the land of another — Disturbance of an ancient ferry — Possession of a pew — Private or public way — Injury arising from defective defences — Shaft of a mine improperly protected, pp. 1011—1014.*

III. *ANCIENT LIGHTS — Right to light, air, or water, acquired by enjoyment — Judgment of Chief Justice Abbott in Moore v. Rawson — Stat. 2 & 3 Will. 4. c. 71. — Uninterrupted enjoyment of light for twenty years confers an absolute title — Judgment of Chief Justice Best in Back v. Stacey — Judgment of Lord Denman in Pringle v. Wernham — Where vendor cannot stop the lights of a house belonging to vendee — Partial enjoyment of light — Opening a window by which the privacy of another is disturbed — Parol license to erect a wall or window, pp. 1014—1016.*

IV. *INJURIES DONE TO A TRADER, WHEREBY HE CANNOT EXERCISE HIS CALLING — Injury done to an apprentice by which his master was deprived of his services — Improper detention of paper delivered to a printer for printing, p. 1016.*

V. *NEGLIGENCE — Leaving a cart unprotected in a street from which a child was injured — Judgment of Lord Denman in Lynch v. Nurdin — Careless driving of carriages — Warehouseman removing goods negligently — Gratuitous permission to use a chattel, pp. 1016—1018.*

VI. *RUNNING DOWN VESSELS AT SEA — Judgment of Lord Ellenborough in Covell v. Laming — Trinity Board regulations, pp. 1018, 1019.*

6. MISCHIEVOUS ANIMALS, pp. 1019—1021.

Improperly fastening a mischievous dog or bull, evidence of scienter — Where action cannot be maintained for an injury committed by a ferocious dog — Judgment of Chief Justice Tindal in Curtis v. Mills.

7. THE DECLARATION, 1021—1025.

VENUE — PARTIES — Possession of real property — Owner of personal property — Several interests but a joint damage — Joint and legal interest — All persons responsible for their tortious acts — Where tort-feasors may be sued singly — Effect of improper joinder — By whom the action can be maintained for stopping ancient lights — Windows erected contrary to Building Act — For injuries by a dog, not material whether defendant was owner or not — Title or interest of plaintiff — Stat. 2 & 3 Will. 4. c. 71. s. 5. — STATEMENT OF CAUSE OF ACTION — Writ of summons describing an action of case as one on promises — Divisible averments — Judgment of Chief Justice Abbott in *Ricketts v. Salwey* — Distinctions between allegations of matter of substance and of matter of description — Where allegation must be proved — Stat. 8 Anne, c. 14. — Averment that defendant's dogs were accustomed to worry and bite sheep and lambs — VARIANCE — DAMAGES.

8. THE PLEADINGS, p. 1025.

Reg. Gen. H. T. 4 Will. 4. — Justification for shooting a dog — Not guilty denies the scienter and injury.

9. LIMITATION OF ACTION — PARTICULARS OF DEMAND — COSTS — JUDGMENT, pp. 1025, 1026.

1. GENERALLY.

GENERALLY.

Although there does not seem to have been at any time a doubt, as to what degree of improvident conduct, or culpable carelessness, will render a man liable to be sued for consequential damages, yet a question has frequently arisen respecting the form of action which should be adopted by the person who has sustained an injury, i. e. whether the proper remedy is by action of *trespass vi et armis*, or *trespass on the case*.

DISTINCTIONS BETWEEN THE REMEDIES OF TRESPASS AND CASE.

If the injury be *forcible*, and occasioned immediately by the act of the defendant, *trespass vi et armis* is the proper remedy; but if the injury be not in legal contemplation forcible, or not direct and immediate on the act done, but only *consequential*, then the remedy is by action on the case. (1)

An injury is considered as immediate, when the act complained of, and not merely a consequence of that act, occasions the injury. Thus, if one give a blow to another, or drive a carriage and horses against another or his property (2); or pour water on another; or commit any injurious act (3), on his land (4); or turn out or put in motion a wild beast or other dangerous thing, to another's damage or hurt (5); or lay rubbish so near another's wall, that the necessary or natural consequence is, that some of it will roll, and it accordingly comes against the wall (6); the injury is immediate, and trespass is the remedy. (7)

WHERE AN INJURY IS CONSIDERED AS IMMEDIATE.

To injure the person of another, by driving a carriage against the carriage wherein he is sitting, although the last mentioned carriage be neither his property nor in his possession, is a direct trespass; and where the de-

(1) *Leame v. Bray*, 3 East, 593. *Scott v. Shepherd*, 2 W. Black. 892. 3 Wils. 403. *Reynolds v. Clarke*, 2 Ld. Raym. 1399. Str. 634., vide etiam *Morgan v. Hughes*, 2 T. R. 225. *Day v. Edwards*, 5 ibid. 649. *Ogle v. Barnes*, 8 ibid. 190, 191. *Turner v. Hawkins*, 1 B. & P. 472. 21 H. 7. c. 28. Bull. N. P. 79. (b.)

(2) *Leame v. Bray*, 3 East, 593. *Covell v. Laming*, 1 Camp. 497. *Lotan v. Cross*, 2 ibid. 465.

(3) *Shapcott v. Mugford*, 1 ibid. 188.

(4) *Reynolds v. Clarke*, 2 Ld. Raym. 1403

(5) *Leame v. Bray*, 3 East, 596.

(6) *Gregory v. Piper*, 9 B. & C. 591.

(7) *Reynolds v. Clarke*, Str. 636.

GENERALLY.

Judgment of
Lord Ellen-
borough in
Leame v. Bray.

defendant drove his gig against another chaise, whereby the plaintiff's wife was much hurt and injured; it was held, that an action at the suit of the husband and wife was properly brought in trespass. (1)

In *Leame v. Bray* (2) Lord Ellenborough said, "The true criterion seems to be, according to what Chief Justice De Grey says in *Scott v. Shepherd* (3), whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my brother Grose, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view, yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. Such also was the case of *Weaver v. Wood* (4), where a like unfortunate accident happened, whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in *Scott v. Shepherd*, did wilfulness make any difference. If the injury were received from the personal act of another, it was deemed sufficient to make it trespass. In the case of *Day v. Edwards* (5), the allegation of the act having been done furiously, was understood to imply an act of force immediately proceeding from the defendant. As to the case of *Ogle v. Barnes* (6), I incline to think it was rightly decided; and yet there are words there which imply force by the act of another: but, as was observed, it does not appear, that it must have been the personal act of the defendants; it is not even alleged that they were on board the ship at the time: it is said, indeed, that they had the care, direction, and management of it: but that might be through the medium of other persons in their employ on board. That, therefore, might be sustained as an action on the case, because there were no words in the declaration which necessarily implied that the damage happened from an act of force done by the defendants themselves. I am not aware of any case of that sort, where the party himself sued, having been on board [the ship], this question has been raised. But here the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore, being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass; and wilfulness is not necessary to constitute trespass." (7)

Wilfulness not
necessary to
constitute
trespass.

Legality or il-

The legality or illegality of the original act is not in general the cri-

(1) *Hopper v. Reeve*, 7 Taunt. 698.

(2) 3 East, 599.

(3) 3 Wils. 411.

(4) Hob. 134.

(5) 5 T. R. 649.

(6) 8 ibid. 188.

(7) The authority of this case has been questioned in *Rogers v. Imbleton* (2 N. R. 117.), in which the plaintiff declared against defendant for drawing his cart against the plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want

of proper care" of the defendant. On demurrer to this declaration, as not being in trespass, it was holden that it was good. Sir James Mansfield C. J. observed, at the close of the decision, that it was not to be considered that the case of *Leame v. Bray* should be overturned by the present; at the same time he might say thus much, that upon a proper case it might be fit that the decision of the court of King's Bench in *Leame v. Bray* should be reconsidered. Vide etiam *Huggett v. Montgomery*, 2 N. R. 446.

terion, whether the injury was immediate or consequential, and will not, therefore, be the test whether the remedy should be trespass or case. (1) A person may become an immediate trespasser *vi et armis*, even in the performance of a lawful act, if, in the course of such performance, he be guilty of neglect, as if he hurt another by accident. (2)

GENERALLY.

legality of the original act.

Case will lie for doing an unlawful act, if the damage sustained thereby be not immediate but consequential, although the defendant has no malicious intention (3); but if the injury be committed through the medium of and under regular process, as in the case of a malicious arrest or prosecution, although such injury were forcible and immediate, yet the remedy must be case. (4)

Malicious arrest.

Nor is the motive, intent, or design of the wrong-doer towards the complainant the criterion as to the form of the remedy (5); for, where the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial (6); and it is clear, that the mind need not concur in the act that occasions an injury to another: and if the action occasion an immediate injury, trespass is the proper remedy; but if the injury be not immediate, but only consequential upon the act done, then the party injured, must bring an action on the case.

Motive, intent, or design of wrong-doer.

If the injury sustained amount to a felony, the civil injury is merged in the criminal offence, and no action can be sustained. (7)

Act complained of amounting to a felony.

2. WHERE CASE OR TRESPASS MAY BE MAINTAINED.

Where a party has sustained an injury which forms the subject of an action in trespass, and there is also a consequential damage, he may sue in case or trespass at his election. (8)

WHERE CASE OR TRESPASS MAY BE MAINTAINED.

In *Scott v. Shepherd* (9) Mr. Justice Blackstone said, "That a person may bring trespass for the immediate injury, and subjoin a *per quod* for the consequential damage, or case for the consequential damage, passing over the immediate injury;" and in *Pitts v. Gainee* (10), where the declaration was in case, and stated that the plaintiff was master of a ship laden with corn ready to sail, and that the defendant seized the ship and detained her, whereby the plaintiff was prevented from proceeding on his voyage. An exception was taken, that the declaration should have been trespass, and several cases were cited; but Lord Holt observed, that in those cases, the plaintiff had a property in the thing taken; but here the ship was not the

Where there is both an immediate and also a consequential injury.

(1) *Reynolds v. Clarke*, Str. 635. *Leame v. Bray*, 3 East, 601. *Scott v. Shepherd*, 3 Wils. 409. 2 W. Black. 894.

(2) Ibid. *Underwood v. Hewson*, Str. 596. 27 Hen. 6. c. 28. (a.) *Wakeman v. Robinson*, 1 Bing. 213. 1 Chitt. Pl. 129.

(3) *Scott v. Shepherd*, 2 W. Black. 895. 3 Wils. 410.

(4) *Belk v. Broadbent*, 3 T. R. 185. *Elsee v. Smith* 2 Chitt. 304.

(5) *Saunderson v. Baker*, 3 Wils. 309. 2 W. Black. 832. *Leame v. Bray*, 3 East, 599. 601.

(6) *Rex v. Philipps*, 6 East, 464. 473, 474. *Haycraft v. Crensy*, 2 ibid. 107.

(7) *Dawkes v. Coveneigh*, Sty. 346. *Gimson v. Woodfull*, 2 C. & P. 41. *Higgins v. Butcher*, Yelv. 90. *Cooper v. Witham*, 1 Sid. 375. *Parker v. Patrick*, 5 T. R. 175.

(8) *Wells v. Ody*, 5 Dowl. P. C. 95.

(9) 2 W. Black. 897. 11 Mod. 180. *Slade's case*, 4 Co. 94. (b.) 95. *Turner v. Hawkins*, 1 B. & P. 475. *Haward v. Bankes*, 2 Burr. 1113.

(10) 1 Salk. 10. *Branscomb v. Brydges*, 1 B. & C. 145. 2 D. & R. 256.

**WHERE CASE
OR TRESPASS
MAY BE MAIN-
TAINED.**

master's but the owner's; the master only declared as a particular officer, and could only recover for his particular loss; yet he might have brought trespass, as a bailiff of goods may, and declared upon his possession, which is sufficient to maintain trespass. Hence it appears, that either trespass or case may sometimes be supported, where there is both an *immediate* and also a *consequential* injury. (1)

In actions for seduction or criminal conversation, the plaintiff may declare either in case or in trespass. (2)

If malicious and unfounded proceedings are pursued against a person in a court having no jurisdiction, case or trespass can be sustained. (3)

Maliciously
suing out a fiat.

If a fiat be maliciously sued out, case or trespass will lie; because the plaintiff, not being subject to the bankrupt laws, the commissioners could have no jurisdiction. (4)

Illegal or ex-
cessive distress.

Where there has been an illegal (5), or an excessive distress (6), the plaintiff has frequently the option of declaring in case or in trespass.

Obstruction of
ancient lights.

If the light of the plaintiff's windows be obstructed by the defendant building on a party wall, half of which belongs to the plaintiff, and half to the defendant, the remedies of trespass or case are concurrent. (7)

3. WHERE CASE OR COVENANT CAN BE MAINTAINED.

**WHERE CASE
OR COVENANT
CAN BE MAIN-
TAINED.**

If there be a legal liability as well as an express covenant, case or covenant will lie.

Against a lessee
for wilful
waste.

Case or covenant can be sustained against a lessee for wilful waste committed during the existence of his term. Thus, in *Kinlysie v. Thornton* (8) it was said by Chief Justice De Grey, "tenant for years commits waste, and delivers up the place wasted to the landlord. Had there been no deed of covenant, the action of waste, or case in nature of waste, would have lain: because the landlord by the special covenant acquires a new remedy, does he therefore lose the old?"

Shipowner.

The owner of a ship is liable in case for negligence, or he may be sued on the charter-party, when the master covenants, and subsequently refuses or neglects, to convey the cargo. (9)

4. WHERE CASE OR ASSUMPSIT MAY BE MAINTAINED.

**WHERE CASE
OR ASSUMPSIT
MAY BE MAIN-
TAINED.**

If there be a breach of duty from which the law will imply a promise, case or *assumpsit* will lie. Thus, in *Govett v. Radnidge* (10) Lord Ellenborough observed, "what inconvenience is there in suffering the party to

(1) Vide *Moore v. Robinson*, 2 B. & Ad. 817.

(2) *Chamberlain v. Hazelwood*, 7 Dowl. P. C. 816., ante, 6, 10.

(3) *Goslin v. Wilcock*, 2 Wils. 302.

(4) *Chapman v. Pickersgill*, ibid. 145.
Perkin v. Proctor, ibid. 382., vide *Dowell v. Inpey*, 1 B. & C. 163.

(5) *Smith v. Goodwin*, 4 B. & Ad. 413.

Branscombe v. Bridges, 1 B. & C. 145. 3 Stark. 171.

(6) *Holland v. Bird*, 10 Bing. 15. *Stark v. Clarke*, 1 N. & M. 671.

(7) *Wells v. Ody*, 7 C. & P. 410.

(8) 2 W. Black. 1111. 2 Saund. 262.

(9) Leigh's N. P. 551.

(10) 3 East, 70.

allege his *gravamen*, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided." Thus, if a false warranty be given on a sale of goods (1), a banker improperly refusing a customer's check (2), or an attorney, carrier, bailee, surgeon, and tradesman be guilty of a misfeasance, case or *assumpsit* can be sustained. (3)

WHERE CASE
OR ASSUMPSIT
MAY BE MAIN-
TAINED.

In *Burnett v. Lynch* (4) the lessee by deed-poll assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee. It was held, that the lessee might maintain an action on the case founded in tort against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage; Chief Justice Abbott observing, "I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained except against a person who, by himself, or some other person acting on his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in Co. Litt. 231. a.) has agreed by deed to do a certain thing. Here the defendant has not engaged by deed to perform the covenants, and, consequently, covenant will not lie. Then will an action of *assumpsit* lie? I think it would; but why? Because the defendant has by taking the estate subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty, a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of *assumpsit* will lie. But it by no means follows, that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. *Kinlyside v. Thornton* (5) is an authority from which it may be inferred, that either *assumpsit* or case will lie. The only case which militates against the plaintiffs, is that of *Jones v. Hill* (6), the facts of which were very similar to the present. But I think the attention of the court was not called to the true ground on which the plaintiff's case was founded. It was contended for the plaintiffs, that an action on the case was not maintainable for permissive waste. The court did not decide that point, but merely that it was impossible it should be waste to omit to put the

Legal obligation united with an express promise.

Judgment of Chief Justice Abbott in *Burnett v. Lynch*.

(1) *Williamson v. Allison*, 2 East, 446.
Stuart v. Wilkins, Doug. 21.

(2) *Marzetti v. Williams*, 1 B. & Ad. 415.

(3) 1 Saund. 312. *Burnett v. Lynch*, 5 B. & C. 605.

(4) 5 B. & C. 589.

(5) W. Black. 1111.

(6) 7 Taunt. 392.

**WHERE CASE
OR ASSUMPSIT
MAY BE MAINTAINED.**

Judgment of
Mr. Justice
Littledale in
*Burnett v.
Lynch*.

premises into such repair as A. B. had put them into. *Kinlyside v. Thornton* was there cited, but it was not argued, that by the acceptance of the assignment it became the duty of the assignee to do the very thing, the omission to do which, was made the subject of complaint. The case was not put on the ground that a duty had arisen. Here that ground has been taken; and I think, that a duty did arise, when the defendant accepted the assignment of the lease, subject to the performance of the covenants, and that, as a breach of that duty has been committed, a special action on the case may be maintained."

Mr. Justice Littledale likewise observed (1), "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in *assumpsit*, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although *assumpsit* may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described, is the best adapted to every case."

**WHERE CASE
WILL LIE.**

Where damage
or injury con-
sequential.

5. WHERE CASE WILL LIE.

Where the damage or injury ensued not directly from the act complained of, it is termed consequential or mediate, and cannot amount to a trespass. Thus, if a log, in the act of being thrown into the highway, hit another, the injury is immediate; but if, *after* it has reached the highway, a person fall over it and be hurt, the injury is only consequential, and the remedy should be case for wrongfully or carelessly throwing and leaving the timber in the road. (2)

*Scott v. Shep-
hard*.

Scott v. Shepherd (3), which Lord Ellenborough in *Leame v. Bray* (4) said had gone to the limit of the law, will illustrate where a damage or injury is considered as immediate or consequential.

It appeared that on the evening of the fair-day at Milborne Port, in Somersetshire, the defendant threw a lighted squib from the street into the market-house: the squib fell upon the stall or standing of Yates; Willis in order to protect himself and the wares of Yates from injury, took up the squib, and threw it across the market-house, when it fell upon the standing of Ryall, who, to save his wares, threw the squib to another part of the market-house; the squib struck the plaintiff in the face, when the combustible matter bursting, put out one of his eyes: an action of *trespass vi et armis* having been brought, it was urged, on the part of the defendant, that it *would not*

(1) 5 B. & C. 609.

(2) *Leame v. Bray*, 3 East, 602. *Reynolds v. Clarke*, Str. 636. *Mitchell v. Turnbull* 5 T. R. 649.

(3) 3 W. Black. 892. 3 Wils. 403.

(4) 3 East, 596.

lie, and that a proper remedy was an action on the case. A verdict was found for the plaintiff, subject to the opinion of the court as to the form of the action. Mr. Justice Nares conceived, that trespass *vi et armis* was the proper form of action, the act being illegal at common law from the probable consequence of injury resulting from it, and by stat. 9 & 10 Will. 3. c. 7. as a nuisance.

WHERE CASE
WILL LIE.

Mr. Justice Blackstone was of opinion, "that an action of trespass did not lie for *Scott* against *Shepherd* upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case." (1) The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in *Strange*, 635., where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule, for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4. c. 7.: but then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognisance, thereby, I shall have an action on the case. Yet here the original act was unlawful, and in the nature of trespass; so that lawful or unlawful is quite out of the case. The solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other; and trespass never lay for the latter.

Judgment of
Mr. Justice
Blackstone in
*Scott v. Shep-
herd*.

"If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate, or consequential only, and I hold it to be the latter. The original act was, as against *Yates*, a trespass; not as against *Ryal* or *Scott*. The tortious act was complete, when the squib lay at rest upon *Yates*'s stall. He, or any bystander had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But *Shepherd*, I think, is not answerable in an action of trespass and assault for the mischief done by the squib, in the new motion impressed upon it, and the new direction given it, by either *Willis* or *Ryal*, who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman: they are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued though diverted. Here the instru-

(1) *Reynolds v. Clarke*, 2 Ld. Raym. 1401.
Str. 634. *Haward v. Bankes*, 2 Burr. 1114.
Harker v. Birkbeck, 3 ibid. 1559.

(2) *Per Powell J.* in 11 Mod. 180.

WHERE CASE
WILL LIE.

ment of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents.

"But it is said, that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief. And so has a stone that has been thrown against my windows, and now lies still: yet if any person gives that stone a new motion, and does further mischief with it, trespass will not lie for that against the original thrower.

"No doubt but Yates may maintain trespass against Shepherd, and, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act? nay, it may be extended in *infinitum*. If a man tosses a football into the street, and after being kicked about by 100 people, it at last breaks a tradesman's windows, shall he have trespass against the man who first produced it? Surely only against that man who gave it a mischievous direction."

Judgments of
Mr. Justice
Gould and
Chief Justice
De Grey in
Scott v.
Shepherd.

Gould J. was of opinion, that trespass *vi et armis* was maintainable; that the defendant might be considered in the same light as if he had thrown the squib in the plaintiff's face. "The terror impressed on Willis and Ryal excited self-defence, and deprived them of the power of recollection." "What they did, was therefore the inevitable consequence of the defendant's unlawful act; they acted from necessity, and the defendant imposed that necessity on them." De Grey C. J. was of the same opinion, agreeing with Blackstone J. as to the principles he had laid down, but differing from him in the application of those principles to the present case. The question first was, whether the injury was received by the plaintiff by force from the defendant, or whether the injury resulted from a new force of another? He considered all that was done, subsequent to the original throwing, as a continuation of the first force and the first act, which would continue until the squib was spent by bursting. Any innocent person was justifiable in removing the danger from himself to another; the blame lighted on the first thrower; the new direction and new force flowed out of the force, and was not a new trespass; Willis and Ryal were not free agents, but acting under a compulsive necessity for their own safety and self-preservation. The several acts of throwing the squib must be considered as one single act, namely, the act of the defendant; the same as if it had been a cracker made with gunpowder, which had bounded and rebounded again and again, before it struck out the plaintiff's eye.

Case given by
statute.

If a statute prohibit an injury to an individual, or enacts that he shall recover a penalty, case will lie. (1)

Magistrates.

Case will lie against a magistrate for a conviction which has been quashed, pursuant to stat. 43 Geo. 3. c. 141 (2); or at the suit of a landlord against a sheriff for taking goods without paying a year's rent (3); and this remedy is sometimes expressly given by statute to public companies. (4)

Landlords.

Public com-
panies.

Splitting cause
of action.

Case will lie against a man for maliciously splitting his cause of action. (5) It is likewise said in Comyn (6), that case lies if a man pro-

(1) Com. Dig. Action on Statute (A. F.).

(2) *Massey v. Johnson*, 12 East, 67.

(3) *Bristow v. Wright*, Doug. 665.

(4) *Huddersfield Canal Comp. v. Buckley*,
7 T. R. 36.

(5) Per Littledale J. in *Smith v. Goodwin*,
4 B. & Ad. 420.

(6) Digest, Action upon the Case for a
Deceit (A. 4.).

cure a vexatious suit; as if a man, sue a *capias* upon a forged statute (1):— or procure another to commence an action in any court against A. to vex him (2):—or sue in an inferior court, and has judgment and execution, without serving the defendant with notice of the suit. (3)

WHERE CASE
WILL LIE.

Vexatious
suits.

Case likewise lies for, not giving evidence after service of a *subpœna* (4); enticing a wife to live apart from her husband (5); infringement of a copy-right (6); negligence in riding horses; false and deceitful representations; unlawfully exercising trades; injuries to health and reputation (7); neglect of duty by commissioners under a local act (8); and also, seemingly, against a clergyman for the non performance of his duties. (9)

Disobedience
to *subpœna*;
enticing a feme
covert;
infringement of
copyright;
deceit;
unlawful trad-
ing;
injuries to
health and re-
putation.

INEVITABLE
ACCIDENT.

If a party be in the prosecution of a legal act, an action does not lie for an injury resulting from an inevitable or unavoidable accident, which occurs without any blame or default on his part. (10)

II. Injuries to or from real Property.

INJURIES TO OR
FROM REAL
PROPERTY.

Case is likewise sustainable for obstructing light or air (11); injuring watercourses (12); not carrying away tithes (13); injuries done to the real property of a reversioner. (14)

Injuries to real
property;
watercourses;
tithes;
reversionary in-
terest.

If one person injure the buildings of another by negligence, case will lie. Thus, in *Vaughan v. Menlove* (15) it was held, that an action lay against a party for so negligently constructing a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house was burnt down; Chief Justice Tindal observing, "I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says, that you must so enjoy your own property as not to injure that of another; and, according to that rule, the defendant is liable for the consequence of his own neglect: and though the defendant did not himself light the fire, yet mediately, he is as much the cause of it, as if he had himself put a candle to the rick; for it is well known that hay, will ferment and take fire if it be not carefully stacked. It has been decided, that if an occupier burn weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. (16) But put the case of a chemist making experiments with ingredients, singly innocent, but when combined liable to ignite; if he leave them together, and injury

INJURY TO
BUILDINGS.

Judgment of
Chief Justice
Tindal in
Vaughan v.
Menlove.

(1) Cit. F. N. B. 96. (B.)

(2) Ibid. 98. (N.)

(3) *Lloyd v. Street*, Lutw. 67.

(4) *Pearson v. Hes*, Doug. 556. *Hallet v. Mears*, 13 East, 17. n.

(5) *Winsmors v. Greenbank*, Willes, 577.

(6) *Clementi v. Goulding*, 11 East, 244. *Roworth v. Wilkes*, 1 Camp. 94.

(7) 1 Chitt. Pl. 132—142.

(8) *Cane v. Chapman*, 1 N. & P. 104.

(9) *Anté*, 236., n. 14.

(10) *Davis v. Saunders*, 2 Chitt. 639. *Wake-
man v. Robinson*, 1 Bing. 213., vide etiam
Knapp v. Salisbury, 2 Camp. 500.

(11) 1 Chitt. Pl. 140.

(12) *Carrington v. Taylor*, 11 East, 571.

(13) *Shapcott v. Mugford*, 1 Ld. Raym. 187.

(14) Com. Dig. Case, Nuisance (B.). 1
Saund. 322. (a.) n.

(15) 3 Bing. N. C. 468.

(16) *Turbervil v. Stamp*, 1 Salk. 18.

**WHERE CASE
WILL LIE.**

Excavating
land adjoining
the house of
another.

Judgment of
Lord Tenter-
den in *Walters*
v. Pfeil.

Mutual ap-
pointment of
agents to su-
perintend the
pulling down
of party-walls.

Digging so
near the gable
end of an
ancient house,
as to cause its
destruction.

Damage done
to a building
which is not
ancient.

Judgment of
Lord Tenter-
den in *Wyatt v.*
Harrison.

is thereby occasioned to the property of his neighbour, can any one doubt, that an action on the case would lie?"

A man excavating his own land adjoining the house of another, is bound to take the necessary precautions that injury does not result from his act; because he is cognisant of what is taking place; the neighbouring owner is not, or if he is, he does not know what precaution may be necessary; and he cannot enter upon the land to examine the nature of the excavations.

In *Jones v. Bird* (1) the court clearly intimated their opinion, that the party doing a work is bound to take care that it be not injurious to the adjoining premises, and to use every precaution for that purpose, which a skilful man could reasonably be required to use in such a case. (2)

In *Walters v. Pfeil* (3) Lord Tenterden said, "The owner of premises adjoining those pulled down, must shore up his own in the inside, and do every thing proper to be done upon them for their preservation." "Still the omission does not necessarily defeat the action: if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed, may not have done all that he ought for his own protection."

In an action against the defendant for the negligence of his agent in pulling down the party-wall between the houses of the plaintiff and defendant, it is a good defence to shew, that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. Thus, in *Hill v. Warren* (4) Lord Ellenborough observed, that "it was not competent to the plaintiff to attach that blame to the defendant which was the common blame of both; and that since the wall had been taken down by both, neither could impute negligence to the other."

In *Stansell v. Jollard* (5), for digging so near the gable end of the house of the plaintiff, let to a tenant, Lord Ellenborough held, that "where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c. he had acquired a right to a support, or, as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near, as to remove the support; but that it was otherwise of a house, &c. newly built." "If a man build a house, and make cellars upon his own soil, whereby a house newly built upon the adjoining soil falls down, no action lies." (6)

In *Wyatt v. Harrison* (7) Lord Tenterden said, "The question reduces itself to this, whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case, that the building is not alleged to be ancient, but may, as

(1) 5 B. & A. 837.

(2) Vide etiam *Trower v. Chadwick*, 3 Bing. N. C. 334. *Peyton v. London (Mayor of)*, 9 B. & C. 725.

(3) M. & M. 364.

(4) 2 Stark. 377.

(5) MS. cit. Selw. N. P. 441.

(6) Vide Com. Dig. Case, Nuisance (C.). *Palmer v. Fleshees*, 1 Sid. 167. 2 Rol. Abr. 565.

(7) 3 B. & Ad. 875.

far as appears from the declaration, have been recently erected ; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rol. Abr. Trespass (1.) pl. 1."

WHERE CASE
WILL LIE.

Where the plaintiff declared (1), that he was possessed of a close of land and a decoy-pond, to which wildfowl used to resort, and the plaintiff at his own costs had procured decoy-ducks, nets, and other engines, for decoying and taking the wildfowl, and enjoyed the benefit in taking them ; yet the defendant, intending to injure plaintiff in his decoy, and to drive away the wildfowl, and deprive him of his profit, discharged guns against the decoy-pond, whereby the wildfowl were frightened away, and forsook the pond ; and upon not guilty pleaded, a verdict was found for the plaintiff, with 20*l.* damages ; Holt C. J. observed, on motion in arrest of judgment, that "the action was maintainable ; that, although it was new in its instance, yet it was not new either in the reason or principle of it. For 1st, the using or making a decoy was lawful ; 2dly, this employment of his ground to that use was profitable to the plaintiff, as was the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy-ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken, is not prohibited either by the law of the land or the moral law ; but it is as lawful to use art to seduce them, to catch them, and to destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then, when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade ; and he that hinders another in his trade or livelihood, is liable to an action for so hindering him." The chief justice added, that it had been objected, that the nature of the wildfowl was not stated ; but this was not necessary, for the action was not brought to recover damages for the loss of the fowl, but for the disturbance.

Frightening
away wildfowl
from a decoy-
pond, whereby
the owner was
deprived of a
profit in their
sale.

But for frightening away game from a preserve not being a franchise (2), or for disturbing a rookery (3), an action is not maintainable.

Frightening
away game and
disturbance of
a rookery,
when not ac-
tionable.
Destruction of
a weir.

Wilfully to destroy any weir, &c. is not a felony within stat. 23 & 24 Geo. 3. c. 20. (1.), unless the act be committed with the intent of obstructing the freedom of the trade in corn, &c. ; and therefore no compensation can be recovered in an action under s. 2. of that act, where the jury find, that the mischief was done with a different intent. (4)

If the occupier of a house (5), who has a right to have the rain fall from

Fixing a spout

(1) *Keeble v. Hickeringill*, 11 East, 574. Selw. N. P. 442. n., from Holt's MS. Holt's Rep. 14. 17. 19. 11 Mod. 74. 130. 3 Salk. 9., cit. in *Carrington v. Taylor*, 11 East, 574. 2 Camp. 258. Bull. N. P. 79.

(2) *Ibid.*

(3) *Hannam v. Mockett*, 2 B. & C. 934.

(4) *Mitchell v. Blake*, 1 Hudson & Brooke (Irish), 195.

(5) *Reynolds v. Clarke*, Str. 634. 2 Ld. Raym. 1399.

WHERE CASE WILL LIE.	
whereby water is cast upon the land of another.	the eaves of it upon the land of another person, fixes a spout, whereby the rain is discharged in a body upon the land, the owner of the land can maintain case against the occupier of the house; because the flowing of the water, which constitutes the injury, is not the immediate act of the occupier of the house, but the consequence only of his act, viz. the fixing of the spout.
Disturbance of an ancient ferry; possession of a pew; private or public way.	Case lies for disturbance of an ancient ferry (1); or of common of pasture; or estovers (2); for disturbing the possession of a pew in a church (3); and for obstructing a private (4) or a public way. (5)
Injury arising from defective fences.	Cases sometimes arise where the law considers special consequential damage as <i>too remote</i> ; but case lies for not repairing the defendant's fence, <i>per quod</i> plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack. (6)
Shaft of a mine improperly protected.	Where a horse had been killed by falling down an old shaft of a mine, which had not been sufficiently covered over, it was held, that the owner of the horse could maintain an action for the value of the horse against the proprietor of the mine. (7)

III. *Ancient Lights.*

ANCIENT LIGHTS.	
Right to light, air, or water, acquired by enjoyment.	The principle to be elicited from the decisions respecting ancient lights is, that every man should so use his own as not to damnify another; and if a man have an ancient house, and another build so near as to darken his windows, an action on the case will lie. (8)
Judgment of Chief Justice Abbott in <i>Moore v. Rawson</i> .	The right to light, air, or water, is acquired by enjoyment, and will continue so long as the party either continues that enjoyment, or shews an intention to continue it. Thus, in <i>Moore v. Rawson</i> (9) Mr. Justice Bayley said, "I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to shew, that he means to resume it within a reasonable time."
Stat. 2 & 3 Will. 4. c. 71.	In the foregoing case Chief Justice Abbott observed, "It seems to me, that if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to shew, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual but a temporary abandonment of the enjoyment, and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burden of shewing that lies on the party, who has discontinued the use of the light." (10)
	By stat. 2 & 3 Will. 4. c. 71. s. 3., "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been

(1) *Trotter v. Harris*, 2 Y. & J. 285.
Peter v. Kendal, 6 B. & C. 703. *Huzzey v. Field*, 2 C. M. & R. 432. *Tripp v. Frank*, 4 T. R. 666.

(2) Com. Dig. Case, Disturbance (A. 2.).
 (3) *Stocks v. Booth*, 1 T. R. 480. *Mainwaring (Bart.) v. Giles*, 5 B. & A. 356.

(4) Com. Dig. Case, Disturbance (A. 2.).

(5) *Greasly v. Codling*, 2 Bing. 263.

(6) *Powell v. Salisbury*, 2 Y. & J. 391.

(7) *Sybray v. White*, 1 M. & W. 435.

(8) *Aldred's case*, 9 Co. 58.

(9) 3 B. & C. 337.

(10) Vide etiam *Garritt v. Sharp*, 3 A. & E. 325.

actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.”

In *Back v. Stacey* (1), which was an issue directed by the lord chancellor to try, whether the ancient rights of the plaintiff in his dwelling house had been illegally obstructed by a certain building of the defendant, Chief Justice Best told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house *uncomfortable*, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as *beneficially* as he had before done. His lordship added, that it might be difficult to draw the line, but the jury must distinguish between a *partial inconvenience* and a *real injury* to the plaintiff in the enjoyment of the premises.

So likewise in *Pringle v. Wernham* (2) Lord Denman said, “Every one is entitled to enjoy that portion of light, which he has enjoyed through the windows of his dwelling house for a long period of time. The first question is, whether, in consequence of this building of the defendant's, the plaintiff had less light than before, to so considerable a degree as to injure the plaintiff's property in point of value? To sustain this action there must have been a considerable obstruction of light, and the merely taking off a ray or two will not be sufficient.”

If a man build a new house on part of his land, and afterwards sell the house to another, neither the vendor nor any other claiming under him, can stop the lights (3); but if he sell the vacant ground to another, and keep the house without reserving the benefit of the lights, the vendee can build. (4)

If a house has for twenty years enjoyed light enough for a malt house, the owner may up to that extent require light to be admitted into it, and no further; therefore he can only maintain an action for a nuisance in darkening his windows so much. (5)

The enjoyment of a saw-pit and timber-yard for twenty years, is not such a right as will prevent a neighbour from intercepting light and air, it not appearing that unobstructed light and air was really necessary for the use of a saw-pit. (6)

An action for opening a window to disturb the privacy of the plaintiff cannot be maintained, and the only remedy is to build on the adjoining land opposite to the offensive window. (7)

WHERE CASE
WILL LIE.

Uninterrupted enjoyment of light for twenty years, confers an absolute title.

Judgment of Chief Justice Best in *Back v. Stacey*.

Judgment of Lord Denman in *Pringle v. Wernham*.

Where vendor cannot stop the lights of a house belonging to vendee.

Partial enjoyment of light.

Opening a window by which the privacy of another is disturbed.

(1) 2 C. & P. 465.

(2) 7 ibid. 378.

(3) *Palmer v. Fletcher*, 1 Lev. 122.

(4) Bull. N. P. 75. (a.)

(5) *Martin v. Goble*, 1 Camp. 320.

(6) *Roberts v. Macord*, 1 M. & Rob. 231.

(7) *Per Le Blanc J. in Chandler v. Thompson*, 3 Camp. 80.

**WHERE CASE
WILL LIE.**

Parol license to erect a wall or window.

If a parol license be given to erect a wall or window by which light and air are obstructed, such license cannot seemingly be recalled, if executed at the defendant's expense. (1)

IV. Injuries done to a Trader, whereby he cannot exercise his Calling.

**INJURIES DONE
TO A TRADER,
WHEREBY HE
CANNOT EXER-
CISE HIS CALL-
ING.**

If goods or *torts* of a tradesman be improperly detained from him, whereby he is prevented from pursuing his avocations, case will lie. Thus, where the plaintiff declared (2), that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, viz. an axe, &c. and, being so possessed, gained a livelihood, &c. and by the license of the defendant deposited the tools in defendant's house, who had detained them two months after request, whereby the plaintiff had lost the benefit of his trade. After verdict a motion was made in arrest of judgment, on the ground, that the plaintiff ought to have brought detinue or trover: but the court held the action well brought; for "if the plaintiff have had the goods again, detinue is not proper; and though a detainer upon request is evidence of a conversion, yet it is not a conversion; and the damages he demands in this case being special, the action ought to be special."

Injury done to an apprentice, by which his master was deprived of his services.

In an action by the master of an apprentice for an injury done to him, *per quod servitium amisit*, the declaration alleged as special damage, that the apprentice was permanently injured, and could never again be capable of serving the plaintiff as his apprentice during the remainder of the term:— It was held, that the jury might award damages for the loss of the master up to the end of the term, by reason of the permanent injury of the apprentice, and that they were not limited to give damages for the loss of the master up to the time of the commencement of the action only. (3)

Improper detention of paper delivered to a printer for printing.

In *Smith v. White* (4) the plaintiff declared in case, that being desirous of publishing a certain work, he employed and retained the defendant to print the same, and delivered to him large quantities of paper to be used in the printing; that upon the acceptance of the retainer, it became the duty of the defendant to use due diligence in printing the said work, but that he neglected his retainer and proceeded in the printing in a dilatory manner; and that he further disregarded his duty and retainer, and wrongfully and in violation of his said duty pawned and pledged large quantities of the paper, which had been delivered to him, instead of using it for the purpose of printing the work. Upon special demurrer, that the cause of action was the non performance of a promise, and that case would not lie, it was held, that the declaration was rightly drawn.

NEGLIGENCE.

V. Negligence.

Leaving a cart unprotected in a street from

In *Lynch v. Nurdin* (5) Lord Denman delivered the following judgment: — "It was an action of *tort* for negligence committed by the defendant's ser-

(1) *Winter v. Brockwell*, 8 East, 308. As to what is not considered a license to open a window, vide *Bridges v. Blanchard*, 1 A. & E. 536.

(2) *Kettle v. Hunt*, Bull. N. P. 78. (a.)

(3) *Hodsoll v. Stallbrass*, 9 C. & P. 63. 8 Dowl. P. C. 482.

(4) 8 Dowl. P. C. 255.

(5) Q. B. H. T. 1841, not yet reported.

vant in leaving his cart and horse standing for half an hour in an open street. The evidence for the plaintiff proved the fact of the cart standing there; that the plaintiff, a child of only six or seven years of age, was heard crying, and was found to be lying under the wheel of the defendant's cart with his leg broken. The defendant's counsel applied for a nonsuit, which having been refused, witnesses were called to establish the defence; and it was given in evidence, that after the cart had remained there a quarter of an hour, many children came up, the plaintiff being one of them, and got into the cart and teased the horse. The plaintiff having got out of the cart a boy made the horse move, and the cart went over the leg of the plaintiff. Upon this state of facts the defendant claimed to have the judge's direction in his favour, contending that as the plaintiff had contributed to the accident, it could not be said to be the defendant's fault. The case was left to the jury, who found for the plaintiff. It was now complained that such direction had not been given, and that the verdict was contrary to the evidence. It had been urged, that the mischief had not been produced by the mere negligence of the defendant's servant, but in combination with other causes. But the presumption was, that if a man were guilty of negligence in leaving any thing dangerous in a street, and an injury arose, though partly by the conduct of other parties, the sufferer unquestionably had a right to redress. If a gamekeeper returning home from his duty, left his gun loaded in a play-ground, and one of the boys fired it off and injured another, it could not be doubted, but that the gamekeeper must answer in damages to the injured party. In the present case an additional fact appeared; the plaintiff had done wrong; he had no right to enter the cart; he was a co-operating cause of his own misfortune; and the question arose, whether that fact alone must deprive this child of his remedy? The court found there was positive misconduct in this child; but to prevent a party maintaining an action, it must be founded on the plaintiff's own knowledge of the danger.

WHERE CASE
WILL LIE.

which a child
was injured.
Judgment of
Lord Denman
in *Lynch v.*
Nardin.

"Between wilful mistake and gross negligence it was the province of the jury to decide upon the circumstances of each case, as for instance, whether the street in which the cart was left was a street liable to be crowded, or where children were in the habit of playing, and where there would in consequence be more than ordinary danger. Had not the plaintiff been equally in fault? and could he then maintain his action? This must be a question for the jury, to be decided by their view of the understanding and motives of the party. The defendant had tempted the child by leaving the cart there. Under the circumstances the court was of opinion, that there was no rule of law that prevented the action being maintained: the case had been left to the jury, and they had decided in favour of the plaintiff; the rule must therefore be discharged."

Province of
jury to deter-
mine between a
wilful mistake
and gross ne-
gligence.

It is probable the same doctrines would be applied to the case of an injury resulting from the careless or unskilful driving of a carriage; unless the act producing it was wilful. In *Williams v. Holland* (1), where through negligence and careless driving one vehicle was caused forcibly to strike another, an action on the case was held to be sustainable for the injury

Careless driv-
ing of carriages.

(1) 6 C. & P. 23.

**WHERE CASE
WILL LIE.**

done, although it was immediate upon the violence;—but if both parties be to blame, and guilty of negligence, then neither can sue at law.

Where the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party:—It was held, that the owners of the carriage were not liable to be sued for such injury; and it was held to make no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he left at their house at the end of each drive; and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. (1)

**Warehouseman
removing goods
negligently.**

A warehouseman at Liverpool employed a master-porter to remove a barrel from his warehouse. The master-porter employed his own men and tackle, and through the negligence of the men the tackle failed, and the barrel fell and injured plaintiff:—It was held, that the warehouseman was liable in case for the injury (2), Mr. Justice Littledale observing, "It seems to me to make no difference, whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant:" and Mr. Justice Patteson said, "The case of a carrier is quite distinct; he has goods in his custody as bailee."

**Gratuitous
permission to
use a chattel.**

Where there is a gratuitous permission to use a chattel, as the possession constructively remains in the owner, he may maintain trespass for an immediate injury to it (3); but if the owner of a horse let him to hire for a certain time, during which he is killed by the owner of a cart driving violently against him, the remedy of the owner of the horse against the owner of the cart (4) is case, and not trespass; because "this is in the nature of an injury to the plaintiff's reversion;" and, according to the authority of *Gordon v. Harper* (5), he neither could have maintained trespass nor trover for them, as he was not in possession of the horses.

VI. Running down Vessels at Sea.**RUNNING
DOWN VESSELS
AT SEA.**

"It is chiefly in actions for running down vessels at sea that difficulties may occur; because, certainly, the force which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the winds and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon: and whether that may make any difference in that case, I will not now take upon me to determine." (6)

In the case of an injury arising from carelessness or unskilfulness in navigating a ship, if the injury were merely attributable to negligence or want

(1) *Quarman v. Burnett*, 6 M. & W. 499.

(2) *Randleson v. Murray*, 8 A. & E. 109.

(3) *Lotan v. Cross*, 2 Camp. 464.

(4) *Hall v. Pickard*, 3 ibid. 1

(5) 7 T. R. 9.

(6) *Per Le Blanc J. in Leane v. Bray*, 3 East, 603.

of skill, and not to the wilful act of the defendant, with intent to injure the plaintiff, the party injured has, it seems, an election either to treat the negligence or unskilfulness of the defendant as the cause of action, and to declare in case; or to consider the act itself as the injury, and to declare in trespass. (1)

In *Covell v. Laming* (2) it appeared, that the owner of a ship being himself on board, standing at the helm, unintentionally ran her against another ship from unskilful management, it was held, that the remedy was trespass not case, Lord Ellenborough observing, "I know there is a difference of opinion upon this subject. I have had much communication concerning it with those whom I respect very highly, but I confess I have not been able to see the grounds of their difficulties. My own opinion has always been uniform. Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant, I consider as the only just and intelligible criterion of trespass and case. If, in the dark, I ignorantly ride against another man on horseback, this is undoubtedly trespass, although I was not aware of his presence till we came into contact. It makes no difference, that here the parties were sailing on shipboard. The defendant was at the helm, and guided the motions of his vessel. The winds and waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force."

WHERE CASE
WILL LIE.

Remedy for
negligence in
steering a ship,
held to be tres-
pass not case.

Judgment of
Lord Ellen-
borough in
*Covell v. La-
ming*.

6. MISCHIEVOUS ANIMALS.

Mr. Justice Buller has written (3), that "There is a difference between things *feræ naturæ*, as lions, bears, &c. which a man must keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tame-

MISCHIEVOUS
ANIMALS.

(1) *Rogers v. Imbleton*, 2 N. R. 117. *Ogle v. Barnes*, 8 T. R. 188. *Leame v. Bray*, 3 East, 601. *Turner v. Hawkins*, 1 B. & P. 472. *Moreton v. Hardern*, 4 B. & C. 220—228.

The regulations published by the Trinity Board on October 30. 1840, are as follow:—

"Whereas the recognised rule for sailing vessels is, that those having the wind fair shall give way to those on a wind.

"That when both are going by the wind the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

"That when both vessels have the wind large or abeam and meet, they shall pass each other in the same way on the larboard hand; to effect which two last-mentioned objects the helm must be put to port.

"And as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack, it becomes only necessary to provide a rule for their observance when meeting other steamers, or sailing vessels going large."

Under these considerations, and with the object before stated, this board has decreed it right to frame and promulgate the following rule, which, on communication with the Lords Commissioners of the Admiralty, the Elder Brethren find has been already adopted in respect of steam vessels in her majesty's service, and they desire earnestly to impress upon the minds of all persons having charge of steam vessels the propriety and urgent necessity of a strict adherence thereto, viz.:—

"When steam vessels on different courses must unavoidably or necessarily cross so near, that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other.

"A steam vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand."

(2) 1 Camp. 497.

(3) N. P. 76. (f.)

**MISCHIEVOUS
ANIMALS.****Mischievous
dogs.**

ness of their nature : in the latter case the owner must have notice ; in the former an action lies against the owner without notice." (1)

Mr. Justice Buller observes (2), " An action upon the case will lie, for keeping a dog used to bite sheep, and which has killed sheep belonging to the plaintiff (3) : but in such case it must be proved, that the defendant knew that he would bite sheep ; and killing sheep twice before, is sufficient proof of usage." (4)

In *Smith v. Pelah* (5) Lee C. J. ruled, that, if a dog have once bit a man, and the owner having notice thereof keep the dog and let him go about, and he bite another person, case will lie against him at the suit of the person bit (though it happened by his treading on the dog's toes), for the owner ought to have hanged him on the first notice.

If one knowingly keep a dog accustomed to bite sheep, and the dog bite a horse, it is actionable ; because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more. (6)

Vicious bull.

Thus, in *Blackman v. Simmons* (7), which was an action for a personal injury by a vicious bull, the plaintiff recovered for such damage, although it appeared, that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow ; because the owner previously knew of its vicious propensities, and neglected to fasten the bull up securely.

**Improperly
fastening a mis-
chievous ani-
mal, evidence
of scienter.**

In *Jones v. Perry* (8) Lord Kenyon observed, " There are three counts in this declaration, and I have no doubt there is evidence to go to the jury that the dog was a fierce and unruly dog, and not properly secured ; but not that the defendant knew him to be mad or used to bite ; and therefore this is not a case for vindictive damages. Such a case as this I believe never appeared before ; but I am clearly of opinion the action is maintainable. Report had said, the dog had been bitten by a mad dog : it became the duty of the defendant to be very circumspect. Whether the dog was mad or not was matter of suspicion : but it is not sufficient to say, ' I did use a certain precaution ; ' he ought to use such as would put it out of the animal's power to do hurt. Here too the defendant shewed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad, by the precaution he used to tie him up ; that precaution has not been sufficient ; and for want of it the injury complained of has happened. I am clearly of opinion the plaintiff is entitled to recover."

**Offering to
compromise an
injury commit-
ted by plain-
tiff's dogs,
slight evidence
of scienter.**

Where the defendant, on being informed that his dogs had bitten the plaintiff's cattle, offered to settle for them, if it could be proved that his dogs had done it : — It was held, that this was some evidence to go to the jury of the *scienter*, though entitled to but little weight ; but that proof that the dogs were of a savage disposition, and had bitten the cattle of other persons, was not evidence, that the defendant knew they were accustomed to bite cattle. (9)

(1) *Rez v. Huggins*, 2 Ld. Raym. 1583.
Mason v. Keeling, 1 ibid. 606.

(2) N. P. 76. (f.)

(3) *Boulton v. Banks*, Cro. Car. 254.

(4) *Kinnion v. Davies*, ibid. 487.

(5) Str. 1264.

(6) *Jenkins v. Turner*, 1 Ld. Raym. 110.

Mason v. Keeling, 12 Mod. 335. *Buxendin v. Sharp*, 2 Salk. 662. 3 Mod. 12.

(7) 3 C. & P. 138.

(8) 2 Esp. N. P. C. 483.

(9) *Thomas v. Morgan*, 2 C. M. & R. 496., vide etiam *Beck v. Dyson*, 4 Camp. 198.

Every man has a right to keep a dog for the protection of his yard or house; and if a dog be properly let loose, and the injury arises from the plaintiff's own fault by incautiously going into the owner's yard after it had been shut up, no action can be maintained. (1) Thus, in *Curtis v. Mills* (2) Chief Justice Tindal said, "The first question is, whether this dog was of a savage disposition to the knowledge of the defendant; and, if so, you will then have to consider, whether the dog was placed in such a situation, that, by common care, he might have been avoided: another question will be, whether the plaintiff was bound to take notice of the danger, as he had been told, that the dog was there. If you think, that, by reason of the plaintiff's not taking common care, this accident occurred, he cannot recover; however, you may be of opinion, that, the master of the dog walking just before the plaintiff, and, as it were, leading him on, the plaintiff might think he was safe, more especially, as no caution was given him at this time by the defendant. I am of opinion that the plaintiff is entitled to recover, if he did not, as it were, run himself into the mischief by his own carelessness and want of caution."

MISCHIEVOUS ANIMALS.

Where an action cannot be maintained for an injury committed by a ferocious dog.

Judgment of Chief Justice Tindal in *Curtis v. Mills*.

7. THE DECLARATION.

The venue is transitory.

THE DECLARATION.

VENUE.

PARTIES.

He whose person or property has been damnified, is the party by whom the action should be maintained. (3)

Actual possession of real property confers a right of action against a wrong-doer (4); but a mere right of entry will not suffice. (5)

Possession of real property.

The absolute or general owner of personal property may in general support an action for an injury thereto, though he has never had actual possession; because property in personal chattels draws to it the possession. (6)

Owner of personal property.

Although the interests of two parties be several, they can be co-plaintiffs if the injury complained of, be a joint damage to both. (7)

Several interests but a joint damage.

Where there is a joint legal interest existing in two or more persons who have received a joint damage, they should join in the action, or the defendant can take advantage in abatement. (8)

Joint and legal interest.

All persons are responsible for their tortious acts, even those who are incapacitated from contracting, such as a feme covert or an infant.

All persons responsible for their tortious acts.

Several *tort feisors* who unite in an injurious act, may be sued each one singly (9); except where an action on the case is brought merely for the *non feissance* of a contract (10), or for such as concern real property; for if only one tenant in common of *realty* be sued in trespass, trover, or case, for any thing respecting the land held in common, as for not setting out tithe, &c. he may plead the tenancy in common in abatement. (11)

Where *tort feisors* may be sued singly.

(1) *Brock v. Copeland*, 1 Esp. N. P. C. 203.

(2) 5 C. & P. 491.

(3) *Moore v. Hopper*, 2 N. R. 411.

(4) *Graham v. Peat*, 1 East, 244.

(5) *Newcastle (Duke of) v. Clarke*, 2 B. Moore, 666., cit. in *Dyson v. Collick*, 5 B. & A. 603. *Welsh v. Nash*, 8 ibid. 394.

(6) *Wilbraham v. Snow*, 2 Saund. 47.

(7) *Solomons v. Medez*, 1 Stark. 191.

(8) 1 Saund. 291. (h.), *sed vide* 2 ibid. 116.

(9) *Sutton v. Clarke*, 6 Taunt. 29.

(10) 1 Saund. 291. (d. e.)

(11) Ibid. 4 Bac. Abr. Joint Tenants (K.). 513.

THE DECLARATION.

Effect of improper joinder.

By whom the action can be maintained for stopping ancient lights.

If several persons be made defendants jointly, when the *tort* could not in point of law be joint, they may demur, or take advantage of it in arrest of judgment, or on a writ of error. (1)

Case can be maintained by a lessee for years, for the prescription goes with the house (2); and also by the reversioners (3); and if the obstruction be continued after the determination of the first action, another action may be sustained for the same cause. (4)

A landlord will not be excluded by his tenant's non opposition to the enjoyment of certain windows by the tenant of the adjoining premises, unless there be evidence of the knowledge of the landlord, sufficient to found a presumption of a grant. (5)

If A. recover damage against B. for stopping his lights, and afterwards B. assign the lands in which the nuisance was erected, A. may bring another action against B. for the continuance of the nuisance, for before the assignment B. was answerable for all the consequential damages, and it shall not be in his power to discharge himself by granting it over: yet A. may bring the action against the assignee (6), though formerly a distinction was taken, viz. where the continuance occasions a new nuisance, and where the first erection has done all the mischief; that in the first case the assignee is liable to an action, but not in the second. (7)

In *Compton v. Richards* (8) it was held, that the occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by the plaintiff; Chief Baron Thomson observing, "Now, without questioning whether this building were a dwelling house or not, it is sufficient for the purpose of maintaining this action, if the erecting of any building on the wall be the doing an act whereby the plaintiff has sustained a derogation of any right which he acquired by his purchase; if so, it is what the original owner could not have done, and all lessees claiming under him were equally bound by the transfer. It is sufficient that the plaintiff declare on his possession, and that he had sustained a wrong."

In *Titterton v. Congers* (9) it was held, that the owner of windows in an edifice carried up above a party-wall, contrary to the provisions of the Building Act (10), could nevertheless recover against the owner of the adjoining land who contributed to the wall for darkening the lights; because if it were improperly built, the remedy was under the foregoing statute, and that such question could not properly be decided by another tribunal.

In order to support case, "it is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was

Sufficient for plaintiff to declare on his possession, and that he has sustained a wrong.

Windows erected contrary to the Building Act of stat. 14 Geo. 3. c. 78.

For an injury by a dog, it is not material whether the defendant was the owner or not.

(1) *Barnard v. Goelling*, 1 N. R. 245. 2 Saund. 117. n. (b.)

(2) *Symonds v. Seabourne*, Cro. Car. 325.

(3) *Jesser v. Gifford*, 4 Burr. 2141. *Biddesford v. Onslow*, 3 Lev. 209. *Leader v. Morton*, 3 Wils. 461.

(4) *Shadwell* (Right Hon. Sir Launcelot) v. *Hutchinson*, 2 B. & Ad. 97.

(5) *Daniel v. North*, 11 East, 372.

(6) *Rosewell v. Prior*, 12 Mod. 635. 2 Salk. 459.

(7) *Ryppan v. Bowles*, Cro. Jac. 373. Bull. N. P. 75. (b.)

(8) 1 Price, 27.

(9) 5 Taunt. 465.

(10) Stat. 14 Geo. 3. c. 78.

the defendant's duty either to have destroyed the dog, or to have sent him away, as soon as he found that he was mischievous." (1);

The plaintiff's title or interest for *torts* relating to personal or real property should be detailed; but a very precise statement of title is not requisite, because damages are the gist of the action. (2)

By stat. 2 & 3 Will. 4. c. 71. s. 5., "in all actions on the case and other pleadings, wherein the party claiming may now, by law, allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation."

If the action be founded either upon contract, or upon a common law liability, such contract or liability should be stated; and it will be an essential defect, if it do not appear from the declaration, that the defendant was bound to perform or omit the act, which is the subject-matter of the action.

The injury may, generally speaking, be described generally (3); but if the injury and its circumstances be minutely described, the proof must substantially coincide with such statements. (4)

Where the copy of a writ of summons described the cause of action as "an action on the *case promises*," the court set it aside for irregularity. (5)

If the averment be divisible, though included in one sentence, it is not necessary for the plaintiff to prove the whole; it will be sufficient if he prove so much of it as will support his case. (6) Thus, in *Ricketts v. Salvey* (7) Chief Justice Abbott said, "The general rule of pleading in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved, affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is one exception, however, to this rule, which is, where the allegation contains matter of description. Then, if the proof given be different from the statement, the variance is fatal. The only difficulty in this case is to ascertain, whether these words are matter of description or not. The words are, 'that the plaintiff was possessed of a messuage and 150 acres of land with the appurtenants, and by reason thereof, was entitled to common of pasture for sheep, levant and couchant, on the said messuage, &c. at all times of the year upon a certain common called Wheat Common.' But there are not the words 'thereto belonging,' or any others of the like import, so as to connect the messuage and the land together. Had there been such words of connection, I should have thought that the plaintiff was not entitled to recover. But this is not the case; and the messuage and lands are not connected together as one entire tenement. I

THE DECLARATION.

Title or interest of plaintiff.

Stat. 2 & 3 Will. 4. c. 71. s. 5.

STATEMENT OF CAUSE OF ACTION.

Writ of summons describing an action of case as one on promises.

Divisible averments.

Judgment of Chief Justice Abbott in *Ricketts v. Salvey*.

(1) *Per* Lord Tenterden in *McKone v. Wood*, 5 C. & P. 2.

(2) 2 Saund. 379.

(3) *Brucher v. Froment*, 6 T. R. 659. *McManus v. Crickett*, 1 East, 110. *Jackson v. Pugh*, 1 M. & S. 234. *Michel v. Alestree*, 2 Lev. 172.

(4) *Hullman v. Bennett*, 5 Esp. N. P. C.

226. *Griffiths v. Marson*, 6 Price, 1. *Fitzsimons v. Inglis*, 5 Taunt. 534.

(5) *Youlton v. Hall*, 7 Dowl. P. C. 186.

(6) 2 Saund. 74. (b.); 207. n. 24.

(7) 2 B. & A. 363. *Jones v. Clayton* (Sir William), 4 M. & S. 349. *Smith v. Hison*, Str. 977.

THE DECLARATION.

think, therefore, that these are not words of description; but that this allegation is divisible; and that it may be considered as stating, that the plaintiff was possessed of a house, and also that he was possessed of land, and that in respect of both or either, he was entitled to the right of common in question. That being the case, the plaintiff who has proved an injury done to the right claimed in respect of the land, is entitled to a verdict."

If an allegation limit and describe that which is material, it is necessarily descriptive; it becomes part of that which is material, and cannot be rejected.

Distinctions between allegations of matter of substance and of matter of description.

In *Stoddart v. Palmer* (1) Chief Justice Abbott said, "Whatever may have been the rule upon this subject in ancient times, a distinction is now established between allegations of matter of substance, and allegations of matter of description. The former require to be substantially proved; the latter must be literally proved. That distinction was laid down by the court in *Purcell v. Macnamara* (2), and has since been acted upon in the case of *Phillips v. Shaw*. (3) If therefore the allegation, that the plaintiff by judgment recovered, &c. be an allegation of substance only, it was sufficient to prove any judgment to warrant the writ. If, on the other hand, it be an allegation of description, it was necessary to prove a judgment, corresponding in time and all other circumstances with that stated in the declaration."

Stat. 8 Anne, c. 14.
Where allegation must be proved,

But in order to maintain an action upon stat. 8 Anne, c. 14. against a sheriff for removing goods without satisfying the rent due to the landlord, it is necessary to shew, that a writ issued out of some court, and that the sheriff seized the goods in pursuance of it; because the seizure and removal of the goods under the writ is the foundation of the action, and the plaintiff is bound to prove the issuing of it according to his allegation. (4)

VARIANCE.

In *May v. Brown* (5) Chief Justice Abbott said, "It is a general rule that a variance between the allegation and proof will not defeat a party, unless it be in respect of a matter which, if pleaded, would be material."

Averment that defendant's dogs were accustomed to worry and bite sheep and lambs.

An averment in a declaration, that defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof, that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men, "because the plaintiff has tied up his complaint by the allegation of the particular habits of these dogs, and of the defendant's knowledge of those habits. For, unless it be inferred that a dog accustomed to attack men is *ipso facto* accustomed also to attack sheep, there is no evidence to support this declaration." (6) It seems, however, that an averment, that the dogs were of a ferocious and mischievous disposition, would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically, that they were accustomed to bite and worry sheep.

DAMAGES.

In actions upon the case for consequential injuries, the damages which the plaintiff has sustained being the gist of the complaint, must be stated in the declaration; which damages must appear to depend on the injury

(1) 3 B. & C. 4.

(2) 9 East, 157.

(3) 4 B. & A. 435.

(4) Per Abbott C. J. in *Sheldon v. Whit-*

taker, 4 B. & C. 658. *Cudlip v. Rundle*, Carth. 202.

(5) 3 B. & C. 122.

(6) Per Lord Ellenborough in *Hartley v. Harriman*, 1 B. & A. 624.

complained of, and not be too remote, or happen from the intervention of another cause. (1)

THE DE-
CLARATION.

Damages are either general or special. General damages are such as naturally arise out of, or are connected with, the injury complained of; and, in actions for malfeasance, they in general correspond with the end or design which the defendant had in view, and which has been previously stated in the declaration. Special damages, are either such as are super-added to general damages, arising from an act injurious in itself, or such as arise from an act indifferent in itself, but injurious in its consequences; and, in either case, they must be specially laid in the declaration, or the plaintiff will not be allowed to give them in evidence at the trial. (2)

8. THE PLEADINGS.

THE PLEAD-
INGS.

By Reg. Gen. Hilary Term, 4 Will. 4., in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Reg. Gen. H.
T. 4 Will. 4.

All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*.

"The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time." (3)

Justification
for shooting a
dog.

In an action for keeping a mischievous animal, the plea of "not guilty" denies the *scienter* as well as the injury. (4)

"Not guilty"
denies the
scienter.

9. LIMITATION OF ACTION — PARTICULARS OF DEMAND — COSTS — JUDGMENT.

LIMITATION OF
ACTION —
PARTICULARS
OF DEMAND —
COSTS—JUDG-
MENT.

Under stat. 21 Jac. 1. c. 16. s. 3., the time limited for bringing actions on the case is six years, except in an action for verbal slander. (5)

In an action on the case, the court will not require the plaintiff to deliver a particular of his claim, where, from the mode of alleging it in the declaration, there is no ambiguity as to the transaction in respect of which the action is brought. (6)

LIMITATION OF
ACTION.
PARTICULARS
OF DEMAND.

(1) *Fitzsimons v. Inglis*, 5 Taunt. 534. 568. *Protheroe v. Mathews*, 5 ibid. 581. *Moore v. Adam*, 2 Chitt. 198. *Janson v. Brown*, 1 Camp. 41. *Hanway v.*

(2) *Tidd*, 445. 1 Saund. 243. (b.) *Boulbee*, 1 M. & Rob. 15. (4) *Thomas v. Morgan*, 2 C. M. & R. 496. (5) *Vide post*, tit. SLANDER.

(3) *Per Lord Denman in Morris v. Nugent*, 7 C. & P. 573. *Wells v. Head*, 4 ibid. 370. (6) *Stannard v. Ullithorne*, 5 Dowl. P. C.

**LIMITATION OF
ACTION, &c.****COSTS.**

In order to obtain particulars in case, there must be an affidavit, stating that defendant does not know, what defendant is going for: in fact, "such an affidavit is necessary, in order to obtain particulars in every action of trespass, trover, or on the case." (1)

By stat. 3 & 4 Vict. c. 24., if in any action of trespass on the case, the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever. (2)

JUDGMENT.

In case, the judgment for the plaintiff is, either, that he recover his "damages and costs:" — or, "his damages," against the defendant.

(1) *Per Parke B. in Snelling v. Chennells*,
5 Dowl. P. C. 80.

(2) *Vide stat. 3 & 4 Vict. c. 24., ante, 228.*

COMMON.

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DEFINED GENERALLY.

Common is the right to take or use a portion of land, &c. which belongs to another.

1. DEFINED GENERALLY.

Common is the right or privilege which one or more persons have to take or use some part or portion of that, which another man's lands, waters, woods, &c. naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing on some agreement between lords and tenants for some valuable purposes, which by age being formed into a prescription, continues good, although there be no deed or instrument in writing that proves the original contract or agreement.

Definition of "all times."

A prescription for common of pasture, for a certain number of sheep, or A. every year, at all times of the year, is well laid, though the evidence which proves the right of common proves also, that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day; the court in *Brook v. Willett* (1) observing, "that the words 'all times' must be taken to mean all usual times; that there were two prescriptions; and that the folding the sheep on Undley Hall Farm, was not part of an entire prescription for common of pasture on Undley Common, but a condition or rather a consideration, subsequent to the enjoyment of the right, and therefore not necessary to be stated, which it would have been, had it been precedent."

What will operate as a new grant of common.

In case for disturbance of common of pasture, plaintiff declared, in respect of a messuage and lands, for all his cattle *levant and couchant*:—It was held, that a lease to plaintiff's testator for years, determinable on

(1) 2 Hen. Black. 224.

lives, of a farm, &c. together with reasonable common of pasture, was sufficient to sustain the right of common alleged in the declaration; and that this right was not destroyed by a subsequent conveyance to the plaintiff in fee, of the farm and common of pasture thereto belonging and appertaining; for this operated as a new grant of the common. (1)

The general division of common is, 1. common of pasture; 2. common of estovers; 3. common of turbary; 4. common of piscary.

But the word "common" is understood of common of pasture, of which there are five kinds, viz. common appendant; common appurtenant; common *pur cause de vicinage*; common in a forest; common in gross.

2. COMMON OF PASTURE.

Common of pasture is where one person has, in common with other persons, the right of taking, by the mouths of his cattle, the herbage growing on land, of which some other person is the owner; and it is either appendant, appurtenant, or in gross; and their rights depend either upon a prescription or a grant (2) actually proved or presumed.

COMMON OF
PASTURE.

I. Common appendant.

COMMON AP-
PENDANT.

The origin of common appendant is thus stated by Lord Coke:— "When a lord of a manor wherein was great waste grounds, did enfeof others of some parcels of arable land, the feoffees, *ad manutenendum servitium socæ*, should have common in the said wastes of the lord for two causes; first, as incident to the feoffment; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; and by consequence the tenant should have common in the wastes of the lord for his beasts, which do plough and manure his tenancy, as appendant to his tenancy; and this was the beginning of common appendant. The second reason was for the maintenance and advancement of agriculture and tillage, which was much favoured in law." (3)

Origin.

Common appendant exists only by prescription (4), which presupposes a grant, and of consequence must have existed beyond time of memory (5), so that it cannot be pleaded by way of custom (6); and yet it is not necessary to prescribe for common appendant (7), because it is of common right, and appendancy implies a prescription. (8) It follows, that such a right cannot be created at this day; in conformity with which practice, where the lord approves part of his waste, he is not entitled to common in respect of his land so approved. (9)

Exists only by
prescription.

(1) *Dridge v. Carpenter*, 6 M. & S. 46., et vide *Ballard v. Dyson*, 1 Taunt. 279.

(2) *Sacheverill v. Porter*, Cro. Car. 482. 2 Bac. Abr. (A.) 94.

(3) 2 Inst. 85. *Tyrringham's case*, 4 Co. 37. (a.)

(4) 17 Ass. pl. 7. 26 Hen. 8. 4. *Chudleigh's case*, Co. Litt. 121. (b.)

(5) 5 Ass. pl. 2. Ibid. pl. 63, 26. 26 Hen. 8. 4. Bro. Com. pl. 1. *Grymes v. Peacock*, 1 Bulst. 17. 1 Rol. Abr. 396.

(6) *Brediman's case*, 6 Co. 59.

(7) 4 Hen. 6. pl. 10. 22 ibid. 10. Co. Litt. 122. (a.)

(8) Co. Litt. 122. (a.)

(9) 5 Ass. pl. 2. 26 Hen. 8. 4.

COMMON
OF PASTURE.

The courts will intend in favour of that right of common in respect of which, commonable right has been proved.

Apportionment.

Number of cattle allowed to be *levant* and *couchant*.

Not essential that the cattle should be the commoner's.

Corporations and copyholders may enjoy common.

Right to prescribe cannot be derived from a temporary interest.

Mode in which the right of

The courts will always intend in favour of that right of common, in respect of which, the immemorial enjoyment of commonable right has been proved (1), unless pleaded, so as to exclude the possibility of such an intentment. (2)

And there can be no doubt, that a man may have two distinct substantial grants of right of common over different wastes, in different manors, from different lords, in respect of the same tenement. (3)

Common appendant, being of common right, may be apportioned by alienation of part of the land to which the common is appendant (4); and if the land be divided ever so often (5), each parcel of land is entitled to common appendant. Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned (6), because common appendant is of common right (7), but otherwise it is of common appurtenant. (8)

As to the number of cattle which are allowed to be *levant* and *couchant*, they are for such and so many, as the tenant has occasion for to plough and manure his land in proportion to the quantity thereof (9), or which the land can maintain during the winter (10): particular circumstances may, however, control such general rule. (11)

It is not essentially necessary that the cattle should be the commoner's own absolute property, provided he has a special property in them (12), and they be employed to the advantage of his own soil. (13) This right may be also limited as to time (14); as where one prescribed to have common appendant, after the corn was cut and carried, during two successive years, and then throughout the year during the third. (15)

Corporations are entitled to a right of common appendant. (16) Copyholders can likewise claim the privilege (17), but they must assert their right by custom. (18)

Inhabitants (19), or persons having a temporary interest, cannot be allowed to prescribe. (20)

Common appendant can only be used for such cattle as are necessary for tillage, as horses and oxen to plough the land, and cows and sheep to manure it. (21) The court will however intend, if possible, that the beasts

(1) *Potter v. North*, 1 Saund. 350. 1 Lev. 268. 2 Keb. 517. *Hockley v. Lamb*, 1 Ld. Raym. 645. 726. 731. *S. P. North v. Cox*, 1 Lev. 253.

(2) *Scamler v. Johnson*, Sir T. Jones, 227. 2 Show. 248.

(3) *Hollinshead v. Walton*, 7 East, 485.

(4) 1 Inst. 122. (a.)

(5) *Per Willes C. J.*, Willes, 230, 231.

(6) *Wield's case*, 8 Co. 79. (a.)

(7) 1 Inst. 122. (a.)

(8) *Ibid.*

(9) *Bassat v. Roere*, Willes, 231. Co. Litt. 122. (a.) 4 Vin. Abr. 584. Bro. Com. pl. 13.

(10) *Leach v. Widsley*, 1 East, 54. *Cheesman v. Hardham*, 1 B. & A. 711. *Dean and Chapter of Salisbury's case*, Sir W. Jones, 282. *Sayer's case*, *ibid.* 286. *Scholes v. Hargreaves*, 5 T. R. 47.

(11) *Smith v. Feverell*, 2 Mod. 7. 1 Freem.

190. 1 Danv. 810. Co. Litt. 122. (a.) 4 Vin. Abr. 192.

(12) *Manneton v. Trevilian*, 2 Show. 328. Skin. 137.

(13) *Rumsey v. Rawson*, 1 Vent. 18. 26. *Pomfret v. Ricroft*, 2 Keb. 410. 493. 1 Ld. Raym. 171.

(14) *Walter v. Chauner*, 1 Vent. 21. 2 Keb. 676.

(15) *Miller v. Ward*, 1 Vent. 92. *Chandler v. Melland*, 2 Keb. 491.

(16) *Mellor v. Walker*, 2 Saund. 1.

(17) *Fisher v. Wren*, 3 Mod. 250.

(18) *Crowther v. Oldfield*, 2 Ld. Raym. 1225. 1 Salk. 364. 6 Mod. 19.

(19) *Ordway v. Orme*, 1 Bulst. 183. *Whittier v. Stockman*, 2 *ibid.* 87.

(20) *English v. Burnell*, 2 Wils. 258.

(21) 45 Edw. 3. 26. 14 Hen. 6. 34. Bro. Com. pl. 13. Co. Litt. 122. (a.) *Tyringham's case*, 4 Co. 37.

cut in, are those that are commonable; as where there was a prescription for twenty great beasts, they were intended to be horses, oxen, kine, &c. (1)

COMMON
OF PASTURE.

common is to
be enjoyed.

COMMON AP-
PURTENANT.

Defined.

II. *Common Appurtenant.*

Common appurtenant is a right of common founded on a grant (2), or prescription (3), which supposes a grant annexed to the enjoyment of land. Common appurtenant may be claimed, as well by grant within time of memory as by prescription; and after an unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, evidence, that the lord's tenant of the land had, for fifty years past, enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land with the appurtenances, and that by reason thereof, he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that, by reason thereof, he was entitled to common of pasture, &c. (4); and may be apportioned (5) by a conveyance of part of the land to which the right is appurtenant. (6)

Common appurtenant ariseth from no connection of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts, besides such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground.

This right of common may be appurtenant to a house, for it shall be intended that a curtilage was belonging to the house (7); and a messuage hath included in it yards, curtilage, and the like (8), or lands (9), or as appurtenant to and parcel of a manor without land, when it is for a limited number, and in the hands of a copyholder. (10)

To what a
right of com-
mon may be
appurtenant.

Common can be enjoyed for a certain number of cattle without levancy and couchancy being an ingredient; as in Lincolnshire, the possessor of the least cottage hath common for 1000 sheep, which is appurtenant and by prescription, and need not be levant and couchant. (11)

Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have is, as in the case of common appendant, levancy and couchancy (12); and consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common appurtenant for a certain number of cattle may be granted over, and so become common in gross.

This right varies both as to the number of cattle (13), the season of enjoyment (14), or the place in which it is to be enjoyed. (15)

Variations to
which this right
is subject.

(1) 37 Hen. 6. 34. Bro. Com. pl. 13.

(2) *Sacheverill v. Porter*, Cro. Car. 482.

(3) 1 Inst. 122. (a.)

(4) *Cowlam v. Slack*, 15 East, 108.

(5) Hob. 235. 1 Inst. 122. (a.)

(6) *Sacheverill v. Porter*, Cro. Car. 482.
Leniel v. Harslop, 3 Keb. 66.

(7) *Patrick v. Lowre*, 2 Brownl. 101.

(8) *Scambler v. Johnson*, 2 Show. 248, Sir
T. Jones, 227.

(9) *Scholes v. Hargreaves*, 5 T. R. 46.

(10) *Musgrave v. Cave*, Willes, 319.

(11) *Leniel v. Harslop*, 3 Keb. 66.

(12) 1 Rol. Abr. 398. *Drury v. Kent*,
Cro. Jac. 15.

(13) *Cheedley v. Mellor*, 1 Sid. 313.
Stonesby v. Musenden, 2 ibid. 87. 1 Saund.
227. F. N. B. 181.

(14) *Musgrave v. Cave*, Willes, 319. (N.)

(15) Ibid.

COMMON
OF PASTURE.

Where right of common cannot be reserved.

Extinguishment of common appurtenant by unity of possession.

Common for cattle cannot be claimed for a house where no curtilage or land is attached.

Judgment of Mr. Justice Buller in *Scholes v. Hargreaves*.

A right of common cannot be reserved in a demise under the word "land." (1) And a right of common (whether appendant or appurtenant not stated in the case) cannot be reserved from the land and converted into common in gross. (2)

Common appurtenant as well as common appendant may become extinct by unity of possession. (3) And where common appurtenant has been extinguished by unity of possession, a new right of common is not created by a deed granting a messuage and land, with all common thereto belonging, although the occupiers of the tenement have used the common since the extinguishment; otherwise, if the language of the deed had been a grant of "all commons used therewith." (4)

Common for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land. (5)

It is doubtful, whether common appurtenant to a messuage without land can exist (6); but it seems common appurtenant may be converted to common in gross by demising it. (7)

In *Scholes v. Hargreaves* (8) Mr. Justice Buller said, "The only question is, what is meant in those cases by the words *messuage* and *cottage*, annexed to which, was the right of common claimed; for in all of them the court say, that they will intend that land was included therein. And that it is necessary there should be some land annexed to the house, is clear from considering, what is meant by *levancy* and *couchancy*; it means the possession of such land, as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain in the winter, so many shall be said to be levant and couchant. It was so determined by Lord Coke, as appears in *Noy*. (9) In *Emerton v. Selby* (10) the court held the prescription good for common appendant to a cottage, because a cottage containeth a curtilage; and to make it a lawful cottage within the 31 Eliz. c. 7. (11) there must be four acres laid to it. So in the case in *Brownlow* (12) the court said, 'it shall be intended that there was a curtilage belonging to the house; and the levancy and couchancy shall be intended those beasts which are nourished and fed upon the land, and may there lie in summer and winter.' Indeed, in *Vaughan* (13) it was said, that common cannot be claimed for cattle levant and couchant on a messuage. That is right, if by messuage be meant only a house; but all the other cases proceed on the ground that, after verdict, land shall be understood to be included in the term messuage." (14)

There may be in every case of this nature special exceptions of particular persons who are entitled to enjoy the right of common. (15) Burgagers in a borough may have common appurtenant to their burgages by prescription (16), or freemen and inhabitants of ancient messuages (17); but an in-

(1) *Smith dem. Jordon v. Milward*, 3 Doug. 70.

(2) *Ibid.*

(3) *Bradshaw v. Eyre*, Cro. Eliz. 570.

(4) *Clements v. Lambert*, 1 Taunt. 205.

(5) *Scholes v. Hargreaves*, 5 T. R. 46.

(6) *Bunn v. Channen*, 5 Taunt. 244.

(7) *Ibid.*

(8) 5 T. R. 48.

(9) *Cole v. Foxman*, *Noy*, 30.

(10) 2 Ld. Raym. 1015.

(11) But that statute has been repealed by stat. 15 Geo. 3. c. 32.

(12) *Patrick v. Lore*, 2 Brownl. 101.

(13) *North v. Coe*, Vaugh. 253.

(14) *Hockley v. Lamb*, 1 Ld. Raym. 736.

(15) *Wakefield's case*, Owen, 4.

(16) *Miller v. Walker*, 1 Sid. 462. *Chedley v. Mellor*, *ibid.* 313.

(17) *Hinkes v. Clarke*, 2 Show. 78.

habitant of a town shall not have the common, by reason of his commonancy in an ancient messuage within that town, not having any estate or interest in the house, in respect of which he ought to have common (1); yet he may have it in a place where such right attaches, provided the cattle be levant. (2)

COMMON
OF PASTURE.

Where the tenant of B. prescribed to have for himself and his tenants, &c. occupiers of the farm of B., the sole and exclusive right of pasture and feeding of sheep and lambs on L., as to the said farm of B. belonging and appertaining: — It was held, that this did not entitle him to take in the sheep and lambs of other persons to pasture on L., for that, by the terms of the grant, some interest in the pasture was reserved to the lord, and the above practice was prejudicial to such interest. (3)

Where commoners not entitled to take in the sheep of other persons to pasture.

III. *Common pur cause de Vicinage.*

COMMON PUR
CAUSE DE VICINAGE.

Common pur cause de vicinage is where, the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another, the beasts of the one straying mutually into the other's fields, without any molestation from either. (4) Though common of vicinage is sometimes reckoned amongst the rights of common, there is properly no such right of common, but it is only an excuse for trespass. If it were a right, it would prevent an inclosure, which it has been always holden, that it will not. (5) Thus, in *Bromfeild v. Kirber* (6) it was acknowledged, that common of vicinage was in the nature of an escape, and so an excuse, for a man could not put in his cattle in such common originally, but they must escape; that this was exemplified by the fact, that those entitled to the privilege could inclose one against the other, if they choose to incur the expense.

Its properties.

Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway, which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continued. (7)

Common pur cause de vicinage cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs, over which, the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. (8)

No excuse for cattle rambling over downs where owner has exclusive possession.

(1) *Fowler v. Dale*, Cro. Eliz. 363. *Gateward's case*, 6 Co. 60. 15 Edw. 4. 29. *Weekly v. Wildman*, 1 Ld. Raym. 406. *Mere-wether and Stephens' Hist. of Boroughs*, 1538.

(2) 15 Edw. 4. 32. Bro. Com. pl. 8. Bro. Prescription, pl. 28. *Fowler v. Dale*, Cro. Eliz. 363. *Weekly v. Wildman*, 1 Ld. Raym. 406. 18 Edw. 4. 3.

(3) *Jones v. Richard*, 6 A. & E. 530.

(4) 1 Inst. 122. (a.) 3 Cruise's Dig. 78. Bract. 22. *Rex v. Tymberly*, Keb. 254. Britt. 144.

(5) *Musgrave v. Cave*, Willes, 322., vide etiam *Hickman (Sir William) v. Thorne*, 2 Mod. 104. *Rex v. Tooley*, 2 Bulst. 187.

(6) 11 Mod. 72.

(7) *Gullett v. Lopes*, 13 East, 348.

(8) *Heath v. Elliott*, 4 Bing. N. C. 388.

COMMON
OF PASTURE.COMMON IN A
FOREST.IV. *Common in a Forest.*

Common in a forest is the privilege of enjoying the herbage arising from the soil of a third person within the forest. (1) The exercising of this right may vary, as in other cases of rights of common already alluded to, both as to the species and number of cattle, and the seasons of the year when they are entitled to depasture. (2) But it has been holden, that it is not necessary, in prescribing for common which is allowed by act of parliament in a forest all the year, except the fence month, to show such limitation. (3)

V. *Common in gross.*COMMON IN
GROSS.

Common in gross is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by prescription; it is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. (4)

Common in
gross *sans*
nombre.

Respecting common in gross *sans nombre*, Willes C. J. observes, "The notion of common *sans nombre* in the latitude in which it was formerly understood, has long since been exploded, and it can have no rational meaning, but in contra distinction to stinted common." (5) However, it has not been expressly decided, that an individual may not have a common *sans nombre*. (6)

Parties who
may enjoy it.

A common in gross may be prescribed for by the parson of a church, or the like corporation sole (7); by the mayor and burgesses of a corporation (8), and by a copyholder. (9) But inhabitants, or occupiers as such, cannot have such a right, because they are incapable of taking by grant (10); nor the king, for he might surcharge the land. (11) A prescription for this right must be established by immemorial usage; hence it appears, that a lessee for years cannot prescribe for such a common, since the imbecility of his interest requires, that he should plead a *que estate*. (12)

3. COMMON OF ESTOVERS.

COMMON OF
ESTOVERS.

Common of estovers is a right of taking necessary house-bote, plough-bote, and hedge-bote, from the estate of another, and must be claimed in respect of ancient premises. (13)

The privilege of taking estovers may be either amplified or confined; in

(1) *Woolridge v. Dovey*, Hardr. 87. Sir Charles Howard's case, Sir W. Jones, 292.

(2) *Biddlecombe v. Kervell*, 2 Burr. 1118.

(3) *Triggs v. Turner*, Pollexfen, 443.

(4) *Stables v. Mellon*, 2 Lev. 246. Sir T. Jones, 115.

(5) *Bennett v. Reeve*, Willes, 232. Hardr. 117., vide 22 Ass. pl. 36. 25 ibid. pl. 8. 36 ibid. pl. 3.

(6) *Weekly v. Wildman*, 1 Ld. Raym. 405.

(7) 2 Black. Com. 34.

(8) 1 Saund. 343. *Stables v. Mellon*, 2 Lev. 246.

(9) *Barwick v. Matthews*, 5 Taunt. 365.

(10) 15 Edw. 4. 29. 33. *Weekly v. Wildman*, 1 Ld. Raym. 407.

(11) 27 Hen. 8. 10. (B.)

(12) — v. *Stringer*, Cro. Car. 599.

(13) *Salby v. Robinson*, 2 T. R. 758.

most cases it applies to the taking of underwood, shrubs, &c.; but there may be a prescription to a much greater extent. (1)

Inhabitants cannot prescribe for estovers in that capacity. (2)

The expending of estovers must be on the premises which give the right to take them (3), and profits granted out of a waste cannot be sold. (4) It is lawful to repair any part of ancient premises, and to rebuild them if destroyed or fallen down, with such estovers, but not to raise any new building, or new erection, or an old building with them. (5)

**COMMON
OF ESTOVER.**

Inhabitants cannot prescribe for estovers.

Mode in which the right is to be enjoyed.

4. COMMON OF TURBARY.

Common of turbary is a liberty of digging turf upon the ground of another, or upon the lord's waste. This kind of common can only be appendant to a house, and not to land, for turf is to be burned in a house, and must be expended on the premises in respect of which it is claimed (6); nor can it extend to a right to dig turf for sale (7); and it may be in gross. (8)

**COMMON OF
TURBARY.**

Common of turbary may on the one hand be limited, both as to the season of the year, and as to the parts of the common from which it is to be extracted; or, on the other, may exist without any restriction whatsoever. (9)

A mere occupant cannot claim this immunity (10); but it seems, that a mayor and burgesses may prescribe to have it for themselves; and the inhabitants of a place (11); and it seems a freeman may plead a custom to take turves for his own use. (12)

Parties who may enjoy it.

The enjoyment of estovers in gross must be always qualified in so far as they must be appropriated to no other purposes, than such as are specified in the grant; and whether by grant or prescription, there should be a reasonable direption of the soil. (13)

Mode of enjoyment.

5. COMMON OF PISCARY.

Common of piscary is a right to fish in the soil of another, or in a river running through another land; and Lord Coke says, that this kind or right does not exclude the owner of the soil from fishing. Like other commons, it may be appendant, appurtenant, or in gross (14): where the right is ap-

**COMMON OF
PISCARY.**

(1) *Fisher v. Wren*, 3 Mod. 250.

(2) *White v. Coleman*, 3 Keb. 247.

(3) 7 Edw. 4. 27. 12 ibid. 8. Clayt. 47. *Sym's case*, 8 Co. 54.

(4) 17 Edw. 3. 7. 11 Hen. 6. 11. (B.) Clayt. 47. 5 Hen. 7. 7. (B.)

(5) 10 Edw. 4. 3. *Luttrell's case*, 4 Co. 87. *Reynolds v. Clarke*, 2 Ld. Raym. 1400.

Opy v. Thomasius, 1 Lev. 167. *Cox v. Matthews*, 1 Vent. 237. *Webb v. Bettell*, 2 Lev.

44. Godb. 97. Freem. 174. *Dewclas v. Kendall*, Yelv. 187. 1 Bulst. 93. 1 Brownl. 219.

(6) *Hayward v. Cunningham*, 1 Lev. 231.

(7) Ibid. 4 Co. 37. *Valentine v. Penny*, Noy, 145.

(8) 2 Black. Com. 35. 3 Cruise's Dig. 89. 5 Ass. pl. 9. 7 Edw. 3. 43.

(9) *Fawcett v. Strickland*, Willes, 57.

(10) *Ely (Dean and Chapter of) v. Warren*, 2 Atk. 189.

(11) *Threadneedle v. Linum*, Freem. 184.

(12) *Rex v. Warkworth (Inhab. of)*, 1 M. & S. 474.

(13) *Wilson (Lady) v. Willes (Sir Francis)*, 7 East, 121. 3 Smith, 167.

(14) 34 Ass. pl. 11.

**COMMON
OF PISCARY.**

Parties who
may enjoy the
privilege.

Mode in which
it is to be en-
joyed.

pendant or appurtenant, it should be claimed in respect of the tenements to which it belongs; when in gross, it is claimed generally by virtue of the deed.

All persons capable of taking commonable rights are competent to enjoy a common of fishery; and the lord cannot be shut out from the right, unless by a special prescription (1); he may, therefore, take it to any extent, so as he does no injury to his tenants. (2)

In conformity with the original intention of the grant of common of piscary, viz. for the maintenance of the tenant's family, it would appear incongruous that parties in whom such a right may be vested should have the power of otherwise appropriating or applying, either to their own benefit by sole, or to the advantage of others by mutual participation, the produce of such incorporeal hereditaments.

**OF THE INTER-
EST OF HIM
WHO IS THE
OWNER OF THE
SOIL.**

The lord can-
not deprive
commoners of
their rights.

Lord cannot be
excluded from
all profit.

General rights.

6. OF THE INTEREST OF HIM WHO IS THE OWNER OF THE SOIL.

The exercise of the lord's rights must not only be guided by a prudential caution in leaving sufficient common, but by due care that it be left in its natural state, and not endangered by any act on his part, unless unavoidably necessary for the perception of those profits, to which he may be entitled. (3)

But the lord of the soil hath such an interest therein, that it seems agreed that a custom or prescription totally to exclude him from all manner of profit is void, as unreasonable and against law. (4)

The lord has an entire dominion over the soil, subject to the commoner's right of common. He may use his waste in a very amplified manner by depasturing his own cattle or those of strangers, or may, in various ways, contract the liberty which the commoner has upon open grounds (5), but his conduct must not be incompatible with that exclusive privilege of the commoners. (6) But the right of the commoner may be subservient to the right of the lord in the soil (7), so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, dig mines (8), plant trees (9), make fish-ponds (10), if it can be proved that such rights have been constantly exercised by the lord, and that the abstract rights of the lord and commoners do not clash. (11)

The lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor. (12)

(1) 1 Inst. 22. (a.)

(2) *Smith v. Kemp*, 2 Salk. 637. 2 Black. Com. 39.

(3) *Goe v. Cother*, 1 Sid. 106.

(4) 2 Bac. Abr. (B.) 98.

(5) *Doe d. Lowes v. Davidson*, 2 M. & S. 175. 3 Cruise's Dig. 85. 18 Edw. 3. 42. 18 Ass. pl. 4. Co. Litt. 122. (a.)

(6) *Potter v. North*, 1 Saund. 347. *Smith v. Feverel*, 2 Mod. 7. *Birch v. Wilson*, *ibid.* 274. *Woolton v. Salter*, 3 Lev. 104., vide

Hoskins v. Robins, 2 Saund. 324., per cur. 1 Vent. 164.

(7) *Bateson v. Green*, 5 T. R. 411.

(8) *Coo v. Cauthorn*, 1 Keh. 390.

(9) *Sadgrove v. Kirby*, 6 T. R. 483. 1 B. & P. 13. 3 Anst. 892.

(10) *Pelling v. Langden*, Owen, 114.

(11) *Boulcott v. Winmill*, 2 Camp. 261.

(12) *Sefton (Earl) v. Court*, 5 B. & C. 917. 8 D. & R. 741.

By stat. Westm. 2. 13 Edw. 1. c. 46. it is declared, that by occasion of a windmill, sheepcote, dairy, enlarging of a court, necessary, or curtilage, none shall be grieved by assize of novel disseisin for common of pasture (1); but whatever house is erected by the lord, it must be either for his own habitation or that of his shepherd. (2)

OF THE INTEREST OF HIM WHO IS THE OWNER OF THE SOIL.

Stat. 13 Edw. 1. c. 46.

It is customary for lords of manors to grant parcels of their wastes for the purpose of building cottages. This permission is, however, seldom given without consent of the homage, unless there exists a presumption of an original reservation of such a right at the time of the original grant (3); but evidence of any erections having taken place without the consent of the commoner, has been holden not sufficient to stand in competition with long enjoyed usage on their part. (4)

So a custom for the lord to grant leases of the waste of the manor without restriction, so as to deprive the commoner of any power to depasture his cattle, is bad in point of law. (5)

Granting leases.

Although the lord can inclose as much of the waste or common within his manor as he pleases, leaving sufficient for the tenants, yet the grantee of a lord, cannot inclose any part of the waste or common, without the consent of the tenants of the manor as well as the lord. (6)

There may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights. (7)

If a commoner, having a right of common for one beast, put on two (8), the lord can only distrain the one put on last, unless they were both put on together, when he may distrain either.

Where commoner exceeds his right, lord can distrain.

7. INTEREST OF THE COMMONER IN THE SOIL.

A commoner hath only a special and limited interest in the soil; but yet he has such remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an action on the case, &c.; but not being absolute owner of the soil, he cannot bring a general action of trespass for a trespass done upon the common. (9)

INTEREST OF THE COMMONER IN THE SOIL.

Commoners have only a special and limited interest in the soil.

Every commoner can break the common if it be inclosed; and although he does not put his cattle in at the time, yet his right of common will excuse him from being a trespasser. (10)

Every commoner can break the common if it be inclosed.

The occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his right of common. (11)

(1) *Vide* 2 Inst. 476. Stat. 3 & 4 Edw. 6. c. 3. ss. 5 & 6.

(2) *Nevill v. Hancerton*, 1 Lev. 62. 1 Sid. 79. 1 Keb. 283. 314.

(3) *Folkard v. Hemmett*, 5 T. R. 417. n.

(4) *Drury v. Moore*, 1 Stark. 102.

(5) *Badger v. Ford*, 3 B. & C. 153.

(6) *Tysen v. Clarke*, 3 Wils. 541.

(7) *Boulcott v. Winmill*, 2 Camp. 261.

(8) *Ellis v. Rowles*, Willes, 638. *Hall v. Harding*, 4 Burr. 2426.

(9) 2 Bac. Abr. (C.) 99.

(10) *Ibid.* 100.

(11) *Bean v. Bloom*, 2 W. Black. 926.

**INTEREST OF
THE COMMONER
IN THE SOIL.**

**Surcharges by
commoners.**

A commoner cannot regularly do any thing on the soil, which tends to the melioration or improvement of the common, as cutting down bushes, fern, &c. (1)

In case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land. (2)

A claim of a right of common without stint, as annexed to an ancient messuage without land, cannot as such exist by law. (3)

In case for a surcharge of common, the plaintiff need not show, that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he ought. (4)

In an action on the case for a surcharge of common, the plaintiff may declare generally for the injury, without stating the defendant's right of common. (5)

By putting in a greater number, or an improper species of cattle, the disturbance may be alleged generally (6): thus, "that the defendant wrongfully and injuriously ate up and depastured the grass on the common with divers sheep and lambs, to wit, 200 sheep and 200 lambs."

To an action of trespass for breaking, entering, and digging up plaintiff's close, and filling up and spoiling the coney-borrows there, a plea of a right of common, that the coney-borrows were wrongfully, unlawfully, and injuriously newly erected and kept up there, by reason whereof the said common was surcharged and spoiled, so that defendant could not enjoy the common as of right he ought; and that he did this in order to abate the said nuisance, is no justification. (7)

In an action of case by a commoner for disturbing his common by putting on cattle, a right of common appurtenant for cattle levant and couchant was pleaded, and that the cattle in the declaration mentioned were defendant's own commonable cattle levant and couchant, and that he put them on to use the common, which is the same, &c.: to which it was replied, that "all the said cattle in the said declaration mentioned" were not defendant's own commonable cattle, levant and couchant, in manner, &c. Conclusion to the country:—It was held, that the defendant maintained his issue by shewing that, on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant, and that the plaintiff could not insist on a surcharge. The word "all" was interpreted to mean, that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others. (8)

(1) 2 Bac. Abr. (C.) 100.

(2) *Hall v. Harding*, 1 W. Black. 673. 4 Burr. 2426.

(3) *Benson v. Chester*, 8 T. R. 396.

(4) *Wells v. Watling*, 2 W. Black. 1233.

(5) *Atkinson v. Treadale*, *ibid.* 817. 3

Wils. 278., et vide *Cheesman v. Hardham*, 1 B. & A. 706.

(6) Vide *Smith v. Feverell*, 2 Mod. 6., per cur. in *Hastard v. Cantrell*, Lutw. 107.

(7) *Cooper v. Marshall*, and *Cope v. Same*, 1 Burr. 259, 268. 2 Ld. Ken. 1.

(8) *Bowen v. Jenkin*, 6 A. & E. 911.

How a sur-
charge to be
applied.

8. APPROVEMENT.

By the order of the common law, there could be no approvement, **APPROVEMENT.**
because this common issued out of the whole waste.

By stat. 20 Hen. 3. c. 4. (1), lords of woods, wastes, and pastures, in which **Parties entitled to approve.**
their tenants have common of pasture, may approve such wastes, &c. provided sufficient pasture, with a sufficient ingress and egress, be left to the tenants.

The feoffee of a waste may approve, provided he leaves a sufficiency of common; and it is not necessary, that the person approving should be lord of the manor — a seisin in fee of the waste is sufficient. (2) So a custom authorising the owners of ancient messuages, after clearing certain moss-
dales of turves, to approve and hold them in severalty, has been sustained (3); and a lord who is in by wrong may, under the Statute of Merton, approve against the tenants and commoners. (4)

The lord has no right, under the Statute of Merton, to inclose and approve the wastes of a manor, where the tenants of a manor have a right to dig gravel on the wastes, or take estovers there (5); and evidence that the lord and manor has, from time to time, erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant, the lord of the manor, by deed, that the confirmation of the commoners was essential to an alienation of part of such common. (6)

The Statute of Merton does not empower the lord to approve against any other right of common (7), except that of common of pasture, appendant or appurtenant. It does not extend to common in gross (8), the words of the statute being *quantum pertinet ad tenementa sua*; nor to common of piscary, of turbary (9), estovers, and the like, the words used throughout the statute being *pastura et communia pasturæ*. (10) **What can and cannot be approved.**

A custom for the lord, with the assent of the homage, to grant part of the waste in severalty, in exclusion of the commoners, is good (11); and a custom for one commoner to inclose against another is good. (12) **Custom to grant part of the waste in severalty.**

Though the lord cannot approve against common of turbary, yet when there is common of pasture and common of turbary in the same waste (13), the common of turbary will not prevent the law from justifying an inclosure against the common of pasture, if he leave sufficient, for they are two distinct rights, and the concurrence of these rights in one person, will not make any difference.

The lord of the manor (14) or his grantee, may justify an approvement or inclosure against tenants having common of pasture, although they have a further right of digging sand, &c. if sufficient common of pasture be left. **Where the lord can justify an approvement**

(1) *Vide etiam* stat. 13 Edw. 1. c. 46. s. 1. & 4 Edw. 6. c. 3. 29 Geo. 2. c. 36. 31 Geo. 2. c. 41.

(2) *Glover v. Lane*, 3 T. R. 445.

(3) *Clarkson v. Woodhouse*, 5 T. R. 412. n.

(4) *Clayt.* 38.

(5) *Shakespear v. Peppin*, 6 T. R. 741.

(6) *Drury v. Moore*, 1 Stark. 102.

(7) 2 Inst. 87.

(8) *Ibid.* 86.

(9) *Grant v. Gunner*, 1 Taunt. 435.

(10) 2 Inst. 87.

(11) *Boulcott v. Winmill*, 2 Camp. 261.

(12) *Barber v. Dixon*, 1 Wils. 44.

(13) *Fawcett v. Strickland*, Willes, 57. Com. 578. But it seems, that a lord may approve against a right of common of turbary. *Arlett v. Ellis*, 7 B. & C. 346. 9 D. & R. 897. 9 B. & C. 671.

(14) *Shakespear v. Peppin*, 6 T. R. 741.

APPROVEMENT.
against tenants
having common
of pasture.

It is however observable (1), that if the inclosure operate as an injury to the other rights, the commoner will be entitled to an action on the case for such injury.

By the approvement of part, agreeably to the rule laid down in the Statute of Merton, that part is discharged of the common, insomuch, that if the tenant who has the common purchases that part, his common is not extinguished, or the residue. (2)

Mode of approving.

When any person entitled to approve avails himself of his rights, he must take care to separate the part inclosed from the remainder of the waste by some visible boundary, so as to prevent the commoners' cattle from straying into the approved ground. Gaps will not, however, prevent land thus severed from being considered an inclosure. (3)

Summoning a jury to inquire of misfeassances done to the waste.

With the view of insuring to the lords of manors the privilege of superintending the prosperity of the wastes over which they are the superiors, they have a right, by custom, of summoning a jury to inquire of his feassance; to pass such byelaws, and to make such salutary regulations, as they shall think fit, for the preservation of the rights of common. (4)

9. INCLOSURE.

INCLOSURE.

The commoner has a special limited interest in the soil, which he may enforce by any means in his power. (5)

When a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common, and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle. (6)

Power of commoner to enjoy common.

The interest which a commoner has in the common is, technically speaking, to eat the grass with the mouths of his cattle. He must not meddle with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common (7), unless authorised by special prescription (8); neither can he justify, in an action of trespass, the coming to put his cattle into the waste, unless he has actually put them in, although he may come to see if the pasture was in a fit state to receive his cattle. (9)

Where commoner cannot make an entry. Where common law right of lord not abridged.

But if the common has been inclosed twenty years, the commoner cannot make an entry, but must make an assize of common. (10)

A custom of *inclosing* for the tenants in a manor, does not abridge the common law right of the lord to *inclose*. (11)

(1) *Faucet v. Strickland*, Com. 577.
(2) 2 Inst. 87.
(3) Ibid. *Paston and Uther's case*, Litt. 267. *Woolrych on Common*, 182.
(4) *James v. Tutney*, Cro. Car. 497, 498. *Woolrych on Common*, 189.
(5) *Anon.* 12 Mod. 648., vide 2 Leon. 202. *Farmer v. Hunt*, Cro. Jac. 271. *Trulock v. Riggsby*, Yelv. 185. 1 Brownl. 188. 320.

(6) 2 Inst. 88. *Arlett v. Ellis*, 7 B. & C. 346.
(7) 1 Rol. Abr. 406. 12 Hen. 8. 2 (A. 5 Vin. Abr. 34. *Howard v. Spencer*, 1 Sid. 251. Bro. Com. pl. 48.
(8) *Bean v. Bloom*, 3 Will. 456.
(9) 5 Vin. Abr. 35.
(10) *Creach v. Wilnot*, 2 Taunt. 160. n., sed vide *Tapley v. Wainwright*, 5 B. & Ad. 395.
(11) *Duberley v. Page*, 2 T. R. 392. n.

And where a lord has a right of inclosure, the lord, or those claiming under him, must prove that there was a sufficiency of common left; and, in the case of a common of turbary, that the common which was left, was also conveniently situated for the commoners. (1)

INCLOSURE.

By stat. 29 Geo. 2. c. 36. the lords and tenants may inclose part of the common for the purpose of planting and preserving trees fit for timber or underwood. And by stat. 31 Geo. 2. c. 41. these powers are declared to be vested in tenants for life or years determinable on lives.

Stats. 29 Geo. 2. c. 36. and 31 Geo. 2. c. 41.

In *Hetherington v. Vane* (2) the plaintiff, being possessed of a house and land in E., had for sixty years exercised rights of common in W.: it appeared at the trial that this was done near the boundary of the two commons of W. and E., which lay open and uninclosed, and adjacent to each other, and that the parties exercising the right did not, at the time, know the exact boundary; that the plaintiff had, on the previous inclosure of the common at E., obtained an allotment there in respect of his estate:— It was held, that it was properly left to the jury to say, whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W.

Evidence referable either to a mistake of boundary or an assertion of right.

10. SUSPENSION — REVIVAL — EXTINGUISHMENT — AND — ALIENATION OF RIGHTS OF COMMON.

SUSPENSION — REVIVAL — EXTINGUISHMENT — AND ALIENATION OF RIGHTS OF COMMON. SUSPENSION OF RIGHTS OF COMMON.

Where a person having common appurtenant, takes a lease of part of the land in which he has such right of common, all his common will be suspended during the continuance of the lease, because it was the folly of the commoner to intermeddle with the land over which he had a right of common. (3)

Respecting the revival of rights of common, when once extinguished or suspended, it will only be necessary to observe, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive (4), and when suspended, will again take effect by the removal of the cause of such suspension. (5)

REVIVAL OF RIGHTS OF COMMON.

A common appendant and appurtenant, may become extinct by unity of possession of the land to which the right of common was annexed, with the land in which the common was (6): but where a copyhold tenement vests in the lord by forfeiture, it does not therefore lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of court-roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grant the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by court-roll. (7)

EXTINGUISHMENT OF RIGHTS OF COMMON. By unity of possession.

To constitute such an unity of possession as will extinguish a right of common, the person must have an estate in the lands to which the common

(1) *Arlett v. Ellis*, 7 B. & C. 346.

(2) 4 B. & A. 428.

(3) *Wild's Case*, 8 Co. 79. (a.) *Higges v. Hemwood*, 2 Rol. 345.

(4) *Bradshaw v. Eyr*, Cro. Eliz. 570. 594. 2 And. 168. *Grymes v. Peacock*, 1 Bulst. 17.

(5) Godb. 4. *Englefield's case*, Sir W. Jones, 285.

(6) *Peers v. Lacy*, 4 Mod. 363. *Packer v. Wellstead*, 2 Sid. 111.

(7) *Badger v. Ford*, 3 B. & A. 153.

**SUSPENSION —
REVIVAL, &c.**

is annexed, and in those where the right of common exists equal in duration (1): where, therefore, a copyholder had a right of common in an adjoining manor, *quod* copyholder and he purchased that manor, the right was considered as still in existence. (2)

After an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with common appurtenant, though those who have occupied the tenement since the extinguishment have always used common therewith. (3)

Release.

Every right of common may be extinguished by release of it to the owner of the soil, and a release of one acre will operate as an entire extinguishment of the whole right. (4)

Severance.

By a grant of a manor with an extinction of the waste, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom. (5)

**Enfranchise-
ment.**

Where the lord of a manor enfranchises his copyholder, having a right of common annexed to his customary estate, the tenant by accepting the feoffment loses his right (6): but where a copyholder has common in the wastes within the manor, that belongs to his estate; and if the estate be enfranchised, the common is extinct. (7)

**ALIENATION OF
RIGHTS OF
COMMON.**

Power to confer an absolute or temporary right of common in others.

Generally speaking, all persons not labouring under natural or acquired disabilities, may alien any right of common they may possess; but a body corporate cannot effect such a change. (8)

In some manors it is very usual for commoners to let their rights, and so for a time to convert them into commons in gross; but common appurtenant is alone capable of being so changed; and even that right cannot be the subject of alteration, unless it be for a *certain* number of beasts (9); and in that case the letting is considered rather to be of pasture than of common. (10) The same principle applies to commons of estovers and turbary: but where a definite quantity of estover or of turf is allowed to be taken throughout the year, it is competent for the grantee to let it, for no injury can be thereby sustained by other persons.

**Mode of alien-
ating common.**

The usual mode of alienating common is by deed, as by grant, bargain, and sale (11): a right of common may also be transferred by license. (12)

**Construction of
deeds.**

In the construction of the words in a deed, by which common will pass, it may be stated as a general principle, that if land be granted, to which there is a common appendant or appurtenant, such common would pass with the land. (13) So by grant of all demesnes the waste itself will pass (14); and incidents to commons, tithes for instance, have been holden to pass with the common under the words, "messuages or tenements, farms, lands, and hereditaments." (15) An apportionable common will go over in

(1) *Rea v. Hermitage (Inhabitants of)*, Carth. 241.

(2) *Revell v. Jodrell*, 2 T. R. 421.

(3) *Clements v. Lambert*, 1 Taunt. 205., vide etiam *Morris v. Edgington*, 3 ibid. 24.

(4) *Miles v. Etteridge*, 1 Show. 326. *Hen v. Hanson*, 1 Keb. 499.

(5) *Revell v. Jodrell*, 2 T. R. 415.

(6) *Speaker v. Styant*, Comb. 127.

(7) *Crowder v. Oldfeild*, 1 Salk. 170. 6 Mod. 19. *Field v. Boothsby*, 2 Sid. 84.

(8) *Fleta*, 314. Co. Litt. 165. (a.) *Ellis*

v. Creswell, 1 Keb. 795. *Weekly v. Wildman*, 1 Ld. Raym. 407.

(9) *Bunn v. Channen*, 5 Taunt. 244.

(10) *Monk v. Butler*, Cro. Jac. 575.

(11) *Speaker v. Styant*, Comb. 127.

(12) *Hoskins v. Robbins*, 2 Saund. 328. 1 Vent. 123. 2 Lev. 2. 1 Mod. 74. 2 Keb. 758. 842.

(13) *Gwydir (Lord) v. Foakes*, 7 T. R. 641.

(14) *North v. Howland*, 2 Keb. 577.

(15) *Gwydir (Lord) v. Foakes*, 7 T. R. 641.

like manner(1); but a common in gross will not be transferred by the mention of lands, tenements, and pastures, for it has no relation to lands.(2) It is usual, however, in deeds which pass commons, to state the grant as being of lands with all commons thereto belonging.(3)

SUSPENSION —
REVIVAL, &c.

11. REMEDY FOR DISTURBANCE OF RIGHTS OF COMMON.

An action on the case is the ordinary remedy for disturbance of rights of common, and it can be maintained either against the lord or owner of the soil(4), a stranger, or a commoner.

Trespass cannot in general be supported, where the matter affected is not substantial, or the estate therein is incorporeal.(5)

If the plaintiff's cattle be chased off the common, trespass may be supported; and that form of action may in some instances be advisable, in order that the right may be fully stated on the record.

Although ejectment is not in general sustainable for the recovery of property, which in legal consideration is not tangible, yet ejectment lies for common appendant or appurtenant, if demanded as such, with the land in respect of which it is claimed, for the sheriff, by giving possession of the land, gives possession of the common.

REMEDY FOR
DISTURBANCE
OF RIGHTS OF
COMMON.

FORM OF ACTION.

Case.

Trespass.

Ejectment.

12. DECLARATION.

For disturbance of common, one commoner can maintain an action against another commoner, as well as against a stranger(6); although the plaintiff himself has been guilty of a surcharge.(7)

Where the lord has licensed a third person to put cattle on the common, the plaintiff can declare against him as a stranger for a disturbance generally.(8)

When two or more persons are *jointly entitled*, or have a *joint legal interest* in the property affected, they must in general join in the action; and though the interest be several, yet if the wrong complained of caused an entire joint damage, the parties may join or sever in the action; but as the courts will not in one suit take cognisance of distinct and separate claims of different persons, where the damage as well as the interest is several, each party must, in that case, sue separately.(9)

In a declaration for an injury to a right of common or of way, it is sufficient for the plaintiff to state a possessory title.

For disturbance of right of common, it is sufficient to allege a disturbance generally, without shewing the particular means adopted(10): thus, if

DECLARATION.

PARTIES.

Joinder of parties.

Statement of title.

(1) *Sacheverill v. Porter*, Cro. Car. 482. 2 Rol. Abr. Graunts (A.) 60.

(2) 20 Ass. pl. 9. 2 Rol. Abr. Graunts (T.) 57.

(3) *Solme v. Bullocke*, 3 Lev. 165. *Heyward v. Cannington*, 1 Sid. 354. 2 Keb. 290. 312.

(4) *Hassard v. Cantrell*, Lutw. 101.

(5) 1 Chitt. Pl. 142.

(6) *Atkinson v. Teasdale*, 2 W. Black. 817.

(7) *Hobson v. Todd*, 4 T. R. 71.

(8) *Smith v. Feverell*, 2 Mod. 6. 1 Saund. 346. (b.) n. 2.

(9) 1 Saund. 291. (g.) n. 1. 1 Bac. Abr. Action (C.) 61, 62. *Weller, &c. v. Baker*, 2 Wils. 423.

(10) Com. Dig. Action on the Case for Disturbance (B.). 1 Saund. 346. (a.) n. 2.

DECLARATION.

the declaration state the possession of the house or land, &c. and that by reason thereof the plaintiff was entitled to the right, in the exercise of which he had been disturbed, it will suffice.

DAMAGES.

The smallest damage to the common is sufficient to maintain the action.

The smallest damage to the common is sufficient to maintain the action (1); and in *Hobson v. Todd* (2) it was held, in an action against another commoner for surcharging, it was sufficient to prove, that the defendant put on the common more cattle than he had a right to do, without proving any specific damage; because, whenever an act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for the invasion of the right, without proof of any specific damage. (3) Thus, an action may be maintained for fishing in the plaintiff's several fishery, although it be neither alleged nor proved, that the defendant caught any fish. (4)

If defendant be lord of the manor, a specific injury must be proven.

If the defendant be the lord of the manor (5), or put his cattle upon the common with the lord's license, the plaintiff must prove a specific injury; and it would be insufficient to shew, that the cattle consumed the grass, as in an action against a stranger, without also proving, that there was not a sufficiency of common left in order to support the action, for the lord is entitled to what remains of the grass, and may either consume it by his own cattle, or license another to depasture it, although in the case of a stranger it seems to be on the defendant to shew, that a sufficiency of common is left for the plaintiff.

PLEADINGS.**13. PLEADINGS.**

Reg. Gen. H.
T. 4 Will. 4.
r. 5. ss. 1, 5
& 6.

By Reg. Gen. Hilary Term, 4 Will. 4. (6), "in actions of trespass, *quare clausum fregit*, the close or place in which &c. must be designated in the declaration, by name or abutments, or other description; in failure whereof the defendant may demur specially." And "where, in an action of trespass, *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified." "And in all actions in which such right of common aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively." (7)

By stat. 2 & 3 Will. 4. c. 71. s. 5., "in all actions upon the case, and other

(1) *Pindar v. Wadsworth*, 2 East, 154.

(2) 4 T. R. 71.

(3) 1 Saund. 346. (a.) n. 2.

(4) *Patrick v. Greenway*, cit. 1 Saund. 346. (b.) n. 2.

(5) *Hobson v. Todd*, 4 T. R. 73. Per Buller J. in *Smith v. Feverell*, 2 Mod. 6. 1 Saund. 340. (b.) n. 3.

(6) Trespass, r. 5. ss. 1, 5 & 6. 5 B.

& Ad. Append. ix. 10 Bing. 471. 2 C. & M. 23.

(7) For the cases in which the issue in trespass has been holden to be divisible, vide *Richards v. Peake*, 2 B. & C. 918. *Bassett v. Mitchell*, 2 B. & Ad. 99. *Tapley v. Wainwright*, 5 ibid. 395. 2 N. & M. 697. *Phythian v. White*, 1 M. & W. 216. 4 Dowl. P. C. 714. 1 Tyrw. & G. 515.

pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act [viz. before 1st August, 1832], it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

PLEADINGS.

Stat. 2 & 3 Will.
4. c. 71. s. 5.

On this statute a plea of enjoyment of right of common for *thirty* years before the commencement of this suit, has been holden to be sufficient, without saying, that it was enjoyed *thirty* years *next* before its commencement. (1)

A plea of prescription for common in a que estate is good after verdict, though it be not in express terms alleged, that the owners of the estate have used it from time immemorial. (2)

A claim to a profit *à prendre* in gross under stat. 2 & 3 Will. 4. c. 71. s. 1. should be pleaded for the periods therein mentioned, although the fifth section of such statute does not in terms apply to such a case. (3)

Claiming a profit *à prendre* in gross under stat. 2 & 3 Will. 4. c. 71. s. 1.

To an action of trespass for chasing and detaining cattle it was pleaded, that defendant was possessed of a messuage, &c. and that he and all the occupiers thereof for the time being, for thirty years next before the time when, &c. had of right had, and been used, &c. to have common of pasture in the *locus in quo*, that the cattle were depasturing, &c. to the disturbance of such right of common, and that defendant distrained, &c. On special demurrer for that, the right was not claimed to have been used, &c. thirty years before the commencement of the suit, it was held, 1. that, as a plea under stat. 2 & 3 Will. 4. c. 71., the plea was bad, for not claiming the right either so, or as used, &c. thirty years before the commencement of *some* suit. 2. That the plea could not be construed as claiming right of common simply by virtue of possession, assuming that, if so construed, it would have been good. (4)

Defective plea for not claiming the right thirty years before commencement of the suit.

A plea claiming a profit *à prendre* in gross on behalf of A. and his ancestors, commencing previously to legal memory, is disproved, by shewing

Where a plea claiming a pro-

(1) *Jones v. Price*, 3 Bing. N. C. 52, 53.,
et vide *Monmouth Canal Comp. v. Harford*,
1 M. & R. 614. 5 Tyrw. 68. *Beasley v.*
Clarke, 2 Bing. N. C. 705. 5 Dowl. P. C.
50. *Payne v. Shedden*, 1 M. & Rob. 382.

(2) *Clark v. King*, 3 T. R. 147.

(3) *Welcome v. Upton*, 7 Dowl. P. C.

(4) *Richards v. Fry*, 7 A. & E. 698.

PLEADINGS.

fit à prendre in gross is not aided by stat. 2 & 3 Will. 4. c. 71.

Plea bad for uncertainty.

a grant to the ancestor of A., eighty years before, from B. for a valuable consideration, and is not aided by stat. 2 & 3 Will. 4. c. 71. s. 1. (1)

Plaintiff in replevin pleaded in bar to an avowry for damage feasant, that the *locus in quo*, from time whereof, &c. ought to be open and common, "on or before the 15th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards;" that the plaintiff, at the time when, &c. put in his cattle, "the same time being when the said field was and ought to be open and common as aforesaid:" —It was held, that the plea was bad for uncertainty, even after verdict, the right of common being too generally described, both in its commencement and conclusion. (2)

A custom that all the customary tenants of a manor, having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken, and carried away, from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common; and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for, the hedges and fences of such customary tenements. (3)

In pleading the right of a lord to inclose parts of a common, it must be stated, that there was sufficiency of common left for the commoners. (4)

But this right of the lord may be given in evidence on an issue, joined on the right of common over the *locus in quo* at the time the trespass was committed, and need not be specially pleaded. (5)

Plea bad for not stating, that after inclosure there was sufficient common left for the commoners.

In trespass for entering plaintiff's close, and consuming the herbage, it was pleaded, that the *locus in quo* was part of a common, over which defendant had a right of common for sheep: to which it was replied, that the *locus in quo* had been inclosed by the consent of the lord: on special demurrer to the replication, it was held bad, for not going on to state, that after the inclosure there was sufficient common left for the commoners. (6)

Justification of trespass, under a deed lost or destroyed.

A defendant in trespass, cannot plead by way of justification, that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, of which the date and names of the parties are unknown. (7)

Where a plea will be intended, as claiming common appurtenant.

Common of pasture, without land, for a certain number of sheep, may be parcel of a manor (8), and demised and demisable by copy of court-roll; and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant;

(1) *Welcome v. Upton*, 7 Dowl. P. C. 475.

(2) *Da Costa v. Clarke*, 2 B. & P. 257.

(3) *Wilson v. Willes*, 7 East, 121. 3 Smith, 167.

(4) *Arlett v. Ellis*, 7 B. & C. 346. 9 D. & R. 897. 9 B. & C. 671.

(5) *Ibid.*

(6) *Rogers v. Wynne*, 7 D. & R. 521.

(7) *Hendy v. Stephenson*, 10 East, 55.

(8) *Musgrave v. Cave*, Willes, 319.

for, not being claimed as incident to arable land, but to the manor, for a certain number of sheep in the soil of another, it cannot be common appendant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor: then it must be common appurtenant, the only remaining sort of common.

14. REPLICATION.

REPLICATION.

To a plea claiming a right of common, the plaintiff cannot reply *de injuria* (1); but must either deny the *seisin in fee* or other title to the estate, as appurtenant to which the defendant claims his right, or may deny the right of common as stated in the plea (2), or that the cattle were the defendant's own commonable cattle, *levant* and *couchant*, upon the premises (3), concluding to the country, and not with a formal traverse. (4) But it is said that in the latter case, where the defendant has turned on his own commonable cattle, as well as other cattle, the plaintiff should new assign, stating that he brought his action for depasturing the common with other cattle, and ought not to traverse the *levancy* and *couchancy*. (5)

To a plea claiming a right of common, plaintiff cannot reply *de injuria*.

The plaintiff may also reply an approvement (6); or he may reply 'that the close in which, &c. had been inclosed from the common more than thirty years and enjoyed adversely. (7) But if only part of the close wherein the alleged trespass was committed has been so inclosed, the plaintiff should reply so; it would be incorrect to reply the whole close had been inclosed. (8) But it seems to be sufficient in these cases; merely to deny the existence of the common of pasture, &c. stated in the plea, without replying specially, &c. (9)

A., being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of B. come upon the land of A., he may distrain them damage feasant; and may, in his replication (in answer to a plea pleaded by B. of his right of common, in bar of the cognisance of A.), set forth the special circumstances of the agreement and covenants; because "a party may state a deed, and leave it to the court to determine what is the operation of it. If the legal operation of the deed is misstated, the plea is bad; but if the deed is only stated without its legal operation, it is good." (10)

Where special circumstances of agreement and covenants should be stated.

In a declaration for trespasses in W., it was pleaded that W. was part of a waste called D., over which the defendant had common appurtenant by

Severance from waste, with an adverse possession.

(1) 8 Co. 67. (a.) Willes, 101. *Stott v. Stott*, 16 East, 350. *Langford v. Waghorn*, 7 Price, 670.

(2) *Sed vide Evans v. Ogilvie*, 2 Y. & J. 79.

(3) *Robinson v. Raley*, 1 Burr. 320. Willes, 100. n. (c.) Bull. N. P. 93. 8 Co. 67. (b.)

(4) 1 Saund. 103. (b.) n. 1.

(5) Ibid. 346. (d.) n. 2.

(6) *Arlett v. Ellis*, 7 B. & C. 346.

(7) *Richards v. Peake*, 2 ibid. 918., et vide *Hawke v. Bacon*, 2 Taunt. 156.

(8) Ibid.

(9) *Arlett v. Ellis*, 7 B. & C. 346.

(10) *Per Wilson J. in Whiteman v. King*, 2 Hen. Black. 4.

REPLICATION.

prescription : to which it was replied, that W. had been inclosed and severed from the waste, and held adversely to the commoners for twenty years. This replication is maintained by evidence that part of W. had been inclosed twenty years, and part not ; and that the alleged trespasses were committed in both parts. (1)

EVIDENCE.

15. EVIDENCE.

Stat. 2 & 3 Will.
4. c. 71. s. 1

Stat. 2 & 3 Will. 4. c. 71. s. 1., after reciting that the expression, "time immemorial, or time whereof the memory of man runneth not to the contrary," was by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed was sometimes defeated by shewing the commencement of such enjoyment, which was in many cases productive of inconvenience and injustice, enacts, "that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common, or other profit or benefit, to be taken and enjoyed from or upon any land of the king, his heirs or successors, or any land, being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rents, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years ; but such claim may be defeated in any other way by which the same is now liable to be defeated : and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear, that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

By the seventh section, the time during which any disability exists, *ex. gr.* infancy, *non compos mentis*, coverture, or tenancy for life, or during which any action shall have been pending and diligently prosecuted, until abated by the death of any party thereto, may be excluded in the computation of the aforesaid periods, except only, where the claim is declared to be absolute.

Partial proof of
that which is
claimed by pre-
scription is in-
sufficient.

A prescription is founded on a supposed grant, and is therefore entire, for the subject-matter granted must necessarily be descriptive of the grant itself ; it follows that *partial* proof of that which is claimed by the prescription is insufficient, although the proof fail only as to part, which is not material in the particular case on the trial. Therefore if a party, in stating a prescription, allege a prescriptive right to fish "in four specified places," but it extend to three of them only, the variance is fatal, although the tort were not committed in the excepted part. (2) So, if he lay a prescriptive right of common generally, and the proof be of a *limited, qualified, or*

(1) *Tupley v. Wainwright*, 2 N. & M. 697. 5 B. & Ad. 395., contra *Hawke v. Bacon*, 2 Taunt. 159.

(2) *Rogers v. Allen*, 1 Camp. 309. *Rotherham v. Green, Noy*, 67. Clayt. 19. Cro. Eliz. 593.

conditional right; as "paying 1d.;" or allege it to be for "all commonable cattle," and that it be only proved that the right relates to certain particular cattle, either in number or species (1), such are fatal misdescriptions. These rules apply to the statement of a *prescription* by either party. But although the prescriptive right be general and absolute for all commonable cattle, yet if the tort relate to a particular description of cattle only, it may be simply alleged, that the party had the right for such cattle; as if the prescription be laid "for two horses," proof that it *also* extended to "two cows," will not be considered a variance from the allegation; for it does not disprove it, or destroy the identity of the prescription; and the party need only shew so much as applies to his case, provided that he do not introduce an allegation contradicting the prescription. (2)

Where a plea of justification in trespass for taking two horses as heriots, stated a custom on the manor, that the lord from time immemorial, until the division of a certain tenement into moieties, had taken and been accustomed to take a heriot upon the deaths of every tenant dying seised; and since the division, the lord had taken and been accustomed to take on the death of every tenant dying seised of either of the moieties, a heriot for each moiety; this must be taken to be one entire custom, and not two distinct customs; the one applicable to the tenement before, the other after the division of it: and being laid to be an immemorial custom, it is disproved by evidence, that the division was made within memory. (3)

On a justification by the lord of a manor, that the lord should have the best beast on the tenant's death: but the custom proved was, that the lord should have the "best beast or good," &c. such variance was held to be fatal. (4)

Proof of a privilege for the tenants to hang lines across a yard, for the purpose of drying the linen of their own families only, will not support a claim of an easement to dry linen in respect of a messuage. (5)

In an action of replevin for taking the plaintiff's cattle, the defendant avowed under a grant of common of pasture, from the lord of the manor to the burgesses of the borough of A.; and the plaintiff pleaded in bar, that the corporation of A. had been accustomed to appoint a reasonable and proper number of herds, for (among other things) taking care of the cattle put upon the common; and also to appoint, for the pains of each such herd, a reasonable and proper number of stints of each of such herds, to be depastured thereon:—It was held, sufficient, after verdict; although it was urged, that the number of herds and stints, and the duties required from the herds, should have been set out with certainty in the plea. (6)

Where a declaration set out a right of common for all commonable cattle, and it was proved that the plaintiff turned out all the commonable cattle he had, but that he had no sheep:—It was held, not a fatal variance; but "if there had been evidence of the plaintiffs having kept cattle which he did not turn on, that might have varied the case." (7)

WHAT IS AND
WHAT IS NOT
PROOF OF A
VARIANCE.

Custom to take
heriots.

Custom that
the lord should
have the best
beast, or good.

Privilege for
drying linen.

What is not
proof of a va-
riance.

Not clearly
setting out the
number of
herds and
stints.

Right of com-
mon for all
commonable
cattle.

(1) Bull. N. P. 59. *Manifold v. Pennington*, 4 B. & C. 161.

(2) *Bushwood v. Pond*, Cro. Eliz. 722. Bull. N. P. 29. *Johnson v. Throughgood*, Hob. 64. *Richetts v. Salwey*, 2 B. & A. 360. 1 Chitt. 104. 112.

(3) *Kingsmill v. Bull*, 9 East, 185.

(4) *Adderley v. Hart*, 1 B. & P. 394. n.

(5) *Drewell v. Towler*, 3 B. & Ad. 735.

(6) *Elliott v. Hardy*, 10 Moore, 347. 3 Bing. 61.

(7) *Manifold v. Pennington*, 6 D. & R. 291. 4 B. & C. 161.

EVIDENCE.**Proof of title.**

Plaintiff need not prove his title to the extent set out in the declaration.

The allegation of a right of common for all the party's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time. (1)

The plaintiff need not prove his title to the same extent as he has set it out in his declaration, for the disturbance is the gist of the action, and the title is only inducement. (2)

An averment that the plaintiff was entitled to common of pasture for all his cattle levant and couchant *upon his land*, is supported by evidence that the plaintiff was a part owner with the defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was, for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon such land during the winter, and although the custom proved was to turn out according to the extent, and not to the produce of the land, in respect of which the right was claimed; and it was also held not to be necessary for the plaintiff to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. (3)

**COMPETENCY
AND INCOM-
PETENCY OF
WITNESS.**

If the issue be respecting a customary right of common, which if proved would benefit the witness, he is incompetent; but if his evidence be to establish the private prescriptive right of another, he is not incapacitated from giving testimony. (4) Thus, "if the issue be on a right of common which depends upon a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right." (5)

In such a case, although the witness be not a party to the action, yet he claims under the same title with the party whose witness he is, and thereby mediately establishes his own title. (6)

If the issue be upon the question, whether the defendant was bound *ratione tenuræ* to repair a fence contiguous to a common, on which the plaintiff prescribed for common appurtenant:—It was held, that another commoner was not a competent witness. (7)

In a suit to try a prescriptive right of toll on all fish landed in a certain cove, a fisherman frequenting the cove is incompetent against the claim (8), for, even though the pleadings do not set forth the right, yet the judgment, coupled with parol evidence of the question in issue, would be evidence against the witness (9): a commoner cannot extend the limits of such rights. But it does not apply where common is claimed by prescription in right of a particular estate; for it does not follow that, if A. has a prescriptive right of common belonging to his estate, that B., who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B. (10), and yet there are cases which lay

(1) *Willis v. Ward*, 2 Chitt. 297.

(2) Bull. N. P. 76. (d.) 1 Saund. 346. (a.) n. 2.

(3) *Cheesman v. Hardham*, 1 B. & A. 706.

(4) *Bent v. Baker*, 3 T. R. 32. *Walton v. Shelley*, 1 ibid. 302.

(5) *Per Buller J. in Walton v. Shelley*, ibid.

(6) Bull. N. P. 283., et vide *Somerset (Duke of) v. France*, Str. 658.

(7) *Anscomb v. Shore*, 1 Taunt. 261.

(8) *Falmouth (Lord) v. George*, 5 Bing.

286., sed vide *Lancum v. Lovell*, 9 ibid. 465.

(9) Ibid. 293.

(10) *Per Buller J. in Walton v. Shelley*, 1 T. R. 303.

it down as a general rule, that one commoner cannot be a witness for another." "So if A. B. C. D. and E. claim common in Dale, exclusively of all other persons, and the common of A. comes in dispute, B. may be a witness to prove, that A. has a right of common there, because in effect it charges himself, viz. he admits another to have common with himself." (1)

EVIDENCE.

One who claims common *pur cause* of vicinage is not incompetent, for this is no interest, but only an excuse for a trespass. (2)

In an action, by a copyholder against a freeholder of a manor, an ancient parchment writing preserved among the muniments of a manor, dated in 1698 and 1717, purporting to be signed by certain copyholders of the manor, was held to be evidence, as against the plaintiff, of the reputation of the manor as to a prescriptive right of common set up by him. (3)

Ancient writings.

To an action of trespass for taking the plaintiff's cattle in an open field, called P. and G. field, and impounding them, the defendant pleaded first, that T. B. and his ancestors had been immemorially used and accustomed to have for themselves, their heirs, and assigns, the sole and several pasturage in 217 acres of P. and G. field, in gross, for all his and their cattle, from the 4th of September to the 5th of April; that T. B. in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns, for ever; that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing upon the said 217 acres. The second plea alleged a right of sole pasturage, in gross, for thirty years before the commencement of the suit (under the stat. 2 & 3 Will. 4. c. 71. s. 2.), in J. B. and his ancestors, and a demise from him to the defendant, concluding as in the first plea. The replication traversed the right of T. B. as alleged in the first plea, and the enjoyment of J. B. as of right, without interruption, for thirty years, as alleged in the second.

What is not conclusive evidence of an interruption of the right of pasturage.

It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres, and that above thirty acres had been thus appropriated, but no encroachments had been made upon that part of the 217 acres, on which the alleged trespass was committed:—It was held, that these interruptions, being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea.

It was also held, 1st, that recitals in a deed poll, of the date of 1800, made by an ancestor of the present owner of the pasturage, and relating to the pasturage, were admissible in evidence to prove the marriages, deaths, &c. of the ancestors of the owner: 2ndly, that leases and agreements made by the ancestors of the present owner, demising the pasturage in question, were evidence to prove the seisin and user of T. B., the grantor, as shewing the enjoyment by parties who claimed under him. (4)

(1) *Per* Holt C. J. in *Hockley v. Lamb*, 1 *Ld. Raym.* 731.

other by means of a highway, the common by vicinage still continues. *Gullett v. Lopes*, 13 *East*, 348.

(2) *Bull. N. P.* 285. Where one of two adjoining commons, with common of vicinage, is fenced off but incompletely, so as to still admit of cattle straying from one to the

(3) *Chapman v. Cowlar*, 13 *East*, 10.

(4) *Welcome v. Upton*, 6 *M. & W.* 536.

It was also held, that the right of pasturage

EVIDENCE.**Hearsay.****Verdict when
evidence
against com-
moners.**

Customary right of common may be proved by hearsay ; but it is questionable, whether a prescriptive right strictly private can be proved by such evidence. (1)

“In the case of customary commoners, a verdict in an action for or against one, is evidence for or against another claiming in the same right.” (2)

alleged in the pleas was capable of being granted away, and did not necessarily descend to the heir of the grantor. *Quære*, Whether such a right of pasturage in gross be within the 5th section of the Prescription Act, 2 & 3 Will. 4. c. 71.?

(1) *Reed v. Jackson*, 1 East, 357.

(2) *Per* Lord Kenyon, *ibid*.

Those who are desirous of acquiring additional information respecting the “Law of Common,” are referred to an able treatise on the subject, by Mr. Woolrych.

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1. DEFINED.

The word "covenant" seems to be borrowed from the Latin *convenire* or *conventus*, which signifies a mutual agreement and accord, upon conditions propounded and accepted by the parties concerned.

DEFINED.

A covenant then is a mutual consent and agreement entered into between persons, whereby they stand bound to each other to perform the conditions contracted and indented for; so that a covenant in this larger sense, is the very same thing with a contract or bargain.

But the word is generally taken in the law of England, and indeed is here considered in a more restrained sense, and applied only to an agreement in writing under seal.

Covenant only applied to an agreement in writing under seal.

By covenants, therefore, are meant those clauses of agreement contained in a deed, whereby either party stipulates for the truth of certain facts, or binds himself to perform or forbear doing some thing to the other. For the breach of these covenants the party injured is entitled to relief by an action or writ of covenant against the covenantor, founded on the deed. (1)

But the word "covenant" is not a word of art, and essential to the constitution of a covenant, for any words in the deed, in what part soever found, from which the intent of the parties to enter into the engagement can be collected, are effectual for that purpose. (2)

The word "covenant" not essential to the constitution of a covenant.

Covenants are distinguished into express and implied covenants: express, when they are expressed in the deed; implied, when the deed doth not express them, but the law doth make and supply them. (3)

Covenants distinguished into express and implied covenants.

They are distinguished also into real and personal: real, when they pass land, or are annexed to and run with land; personal, when they attach upon or run in the personalty, and charge or benefit some person in particular.

Real and personal.

Personal again may be distinguished into such as are transitive or intransitive: intransitive, when the duty of performing them is limited to the covenantor himself; transitive, when it passes to his representatives.

Transitive and intransitive.

Covenants again are divided into affirmative and negative, as they may be in the one or the other; and into covenants executed and executory: the former referring to a thing as done already, the latter, providing, that it shall be done hereafter.

Affirmative and negative. Executed and executory.

A covenant is not a duty, nor cause of action, till it be broken; so that it is not discharged by a release of all actions; and when it is broken, the action is not founded merely on the specialty, as if it were a duty, but savours of trespass, and sounds in damages, and therefore an accord is a good plea to it. (4)

A covenant is not a duty, nor cause of action, till it be broken.

Covenant does not lie upon a verbal agreement, neither can it be grounded without a writing, except it be by a special custom, as in London, or by the custom of any other place, though such custom shall be taken strictly. (5)

Covenant must be in writing.

(1) 3 Bac. Abr. Covenant, 336, 337.

(3) Touchst. by Atherley, 160.

(2) *Porter v. Sweetnam*, 1 Leon. 324. Sty. 406.(4) *Eeles v. Lambert*, Aleyn, 39.

(5) Touchst. by Atherley, 161.

COVENANT
GENERALLY.

2. COVENANT GENERALLY.

Distinction
between cove-
nant, *assumpsit*,
and debt.

The action of covenant being for the recovery of *damages* for the non performance of a contract *under seal*, differs very materially from the actions of *assumpsit* and debt. *Assumpsit*, though for the recovery of damages, is not in general sustainable, where the contract was originally under seal, or where a deed has been taken in satisfaction; and though debt is sustainable upon a simple contract, a specialty, a record, or a statute, yet it lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty.

When covenant
and debt are
concurrent re-
medies.

But covenant and debt are concurrent remedies for the recovery of any *money* demand, where there is an express or implied contract in an instrument under seal to pay it; but in general, debt is the preferable remedy, as in that form of action the judgment is final in the first instance, if the defendant do not plead.

Where the declaration stated that, by an indenture made between R. R. of the first part, the plaintiff of the second part, and the defendants of the third part, the defendants covenanted to pay the plaintiffs 100*l.* on the 31st of August then next; and the plea set out, on oyer, an indenture, by which (after reciting that in consideration of 300*l.* and 100*l.* paid to R. R. by the plaintiff) R. R. mortgaged certain premises to the plaintiff; and that the defendant and R. R., for more effectually securing the repayment of the said sum of 100*l.* and interest, covenanted with the plaintiff to pay that sum and interest on the 31st of August then next: — It was held, that this was an absolute covenant to pay a sum of money on a day certain, on which debt might be maintained. (1)

Where cove-
nant the most
expedient re-
medy.

Where an entire sum is by deed stipulated to be paid by instalments, and the whole is not due, nor the payment secured by a penalty (2), covenant is the proper mode of procedure. It is frequently more advisable to proceed in covenant on a lease, &c. for general damages, than to declare in debt for a penalty, securing the performance of a covenant; because, if the party elect to proceed for the penalty, he is precluded from afterwards suing for general damages; and he cannot, in case of further breaches, recover more than the amount of the penalty; and in many cases, before he can issue execution, he must proceed under stat. 8 & 9 Will. 3. c. 11.; whereas, if he proceed in covenant for every repeated breach, he may ultimately recover beyond the amount of the penalty. (3) And where rent is due upon a lease, and there has also been another breach, as for not repairing, for which the plaintiff claims unliquidated damages, covenant is preferable to debt; because in the former, both the breaches of covenant may be included in one action, and damages for the whole demand may be recovered. (4)

Covenant re-

Sometimes covenant is sustainable, although it relates to matter *in pre-*

(1) *Evans v. Jones*, 7 Dowl. P. C. 482.

Ld. Raym. 314. *Harrison v. Wright*, 13

(2) Com. Dig. Action (F.). 2 Saund.

East, 347, 348.

303. n. (b.)

(4) 1 Chitt. Pl. 118.

(3) *Bird v. Randall*, 3 Burr. 1345. 1

sent, as that the covenantor is seised and *hath* good title (1), though it is said, that in general covenant will not lie on a contract *in presenti*, as on a covenant to stand seised; or that a certain horse is yours, or shall henceforth be the property of another. (2)

Covenant is the usual remedy upon indentures of apprenticeship against the master for not instructing his apprentice, or against the party who covenanted for the due service of such apprentice; but it will not lie against an infant apprentice. (3) It lies also on articles of agreement under seal (4), or deeds for separate maintenance (5); and on covenants in deeds of conveyance, &c. for good title, &c. (6); on charter-parties of affreightment (7); on policies of insurance under seal against fire, &c. (8); and on annuity and mortgage deeds; though debt in the last instances is in general preferable when the demand is for money: and it seems that covenant lies on a bond, for it proves an agreement. (9)

Covenant may be supported, although the covenantee did not sign the indenture (10); and in the case of a deed-poll, a stranger to it may sue on a covenant therein to pay him a sum of money, though it is otherwise in the case of a deed *inter partes*. (11)

Covenant will lie against the lessee or patentee of the crown, although he did not seal the lease or any counterpart of the lease, it being matter of record, and the lessee's acceptance of the demise being in such case as obligatory, as an express covenant. (12)

If a lessee by deed-poll assign the term, although in express terms "*subject to the covenants in the lease*," it seems that his proper remedy against the assignee for not performing the covenants, is an action of *assumpsit*, not an action of covenant, the assignee not having executed any deed covenanting to perform the covenants in the lease. (13)

Covenant is also the usual remedy on leases at the suit of the lessee, his executor, or assignee, against the lessor, &c. for the breach of a covenant for quiet enjoyment, &c.; and by the lessor, &c. against the lessee, &c. for non payment of rent, not repairing, &c.

But covenant will not lie for the disturbance of a close, where the demise is of land, except a close (14); but if the exception be of a thing *dehors* to the lessor, as a way, common, estovers, or other profit *apprendre*, that is equivalent to an engagement by the lessee for the lessor's enjoyment: the

COVENANT
GENERALLY.

relating to matter
in presenti.

Particular
deeds and co-
venants on
which covenant
lies.

Covenant may
be supported,
although the
covenantee did
not sign the
indenture.

Lessee or pa-
tentee of the
crown.

Leases.

Disturbance of
a close.

(1) *Kingdon v. Nottle*, 4 M. & S. 53. 3 Wood. 85, 86. *Browning v. Wright*, 2 B. & P. 13. 2 Saund. 181. (b.) *Adams v. Gibney*, 6 Bing. 656.

(2) Plowd. 308. Finch, 49. (b.) Com. Dig. Covenant (A. 1.). Vin. Abr. Covenant (A.), pl. 5. (G. 3.) Platt on Covenants, 4.

(3) *Gylbert v. Fletcher*, Cro. Car. 179.

(4) *Holles v. Carr*, 3 Swanst. 647.

(5) *Nurse v. Craig*, 2 N. R. 148.

(6) 2 Saund. 175. 178. 181. *Howes v. Brushfield*, 2 B. & P. 13. 3 East, 491.

(7) *Randall v. Lynch*, 12 East, 179. *White v. Parkin*, *ibid.* 578. 583. 6 Moore, 415.

(8) *Worsley v. Wood*, 6 T. R. 710. 2 Marsh. 601. n. (a.) Stat. 6 Geo. 1. c. 18., *sed vide* 6 Moore, 199. 202.

(9) *Holles v. Carr*, 3 Swanst. 648. *Ket-*

leby v. Hales, 3 Lev. 119. Hardr. 178. Com. Dig. Covenant (A. 2.).

(10) 2 Rol. Abr. 22., *Faits* (F.), pl. 2. Lutw. 305. Com. Dig. Covenant (A. 1.). *Petrie v. Bury*, 3 B. & C. 353.

(11) Com. Dig. Covenant (A. 1.). 1 Chitt. Pl. 119.

(12) *Ewre v. Strickland*, Cro. Jac. 240. 399. 521. Com. Dig. Covenant (A. 1.). Vin. Abr. Covenant (B.), pl. 1. Platt on Covenants, 9, 10.

(13) *Burnett v. Lynch*, 5 B. & C. 589. 602. 8 D. & R. 368. S. C. case lies, *ibid.*, *sed vide* *Hawkins v. Sherman*, 3 C. & P. 462.

(14) *Russel (Lady) v. Gulhoel*, Cro. Eliz. 657. Mod. 553. *Wilson v. Welch*, 1 Rol. Abr. 103. *Clanrickarde's case*, Hob. 276. *Liford's case*, 11 Co. 50. (b.)

**COVENANT
GENERALLY.**

exception amounts to a reservation of a newly created way, &c. and therefore covenant lies. (1)

But a reservation of a liberty to take certain property upon the premises assigned, differs from a covenant. (2)

**CONSTRUCTION
OF COVENANTS
GENERALLY.**

Contracts to be taken, according to the intent of the parties, expressed by their own words.

3. CONSTRUCTION OF COVENANTS GENERALLY.

All contracts are to be taken according to the intent of the parties, expressed by their own words, for "benigne sunt faciendæ interpretationes chartarum propter simplicitatem laicorum, et verba intentioni non è contra debent inservire."

If there be any doubt in the sense of the words, such construction will be made as is most strong against the covenantor, lest, by the obscure wording of his contract, he should find means to evade and elude it (3):—the maxim being, "verba chartarum fortius accipiuntur contra proferentem." (4)

Equivocal language.

In the construction of a covenant no attention is paid to the acts of the parties, or the interpretation they may put upon it (5); but where a deed has been incorrectly or metaphorically settled, it has been deemed the safer rule to adhere to the language used, and to construe the instrument according to its letter. (6)

The rule, that the words of a covenant are to be taken more strongly against the covenantor, must not be rigorously insisted upon, nor indeed is it of universal application. The true key to the exposition of covenants is the intention of the parties; and a rule, which founds itself upon a presumption of intent, as this does, must give way to that clearer evidence of intent, which is to be collected from the whole context of the instrument, and its general scope and design. (7)

Exposition must be upon the whole instrument.

"Exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words." (8) Thus Plowden says, "the scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself and the intent thereof also accomplished." (9)

(1) *Cole's case*, 1 Salk. 196. *Bush v. Cole*, 12 Mod. 24. Carth. 232. 1 Show. 388. nom. *Bush v. Calis*, Co. Litt. 47. (a.) Platt on Covenants, 32.

(2) *Tuckerman v. Tuckerman*, Lutw. 334. *Stevens v. Carrington*, 1 Doug. 27. *Brailford v. Parsons*, Lutw. 308.

(3) 2 Bac. Abr. Covenant (F.), 356.

(4) *Love v. Pares*, 13 East, 86. Plowd. 287. *Rubery v. Jervoise*, 1 T. R. 234. *Fowle v. Welsh*, 1 B. & C. 35. *Shrewsbury (Earl of) v. Gould*, 2 B. & A. 494.

(5) *Baynham v. Guy's Hospital*, 3 Ves. 298. *Eaton v. Lyon*, ibid. 694. *Moore v. Foley*, 6 ibid. 237. *Iggulden v. May*, 9 ibid. 333.

(6) *Doe d. Spencer v. Godwin*, 4 M. & S.

265. *Crisp v. Price*, 5 Taunt. 548. Touchst. by Atherley, 86. n. 208. n.

(7) 2 Bac. Abr. Covenant (F.), 361. *Howell v. Richards*, 11 East, 639.

(8) Per Lord Ellenborough in *Iggulden v. May*, 7 East, 241. *Trenchard v. Hoskins*, Winch, 93. *Doe d. Spencer v. Godwin*, 4 M. & S. 265. *Barton v. Fitzgerald*, 15 East, 541. *Doe d. Bish v. Keeling*, 1 M. & S. 95. *Sicklemore v. Thistleton*, 6 ibid. 12. *Earl of Clanrickarde's case*, Hob. 275. 277. *Noke's case*, 4 Co. 81. (a.) *Kingston v. Preston*, 2 Doug. 689. *Pigot v. Bridge*, 1 Vent. 292. *Ferrers v. Newton*, 1 Sid. 312. *Foord v. Wilson*, 2 Moore, 592. *Glazebrook v. Woodrow*, 8 T. R. 370.

(9) Plowd. 18., cit. per Lord Ellenborough, 8 East, 89.

Lord Hobart also coincides in the same views, saying, "the law, being to judge of an act, deed, or bargain, consisting of divers parts, containing the will and intent of the parties, all tending to one end, doth judge of the whole, and gives every part his office to make up that intent, and doth not break the words in pieces." (1) And exposition will sometimes be made of deeds contrary to grammatical construction. (2)

CONSTRUCTION
OF COVENANTS
GENERALLY.

Exposition should be made of the deed so as to support, rather than annul, the transaction; *ut res magis valeat quam pereat*. (3) Thus, the lessor, after a demise of certain premises, with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself whilst the same should remain there, paying half the expenses of the repairs:" — It was holden, that the words "whilst," &c. reserve to the lessor a power of removing the pump at his pleasure; and that it was no breach of the covenant, though he removed it without reasonable cause, and in order to injure the lessee. But without those words, it would have been a breach of covenant to have removed the pump. (4)

Construction
should be made
in support of
the covenant.

The lessee of a coal-mine, who covenants to pay a certain share of all such sums of money as the coal shall sell for, at the pit's mouth, is not liable under that covenant to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth. (5)

By deed B., for himself, his heirs, executors, and administrators, covenanted that for and notwithstanding any act done by him (B.), it should be lawful for A. to receive certain money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of B., his executors or administrators, or any person claiming under him or them: — It was held, that the words, "for and notwithstanding any act done by B.," being inconsistent with the subsequent part of the covenant, ought to be rejected; and, therefore, that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B., in respect of the contracts mentioned in the indenture. (6)

A. conveyed to B. in fee, a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the said lands and hereditaments; with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains, &c. necessary for working the coal; except as to such lands as lay within 150 yards of the messuage and buildings, and except any homestead: — It was held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and homestead, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains, within 150 yards of the messuage or buildings, or within the homestead. (7)

In order to effect the evident intention, the word "and" has frequently,

The word
"and" has re-

(1) Hob. 275.

(2) *Fountain v. Guavere*, 2 Show. 333. Comb. 59. Skin. 146., et vide Co. Litt. 219. (b.)

(3) *Touchst. by Atherley*, 166. *Smith v. Packhurst*, 3 Atk. 136.

(4) *Rhodes v. Bullard*, 7 East, 116. 3 Smith, 173.

(5) *Clifton v. Walmsley*, 5 T. R. 564. *S. P. Gerrard v. Clifton (in error)*, 7 ibid. 676. 1 B. & P. 524.

(6) *Belcher v. Sikes*, 8 B. & C. 185.

(7) *Bowler v. Wolley*, 15 East, 444.

CONSTRUCTION
OF COVENANTS
GENERALLY.

ceived a dis-
junctive con-
struction, and
the word "or"
a conjunctive
one.

Deed operating
in different
ways.

Reasonable
time allowed
for perform-
ance.

Where cove-
nantor will be
absolved from
liability.

both in deeds and wills, received a disjunctive construction, and the word "or" a conjunctive one. (1)

When a deed may operate in different ways, the person to whom it is made shall have his election which way to take it. As if a deed of grant be made by the words "*dedi et concessi*;" this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender, and it is in the choice of the grantee to plead or use it one way or the other. (2)

If a covenant have been changed by a subsequent parol agreement, and another contract substituted in lieu of the former, such parol agreement can neither be the foundation of an action of covenant (3), nor pleaded in bar to an action brought on the original contract (4); but it may be the subject of an independent action of *assumpsit*. (5)

Where no time is limited for the doing of a thing, it shall be done in a reasonable time. (6)

If a covenant be once properly performed, the covenantor will be absolved from all liability, although the performance may, by matter subsequent, be defeated or rendered unavailing. (7)

PERSONS BY
AND WITH
WHOM COVE-
NANTS CAN AND
CANNOT BE
MADE.

Persons ca-
pable of con-
tracting.
Aged persons.
Feme covert.

Husband with
wife.

Infants.

4. PERSONS BY AND WITH WHOM COVENANTS CAN AND CANNOT
BE MADE.

All persons of sufficient legal capacity can bind themselves by covenant.

Old age in the covenantor, in the absence of fraud, is not a ground for annulling an improvident agreement. (8)

A feme covert during coverture is incompetent to bind herself or husband by covenant (9), unless authorised by the husband. (10)

But marriage will not defeat a covenant previously entered into by the woman with a third person (11); and an action will in some cases survive against the wife after her husband's decease. (12)

On account of the consolidation of the legal existence of husband and wife, his covenant with her is completely ineffectual (13); but a covenant by A. with B. to stand seised to the use of his (A.'s) wife, will raise an use in favour of the wife, which will be executed by the statute of uses, and thus vest the estate in her. (14)

Covenants by infants are mere nullities. (15) An exception exists with respect to London, because there an action of covenant will lie against an infant, as if he were a man of full age. (16)

(1) Touchst. by Atherley, 86. n.
(2) Heyward's case, 2 Co. 35. (a.)
(3) Littler v. Holland, 3 T. R. 590.
Heard v. Wadham, 1 East, 619.
(4) Ibid.
(5) Heard v. Wadham, 1 East, 619.
(6) Perpoint v. Thimblebye, 1 Rol. Abr. 441.
Challoner v. Davies, 1 Ld. Raym. 402.
Peeter v. Carter, 1 Rol. Abr. 438.
(7) Leigh v. Hammer, 1 Leon. 52. Boulter v. Ford, 1 Sid. 76.
(8) Lewis v. Plead, 1 Ves. jun. 19.
(9) St. John (Lord) v. St. John (Lady), 11 Ves. 531. White v. Cuyler, 1 Esp. N. P. C. 200. 45 Edw. 3. 11, 12.
(10) Ibid.
(11) Anon. 6 Mod. 239.
(12) Wotton v. Hele, 2 Saund. 177.
(13) Co. Litt. 112.
(14) Ibid. (a.) 27 Hen. 8. 10.
(15) Farnham v. Atkins, 1 Sid. 446. Co. Litt. 172. (a.) Baylis v. Dindey, 3 M. & S. 482. Gylbert v. Fletcher, Cro. Car. 179. Whitley v. Loftus, 8 Mod. 190.
(16) Horn v. Chandler, 1 Mod. 271. Lilly's case, 7 ibid. 15. Walker v. Nicholson, Cro. Eliz. 652.

But if an infant and one of full age jointly and severally covenant for the payment of an annuity to a third person, a plea that his co-covenantor was an infant, is not admissible to protect the party of full age from the consequences of his contract. (1)

PERSONS BY
AND WITH
WHOM COVE-
NANTS CAN AND
CANNOT BE
MADE.

An obligation granted by a person, while he is in a state of absolute and total drunkenness is ineffectual, because the grantor is incapable of consent; for the law has thought it equitable to protect those who have not the use of their reason (even though they should have lost it by their own folly) from the fraud or circumvention of others. (2)

Drunkards.

A deed acquired from an inebriated person would be invalid, if any unfair advantage has been made of the situation of the drunken party, or any contrivance or management resorted to for the purpose of drawing him on to drink. (3)

A lesser degree of drunkenness, which only darkens reason has not the effect of annulling the contract. (4)

Neither will aid be given to a person to avoid any agreement or deed merely upon the ground of his having been inebriated at the time, because to interpose on either side in the common case of intoxication would be to encourage drunkenness. (5)

Every true consent supposes a physical power—a moral power of consenting, and a serious and free use of the reasoning faculties; therefore idiots and lunatics, from the imbecility of their intellects, are incapacitated from entering into any species of agreement. (6)

Idiots and lunatics.

If a weak man give a bond, and there be no fraud or breach of trust in obtaining it, equity will not set it aside for the weakness of the obligor, if he be *compos mentis*; for the court will not measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity. (7)

Persons of weak mind.

Thus, in *Willis v. Jernegan* (8) Lord Hardwicke held, that it was not sufficient to set aside an agreement in equity to suggest weakness and indiscretion in one of the parties who had engaged in it; for, supposing the bargain to be in fact very hard and unconscionable, if a person would enter into it with his eyes open, equity would not relieve him upon this footing only, unless he could shew fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement. (9)

A person attainted of certain crimes (10), or an outlaw in a civil suit (11) or criminal prosecution (12), is deemed *civiliter mortuus* (13); but upon reversal of the attainder or outlawry, the competency is re-established.

Attainted and outlawed persons.

But this incompetency does not extend to defeat another of his claim, or right of action against the outlaw or attainted person; for the latter, not-

(1) *Haw v. Ogle*, 4 Taunt. 10.

(2) 3 Camp. 34. n. (a.)

(3) *Cory v. Cory*, 1 Ves. sen. 19. *Johnson v. Medlicott*, 3 P. Wms. 131. n. (a.) *Cooke v. Clayworth*, 18 Ves. 16., vide etiam *Dunnage v. White*, 1 Swanst. 137.

(4) *Stair*, July 29. 1672. Lord Hatton in *Ersk. Inst.* 447. s. 16.

(5) *Cragg v. Holme*, cit. 18 Ves. 14.

(6) *Yates v. Boen*, Str. 1104. *Faulder v. Silk*, 3 Camp. 126. 1 Dow, 177.

(7) *Osmond v. Fitzroy*, 3 P. Wms. 129.

Griffin v. Deveuille, Cox's n. ibid. 130. 3

Wood. Vin. Lect. App. xvi.

(8) 2 Atk. 251.

(9) Vide etiam *Bridgeman v. Green*, Wil-
mot, 58. *White v. Small*, 2 C. C. 283.

(10) 1 Chitt. C. L. 730.

(11) Com. Dig. Utlagary (D. 2.).

(12) Ibid.

(13) *Bullock v. Dodds*, 2 B. & A. 258.

PERSONS BY
AND WITH
WHOM COVE-
NANTS CAN AND
CANNOT BE
MADE.

Effect of an
unlettered man
making a deed.

withstanding his own inability to sue, may be sued on a contract made by him during the continuance of the outlawry or attainder. (1)

An unlettered man, under a covenant to make a deed, is not obliged to seal and deliver any writing tendered to him, unless somebody be present who can read the deed to him, should he require it; and if the deed be in Latin, French, or other language, which he cannot understand, and he demand that some one should read and interpret the writing to him, and no one happen to be present that can read and expound the tenor of the same in an intelligible language, he may refuse to deliver the instrument. So it is, although the man can read; yet if the deed be indited in Latin, French, or other such language as he cannot comprehend, and if he demand that it be read or expounded to him in such language as he may understand, and no one happen to be there to do it, he may withhold his delivery of it. And it is to be observed, that ignorance in reading, or ignorance in the language *quæ sunt ignorantia facti* may excuse, but *ignorantia juris non excusat*. If, therefore, the party can read and understand the language also in which the writing is made, he will not be allowed time to obtain the opinion of his counsel learned in the law, although he may not be acquainted with the legal sense and operation of the words, and whether they agree with his covenant or not; but at his peril he must deliver the deed immediately on the covenantee's tendering it for execution. (2)

5. EXPRESS COVENANTS.

EXPRESS CO-
VENANTS.
Defined.

It has been previously stated, that a covenant is the agreement or consent of two or more by deed in writing sealed and delivered, whereby either one of the parties doth promise to the other, that something is done already, or shall be done afterwards; he that makes the covenant is called the covenantor, and he to whom it is made, the covenantee.

And this is either express or in deed, i.e. when the covenant is expressed in the deed; or it is implied, or in law, i.e. when the deed doth not express it, but the law doth make and supply it.

When the covenant is created by law, the covenantee cannot bring an action of covenant, unless he is ousted by one who has a title; but it may be otherwise in case of an express covenant. (3)

Liabilities of
covenantor and
covenantee. ♣

The covenantor and covenantee are bound to perform their respective covenants, and the party who neglects so to do, can by an action of covenant be compelled to give damages adequate to the damages occasioned by the breach.

No set form of
words abso-
lutely neces-
sary to create a
covenant.

The law does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant; and therefore it seems, that any words will be effectual for that purpose, which shew the party's concurrence to the performance of a future act. (4)

(1) *Macdonald v. Ramsay*, Fort. C. L. 61., cit. 15 East, 465.

(2) *Manser's case*, 2 Co. 3. (a.) S. C. 4 Leon. 62., overruling *Bennet's case*, Cro. Eliz. 9. *Wotton v. Cooke*, 3 Dy. 337. (b.) Bendl. 228. Jenk. Cent. 6. Case, 24. 1

Rol. Abr. 424. *Symmes v. Smith*, Sir W. Jones, 314. 1 Rol. Abr. 441. Cro. Car. 299. *Andrews v. Eddon*, 1 And. 122.

(3) Touchet. by Atherley, 160.

(4) 2 Bac. Abr. Covenant (A.), 336

A party may also covenant in respect of past transactions. (1) So he may covenant as to time *present*, for it is the constant language of deeds of alienation, that the grantor has lawful power to convey. (2)

The formal word "covenant" is not indispensably necessary. (3) Thus, in *St. Albans (Duke of) v. Ellis* (4) Lord Ellenborough said, "by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it."

If it be agreed between two persons that one shall pay the other a sum of money for his lands on a particular day, these words will amount to a covenant on the part of the latter to convey the lands. (5)

If an office be granted *absque impetitione, denegatione, restrictione*, a covenant will lie on the words against the grantor. (6)

Words used in the future tense, unconnected with preceding words of agreement (7), or language used exceptively, will, sometimes, create express covenants. (8)

If words be applied restrictively, as that the lessee shall have wood *non succidendo arbores*, it will be holden to be a covenant by the lessee that he will not cut down the trees. (9) So, where the words are, that A. shall take fire-bote without cutting more than is necessary (10), covenant will likewise lie.

Covenant can be maintained on words of recital, if they can be joined and considered with the rest of the instrument. Thus, in *Severn v. Clarke* (11) it was held, that the recital was an agreement within the meaning of the condition of the bond, for "every thing contained in the deed is an agreement, and not only that which I am bound to perform; as if I recite by my deed, that I am possessed of such an interest in certain land, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed; if I be not possessed of such interest, the covenant is broken." (12)

If a particular recital be contained in a deed, or referred to as the occasion of a covenant, the covenant, if inconsistent therewith, will not be binding. (13)

If the word "whereas" render the deed senseless or repugnant, it may be erased as impertinent, and a deed in other respects sensible, will not be thereby destroyed. (14)

Language, which at the first view apparently operates rather as con-

EXPRESS COVENANTS.

By what language created.

Words used in the future tense.

Words in the first person.

Words of exceptive construction.

Words of recital.

The word "whereas," if it render the deed senseless, can be struck out.

Words appear-

(1) Plowd. 308.

(2) 3 Wood. 86. 1 Rol. Abr. 519.

(3) *Harwood v. Hilliard*, 2 Mod. 268. 3 Keb. 848. *Stevenson's case*, 1 Leon. 324. *Saltoun v. Houstoun*, 1 Bing. 433. Platt on Covenants, 28. *Hill v. Carr*, 1 Ch. C. 294.

(4) 16 East, 352.

(5) *Andrews v. Ellison*, 6 Moore, 199.

(6) *Bishop v. Redman*, 1 Leon. 277.

(7) *Brett v. Cumberland*, Cro. Jac. 399. 521. 1 Rol. 359. 2 ibid. 63. Poph. 136. Godb. 276. Platt on Covenants, 30. 1 Rol. Abr. 519. 2 Bac. Abr. Covenant (A.), 338.

(8) *St. Albans (Duke of) v. Ellis*, 16 East, 352.

(9) Mar. 9. pl. 22. *Anon. Dy. 19. (b.)* pl. 115.

(10) *Stevenson's case*, 1 Leon. 324.

(11) Ibid. 122.

(12) *Per* Gawdy J. in ibid., *vide etiam* Platt on Covenants, 34. *Holles v. Carr*, 3 Swanst. 638. 643. 2 Mod. 86. Finch, 261. 2 Freem. 3. *Johnson v. Procter*, Yelv. 175. Cro. Jac. 233. 1 Bulst. 2. 2 Brownl. 212., cit. by Lord Eldon, 2 B. & P. 25. *Best v. Brett*, 1 Rol. Abr. 518, 519., cit. in *Holles v. Carr*, 3 Swanst. 649., *vide etiam* *Barton v. Fitzgerald*, 15 East, 530.

(13) *George v. Butcher*, 2 Vent. 140., *vide etiam* *Ramaden v. Hylton*, 2 Ves. sen. 310. *Cole v. Gibson*, 1 ibid. 507.

(14) *Hilton v. Smith*, Lutw. 493.

EXPRESS COVENANTS.

ing to operate as conditions, qualifications, or defeasances of covenants.

Words of proviso;
of condition;

or of indemnity in marriage settlements.

Language merely importing an order or direction.

Where a party engages in a contract in the performance of a public duty, covenant cannot be sustained.

ditions, qualifications, or defeasances of covenants, may create an express covenant.

Where an office had been conveyed by the plaintiff to the defendant, provided that out of the first profits he should pay the plaintiff 500*l.*:—It was held, that as this proviso was in the nature of a covenant, and not by way of condition or defeasance, covenant would lie. (1)

Where A. leased to B. for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them:—It was holden, that the lessee was liable to an action for omitting to leave the houses in good plight (2), for here an agreement was implied.

But if the words do not amount to an agreement, or are merely conditional to defeat the estate, as if a lease be granted, provided and on condition, that the lessee collect and pay the rents of the other houses of the lessor, covenant is not maintainable. (3)

The common clause of indemnity in marriage settlements is not a clause of charge, but rather of discharge and indemnity; it is to take away that responsibility which each would be under, for the acts of the other, were it not for this clause. (4)

Words merely importing an order or direction, that other persons shall pay a sum of money, cannot be the foundation of an action of covenant. (5)

If a party engage in a contract in the performance of a public duty, on behalf of the public, such person will not be personally responsible in an action on that contract; for it would be extremely dangerous and detrimental to the king's service to hold, that individuals should make themselves personally liable on contracts, which they enter into on the part of government, since no private person would accept of any command on such terms. (6) Whether the contract be by parol, or by deed, makes no difference as to the construction to be put upon it. (7)

IMPLIED COVENANTS.

Defined.

6. IMPLIED COVENANTS.

There are some words, which of themselves import no express covenant, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law, and will as effectually bind the parties, as if expressed in the most explicit terms. (8) As, if a man make a lease for years of land by the words *concessi* or *demisi*, these import a covenant; and

(1) *Clapham v. Moll*, 3 Salk. 108. 1 Lev. 155. 1 Keb. 842. 860. 897. *Parker v. Gravenor*, 2 Dyer, 150. (a.) *Holder v. Taylor*, 1 Brownl. 23. *Pordage v. Cole*, Sir T. Raym. 183. *Samways v. Eldsly*, 2 Mod. 77. *Suffield v. Barkervil*, 2 Mod. 36. *Briscoe v. King*, Cro. Jac. 281. Platt on Covenants, 36.

(2) 40 Edw. 3. 5. (b.) 2 Bac. Abr. Covenant (A.). 339. 1 Rol. Abr. 518. (3) *Geery v. Reason*, Cro. Car. 128., vide *Simpson v. Titterell*, Cro. Eliz. 242. *Crom-*

well's case, 2 Co. 71. (b.) Platt on Covenants, 37.

(4) *Bartlett v. Hodgson*, 1 T. R. 42.

(5) *Alchorne v. Saville*, 6 Moore, 202.

(6) Platt on Covenants, 27. *Masbeath v. Haldimand*, 1 T. R. 172. *Unwin v. Walseley*, ibid. 674. *Allen v. Waldegrave*, 8 Taunt. 566. *Hancock v. Hodgson*, 4 Bing. 269.

(7) *Unwin v. Walseley*, 1 T. R. 678. *Gidley v. Palmerston* (Lord), 3 B. & B. 275. *Miller v. Seave*, 2 W. Black. 1141.

(8) 1 Rol. Abr. 519.

if the lessee or his assignee be evicted, he may bring an action thereupon. (1)

The distinction between implied covenants by operation of law, and express covenants, is, that the latter are taken more strictly, and are obligatory upon the covenantor in every event, and in every state and condition of the thing, which is the subject of the covenant; for when the law creates a duty, and the party is disabled to perform it without any default in him, and hath no remedy over, he will be excused; but when, by his own express contract, he creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident even by inevitable necessity, because he might have provided against it by his contract. If, therefore, a lessee covenant to repair a house, though it be burnt by lightning or by accident, or thrown down by the king's enemies, yet he is bound to repair it. (2)

If a lease for years be made by any of the following words, "grant," "demise," "*demisi*," or "*demiserunt*," the law implies a covenant on the part of the lessor, that the lessee shall hold and enjoy the term against all lawful incumbrances; and if the lessor have not sufficient power to demise for the whole term, the lessee can maintain covenant for any expenses he may have incurred in procuring a better title for the whole term. (3)

Where estates of freehold are the subject of conveyance, the word "grant" will not constitute a warranty. (4)

If goods however be demised by indenture for years, and the lessee be evicted within the term, covenant will not lie on the word "*demisi*," for the law does not create any covenant on such a personal thing. (5)

Unaccompanied by the term "grant," it does not seem that the words "bargain and sell" import an implied covenant. (6)

On words of assignment, a covenant in some particular instances will be implied: thus, where a man *assignavit et transposuit* all the money that should be allowed by an order of a foreign state, to come to him in lieu of his share of a ship, it was held to be a covenant. (7)

But no case has decided, that the words "assign" and "transfer" shall have any such legal import. The word "assign" does not imply any covenant or contract on the part of the assignee, but is a mere description of the interest conveyed. (8)

There are only two or three cases which give to the words "yielding and paying" the operation of an express covenant, while, on the other hand, the more numerous as well as the more recent decisions are opposed to that

IMPLIED COVENANTS.

Distinction between express and implied covenants.

WORDS BY WHICH IMPLIED COVENANTS MAY BE RAISED.
"Grant," "demise."

"Bargain and sale."

"Assign and transfer."

"Yielding and paying."

(1) 2 Bac. Abr. Covenant (B.), 342.

(2) Ibid. Br. Covenant, 4. Dyer, 33. *Paradine v. Jane*, Aleyn, 27. *Chesterfield (Earl of) v. Bolton (Duke of)*, Com. 627. *Bullock v. Dommitt*, 6 T. R. 650. *Walton v. Waterhouse*, 2 Saund. 420. *Compton v. Allen*, Sty. 162. *Brecknock Navig. Comp. v. Pritchard*, 6 T. R. 750. *Monk v. Cooper*, 2 Ld. Raym. 1477. Str. 763. *Bel-four v. Weston*, 1 T. R. 310. *Doe v. Sandham*, ibid. 705. *Shubrick v. Salmond*, 3 Barr. 1637. *Hare v. Grovers*, Anst. 687. There is a distinction between express covenants and implied agreements as to being enforced by injunction; in the former

instance, but not in the latter, an injunction will be granted against tenants removing articles contrary to the custom of the country. *Kimpton v. Eve*, 2 Ves. & B. 379.

(3) *Fraser v. Skey*, 2 Chitt. 646.

(4) *Spencer's case*, 5 Co. 18. 4 Cruise's Dig. 381. *Browne or Browning v. Honeywood*, Freem. 359. *Pincombe v. Rudge*, Hob. 3. *Hayes v. Bickerstaff*, Vaugh. 126., sed vide *Browning v. Wright*, 2 B. & P. 21.

(5) 2 Bac. Abr. Covenant (B.). 343.

(6) Platt on Covenants, 49.

(7) *Deering v. Farrington*, 1 Mod. 113. Twisden J. dubit.

(8) *Burnett v. Lynch*, 5 B. & C. 609.

**IMPLIED
COVENANTS.**

construction: thus, Mr. Platt observes (1), "that an express covenant is not created by these words; but that the covenant which exists by virtue of them, is derived solely from intendment and implication of law."

On an implied covenant, arising from the words *yielding and paying*, an action of covenant will not lie against a lessee, his executors, administrators, or assigns, where the instrument by which the term is granted is a deed-poll, or an indenture unexecuted by or on behalf of the lessee. (2)

Whether the word "*reddendum*" in a lease for life will support an action of covenant, is an unsettled point. (3)

Covenants
sometimes im-
plied from the
terms or object
of the contract.

Covenants are sometimes raised, by implication of law, from the words of the parties actually used in an express covenant, when, without such legal intendment, the express covenant would be cramped in its operation, or the advantage or security meant to be enjoyed under it, in a measure defeated. (4)

Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions upon a waste near the mines, and also a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: — It was held, that such a covenant was to be implied; and that the lessor might sue upon it in respect of his interest. (5)

Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses: — It was held, that this implied a covenant, also, that he would burn lime at all such seasons; and that it was not a good defence to plead, that there was no lime burned on the premises out of which the lessor could be supplied. (6)

When a general implied covenant arising on the words "demise and lease," and an express limited covenant, as, that the lessee shall quietly enjoy against the acts of the lessor or any claiming or to claim by, from, or under him, are comprised in the same instrument, the former will be qualified and restrained by the latter, the rule of law being, *expressum facit tacitum cessare*. (7)

Things not in
esse.

Implied covenants do not extend to a thing not in *esse* at the time of the demise. Therefore if A., in consideration that B. will build a mill upon the land, and a watercourse through the land, demises the land to B. by the words *dedi et concessi*, and afterwards stops the watercourse, B. cannot maintain covenant against A. (8)

(1) On Covenants, 53.

(2) *Ibid.* 55.

(3) *Harper v. Bird*, Sir T. Jones, 102.

(4) *Seddon v. Senate*, 13 East, 63. *Webb v. Plummer*, 2 B. & A. 746. *Randall v. Lynch*, 12 East, 179. *Pomfret v. Ricraft*, 1 Saund. 321. *Climson v. Pool*, Latch. 47., et vide *Rhodes v. Bullard*, 7 East, 116.

(5) *Sampson v. Easterby*, 4 M. & R. 422. 9 B. & C. 505. S. C. nom. *Easterby v.*

Sampson, 6 Bing. 644. 4 M. & P. 601. 1 C. & J. 105.

(6) *Shrewsbury (Earl of) v. Gould*, 2 B. & A. 487.

(7) *Line v. Stephenson*, 4 Bing. N.C. 678. *Merrill v. Frame*, 4 Taunt. 329. *Nob's case*, 4 Co. 80. (b.) Cro. Eliz. 674. *Goinsford v. Griffith*, 1 Saund. 58. *Deering v. Farrington*, 1 Mod. 118. *Hayes v. Bickstaff*, Vaugh. 118.

(8) *Huddy v. Fisher*, 1 Leon. 278. pl. 377.

7. REAL COVENANTS.

REAL
COVENANTS.
Defined.

A covenant real is defined in Sheppard's Touchstone (1) to be "that, whereby a man doth bind himself to pass a thing real, as lands or tenements, as a covenant to levy a fine of land, in which case the land itself is to be recovered; or when it doth run in the realty so with the land, that he that hath the one hath, or is subject to the other, and so a warranty is called a real covenant." (2)

Hence a covenant may be real, having for its object something annexed to, or inherent in, or connected with land or other real property, although it may be purely personal to the covenantor and his personal representatives, because he has omitted to name his heirs; and *secondly*, a covenant, though clearly personal, or relating personally, as to pay a gross sum of money, may be a covenant real, because the heir being named, will be liable in respect of assets by descent from his ancestor, the covenantor. (3)

Covenants are said to be inherent, which concern the land, as that the thing demised shall be quietly enjoyed; shall be kept in reparations; that the party shall pay rent; shall not cut down timber trees; or do waste; shall fence the coppices when they are new cut, or make further assurance, or the like. (4)

INHERENT Co-
VENANTS.

In order to a covenant's running with the land, it is not enough, that it concerns or relates to the land, but it is necessary, that there should be a privity of estate between the covenantor and covenantee. (5)

To make a covenant run with the land, the performance or non performance of it must affect the nature, quality, or value of the property conveyed, independently of collateral circumstances, or must affect the mode of its enjoyment.

A covenant personal relates only to matters personal as distinguished from real, and is binding on the covenantor during his life, and on his personal representatives after his decease in respect of assets. A personal covenant may be transformed into a real covenant by the mere circumstance of the heirs being named therein, and having assets by descent from the covenantor (6); and a covenant may also be personal in a sense, when it is to be performed personally by the covenantor only. (7)

PERSONAL Co-
VENANTS.
Defined.

Where one who covenants for himself, his heirs, &c. and under his own hand and seal, for the act of another, he will be personally bound by his covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person. (8)

In *Hancock v. Hudson* (9) the defendants, as directors of a mining company, agreed by deed to purchase a mine of the plaintiffs, the purchase money to be paid within twelve months by certain instalments "out of the

(1) By Atherley, 161.

(2) *Vide etiam* F. N. B. 145. (A.) 323.
4 Cruise's Dig. 397. 2 Black. Com. 304.
Jenk. 241. *Spencer's case*, 5 Co. 16. (b.)
Com. Dig. Covenant (A. 2.). Gilb. Law
of Covenants, 105. 2 Bac. Abr. Covenant
(E.). 347.

(3) Platt on Covenants, 63.

(4) Touchat. by Atherley, 161., *sed vide*
Co. Litt. 385. (a.)

(5) *Roach v. Wadham*, 6 East, 289.

(6) 2 Black. Com. 304.

(7) *Cooke v. Colcraft*, 2 W. Black. 856.
Harvey v. Oswald, Cro. Eliz. 553. *Spencer's*
case, 5 Co. 16 (b.) 2d resol.

(8) *Appleton v. Binks*, 5 East, 148. 1
Smith, 361.

(9) 12 Moore, 504. S. C. nom. *Han-*
cock v. Hodgson, 4 Bing. 269.

**REAL
COVENANTS.**

moneys to be raised by the company," with a proviso, that in case they should not have received the deposits from the shareholders, so as to enable them to pay the money by the time stipulated for, the directors should be allowed a further time of six months; and the defendants covenanted, that they would, "out of the said payments so to be made by the subscribers or shareholders in the said company," pay the purchase money, according to the terms and at the times before specified, subject to the aforesaid proviso:—Held, that this was a personal undertaking on the part of the defendants to pay at the expiration of the additional six months.

**Distinction
between a real
and personal
covenant.**

One of the principal differences between a real and personal covenant therefore is, that the former may run with the land, and charge an unnamed assignee; but the latter never can, nor can an assignee, even where expressly named, be bound by, or avail himself of, any benefit under such covenant. (1)

Thus, where the lessees of a theatre, by deed under seal, agreed to pay certain money lent to them by the plaintiff on a certain day, and that, until payment, the plaintiff, and such persons as he might appoint, should have the free use of two boxes in the theatre, one in the dress circle and one in the circle above, no specific boxes being mentioned; and the lessees afterwards assigned their interest in the theatre to the defendant:—It was held, that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes in the theatre. (2)

**COLLATERAL
COVENANTS.**

Where collateral covenants run with the land, that is, extend to something *in esse*, parcel of the demise, and affect the estate, covenant will lie between all those who are privy in tenure or contract, though not named, like debt for rent at common law. And the reason is, because usually the rent is more or less accordingly, *et qui sentit commodum sentire debet et onus*.

Covenants are also *collateral*, i. e. such as concern some collateral thing, that doth nothing at all, or not so immediately, concern the thing granted, as to pay a sum of money in gross, to build a house on another man's ground, to make a feoffment or lease of other land, to give other security to perform the covenants, to pay the rent; or that the lessor shall distrain for the rent in some other land than that which is demised, or the like (3); so is a covenant by an assignee of a term with his assignor to pay the rent reserved, and perform the covenants contained in the original lease, and indemnify the assignor therefrom (4): and of this description is a covenant by the lessee of a mortgagor and mortgagee with the mortgagee to pay the rent, &c. (5); by a mortgagor with the mortgagee to pay the mortgage money (6); by the lessee of a public house to account and pay such a sum for every ton of wine sold in the house. (7)

(1) Platt on Covenants, 69.

(2) *Flight v. Glossopp*, 2 Scott, 220. 2 Bing. N. C. 125.

(3) *Touchst.* by Atherley, 161. *Vernon v. Smith*, 5 B. & A. 7.

(4) *Mayor v. Steward*, 4 Burr. 2439.

(5) *Webb v. Russell*, 3 T. R. 393

(6) *Canham v. Rust*, 8 Taunt. 227.

(7) *Anon.* Godb. 120. pl. 140.

8. DEPENDENT, CONCURRENT, AND MUTUAL OR INDEPENDENT COVENANTS.

There are likewise dependent, concurrent, and mutual or independent covenants.

First, there are covenants, which are conditions and dependent, in which the performance of one depends on the prior performance of another; and therefore, till the prior condition be performed, the other party is not liable to an action on his covenant. (1)

A covenant to be a hired servant for one year and a quarter, and to pay, at the expiration, 200*l.*, when defendant should surrender his trade to plaintiff's nephew, or such other person as he should appoint, was upon demurrer held to be a condition precedent, that plaintiff should have a sufficient security for the payment of the sum. (2)

Where A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure to pay 21*l.*:—It was holden, that these were dependent covenants, and that A. could not recover the 21*l.* without shewing a conveyance on his part, or a tender of one. (3)

In *Glazebrook v. Woodrow* (4) the plaintiff covenanted to sell to the defendant a school house, &c. and to convey the same to him on or before the 1st of August, 1797, and to deliver up the possession to him on the 24th of June, 1796; and in consideration thereof, the defendant covenanted to pay to the plaintiff 120*l.* on or before the 1st of August, 1797:—It was holden, that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed, or tendered a conveyance to the defendant.

Concurrent covenants are those, where mutual conditions are to be performed at the same time; and in these, if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain, that either is obliged to do the first act.

If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant. (5)

But where there are mutual covenants, which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. (6)

Where a covenant is part only of the consideration on one side, it is an independent covenant, and not a condition precedent. (7)

Therefore, where the plaintiff assigned to the defendant a fish business, and also his interest in a salmon fishery, and agreed not to interfere with the business, and the defendant agreed to grant the plaintiff an annuity; a

DEPENDENT,
CONCURRENT,
AND MUTUAL OR
INDEPENDENT
COVENANTS.
Dependent
covenants.

Concurrent
covenants.

Mutual or in-
dependent
covenants.

(1) *Kington v. Preston*, 2 Doug. 689.

(2) *Anon. Loft*, 194.

(3) *Goodisson v. Nunn*, 4 T. R. 761.

(4) 8 *ibid.* 366.

(5) *Boone v. Eyre*, 2 W. Black. 1312.

S. C. nom. *Boone v. Eyre*, 1 Hen. Black 273. n.

(6) *Ibid.*

(7) *Carpenter v. Cresswell*, 4 Bing. 409

1 M. & P. 66.

DEPENDENT,
CONCURRENT,
AND MUTUAL OR
INDEPENDENT
COVENANTS.

plea, in an action for the annuity, that the plaintiff had interfered in the business;—was held bad. (1)

In *Stavers v. Curling* (2) the plaintiff, as captain of a South Sea whaler, covenanted with the defendant, that he would proceed to the fishery, and procure a cargo of sperm oil, &c. or as great a proportion as might be, under all circumstances within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit any one on board to do so. The defendants covenanted, on the performance of the before mentioned terms and conditions on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo:—It was holden, that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to an action on defendants' covenant.

A covenant to repair generally, and to repair within three months after notice in writing, are independent covenants (3); and where a lessee covenanted to leave premises in repair at the expiration of the term, and also, that the lessors might direct the lessee to complete the repair by giving six months' notice in writing:—It was held, that these were two distinct and separate covenants, the former of which was not qualified by the latter. (4)

Rules for the
construction
of dependent
and independ-
ent covenants.

The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. (5)

When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. (6)

Where a day certain is appointed for the payment of money; if such day is to occur after the time in which the consideration ought to be performed, for which the money is made payable, the performance of the consideration is a condition precedent to the payment of the money, and ought to be averred in an action brought for the money. (7)

Where mutual covenants go to a part only of the consideration on both sides, and where a breach may be paid for in damages, the defendant has a remedy on his covenant, and can not plead it as a condition precedent. (8)

If a day be appointed for payment of money, and the day arrives before

(1) *Carpenter v. Cresswell*, 4 Bing. 409. 1 M. & P. 66.

(2) 3 Bing. N. C. 355.

(3) *Doe d. Morecraft v. Meux*, 7 D. & R. 98. 4 B. & C. 606. 1 C. & P. 346.

(4) *Wood v. Day*, 1 Moore, 389. 7 Taunt. 646.

(5) *Kingston v. Preston*, cit. in *Jones v. Barkley*, 2 Doug. 689. *Thomas v. Cadwallader*, Willes, 496. Platt on Covenants, 79.

(6) *Boone v. Eyre*, 1 Hen. Black. 273. n. 2 W. Black. 1312. Platt on Covenants, 80. *St. Albans (Duke of) v. Shore*, 1 Hen. Black. 270. *Large v. Cheshire*, 1 Vent. 147. *Thomas v. Cadwallader*, Willes, 496.

(7) *Thorpe v. Thorpe*, 1 Ld. Raym. 665. 1 Mod. Ent. 111. *Smith v. Wilson*, 8 East, 437. *Cook v. Jennings*, 7 T. R. 381. *Thompson v. Brown*, 7 Taunt. 656. 1 Moore,

358., overruling *Hotham v. E. I. Comp.* 1 Doug. 272., vide etiam *Heard v. Wadham*, 1 East, 619. *Storer v. Gordon*, 3 M. & S. 308. *Fothergill v. Walton*, 8 Taunt. 576. *Gibbon v. Mendez*, 2 B. & A. 17. *Lock v. Wright*, Str. 569. 8 Mod. 40. *Porter v. Shephard*, 6 T. R. 665. *Worsley v. Wood*, ibid. 710. *Routledge v. Burrell*, 1 Hen. Black. 254. *Oldman v. Bewicke*, 2 ibid. 577. n. (a.), cit. 6 T. R. 714. *Anvert v. Ennover*, 2 Barn. 308. *Walker v. Harris*, Anst. 245. *Glazebrook v. Woodrow*, 8 T. R. 374. *Goodisson v. Nunn*, 4 ibid. 761. *Merrit v. Rane*, Str. 458. *Turner v. Goodwin*, Fort. 145.

(8) *Boone v. Eyre*, 1 Hen. Black. 273. n. 2 W. Black. 1312. *Fothergill v. Walton*, 8 Taunt. 576. *Campbell v. Jones*, 6 T. R. 570. *Carpenter v. Cresswell*, 4 Bing. 409. Platt on Covenants, 90.

the thing for which the money is to be paid can be done, there, though the agreement be to pay the money for the doing of the thing, yet an action may be brought for the money before the thing done, because the agreement is positive that the money shall be paid at the appointed day (1), and it is presumed that the party intended to rely on his remedy, and not make the performance a condition precedent. The same rule had before been propounded by Hale C. J. (2): "'Tis true," said he, "if there be a time limited for payment, which time may fall out before the work or thing be done, then the doing of it is not a precedent condition." (3)

DEPENDENT,
CONCURRENT,
AND MUTUAL OR
INDEPENDENT
COVENANTS.

9. VOID AND ILLEGAL COVENANTS.

I. Generally.

All the instances of conditions against law in a proper sense are reducible under one of these three heads: 1. Either to do something that is *malum in se* or *malum prohibitum* (4); 2. To omit the doing of something that is a duty (5); 3. To encourage such crimes and omissions. (6)

Every covenant is invalid which has for its object the performance of an act *malum in se*: thus, if one covenant to kill or rob a man, or commit a breach of the peace, it would be a void covenant. (7)

Covenants that are fraudulent (8), or in violation of the precepts of religion, or morality, or the laws of public decency, are void *ab initio* (9); and generally, when the matter being in a condition would invalidate the condition as against law, then being in a covenant, it will in like manner render the covenant invalid.

Covenants having for their object the encouragement of litigation, or the prevention of justice, are not lawful, although persons having a common interest may agree to unite in a defence, but then the agreement must not go beyond the common object. (10).

VOID AND IL-
LEGAL COVE-
NANTS.

GENERALLY.

Every covenant is invalid which is for the performance of an act *malum in se*.

Covenants founded in fraud, immorality, or vice.

Covenants for the encouragement of litigation.

II. Covenants void by the Act of God.

When the performance of a covenant becomes impracticable through the act of God, and there is no provision exonerating the covenantor from the performance, under such circumstances, he must answer for the breach of it in damages (11), because he might have provided against it by his contract. (12) In covenant on a coal lease to pay a certain proportion of the

COVENANTS
VOID BY THE
ACT OF GOD.

- (1) *Thorpe v. Thorpe*, 1 Ld. Raym. 665.
 (2) *Peter v. Opie*, 1 Vent. 177. 214.
Cowper v. Andrews, Hob. 41.
 (3) Platt on Covenants, 96. *Pordage v. Cole*, 1 Saund. 319. *Terry v. Duntze*, 2 Hen. Black. 389., cit. in *Heard v. Wadham*, 1 East, 629, 630. *Bach v. Owen*, 5 T. R. 409. *Russen v. Coleby*, 7 Mod. 236. *Ridg.* 154. *Hays v. Bickerstaffe*, 2 Mod. 34.
 (4) Co. Litt. 206.
 (5) Palm. 172. *Holder v. Taylor*, Hob. 12.
 (6) Fitz. Obligation, 13. Bro. Obli-
 gation, 34. *Dyer*, 118. *Mitchel v. Reynolds*, 1 P. Wms. 181.
 (7) Touchst. by Atherley, 163. Co. Litt. 206. (b.) *Atkinson v. Ritchie*, 10 East, 534, 535.
 (8) *Waldo v. Martin*, 4 B. & C. 319.
 (9) *Franco v. Bolton*, 3 Ves. 371. *Gray v. Mathias*, 5 ibid. 286. *Knye v. Moore*, 1 S. & S. 61. 2 ibid. 260. *Priest v. Parrot*, 2 Ves. sen. 160.
 (10) *Capes v. Hutton*, 2 Russ. 357.
 (11) *Shubrick v. Salmond*, 3 Burr. 1637.
 (12) *Paradine v. Jane*, Aleyn, 27.

VOID AND
ILLEGAL
COVENANTS.

The law will excuse a duty or charge, if impossible to be performed, without covenantor's default.

value of 9 cwt. of the coals to be raised, unless prevented by unavoidable accident from working the pit, it was pleaded, that the defendant was prevented by unavoidable accident. It appeared in evidence, that the accident might have been remedied at a greater expense than the value of the coals to be raised: and it was holden, that the plaintiff was entitled to recover. (1)

But if the law create a duty or charge, and the party be disabled to perform it, without any default in him, and hath no remedy over, then the law will excuse him, as in the case of waste, where the house is destroyed by a tempest. In some cases where the act of God renders performance absolutely impossible, the covenantor will be discharged, *quia impotens excusat legem*; as if a lessee covenant to leave a wood in as good plight as it was at the time of the lease, and afterwards the trees are blown down by a tempest. (2)

If a man covenant to deliver goods at London, the overturning of the boat by tempest will not excuse him. (3)

It is laid down in Rolle's Abridgment (4), that if a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant, for not doing thereof before the day; for the law will not compel him to venture his life for it, but he may do it after. And Sheppard (5) says, it must be done in convenient time afterwards, for otherwise the covenant will be broken. But it may be doubted whether this position is law at the present day; indeed, the principle of it has been much shaken by *Barker v. Hodgson* (6), where the charterer of a ship, who covenanted to send a cargo alongside at a foreign port, was not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the law at the port, and though he could not have any communication without danger of contracting and communicating the disease: and Lord Ellenborough observed, "Perhaps it is too much to say, that the freighter was compelled to load his cargo; but if he was unable to do the thing, was he not answerable for it upon his covenant?" "The question is, on which side the burthen is to fall?" So that this subsequent determination appears to impeach most materially the doctrine advanced in Rolle's Abridgment. And this decision is in accordance with one of rather earlier date. (7)

COVENANTS
VOID OR DIS-
CHARGED BY
STATUTE.

A subsequent statute will ex-

III. Covenants void or discharged by Statute.

All covenants for the purpose of evading or contravening the provisions of legislative enactments are void; therefore, if performance of a covenant be rendered unlawful by the government of this country, the contract will

(1) *Morris v. Smith*, 3 Doug. 279.

(2) 40 Edw. 3. c. 6., vide etiam *Williams v. Lloyd*, Sir W. Jones, 179. *Lawrence v. Twentiman*, 1 Rol. Abr. Condition (G.) pl. 10.

(3) *Thompson v. Miles*, 7 T. R. 488. 1 Rol. Abr. Condition (G.), pl. 9. Danv. Abr. Condition (G.), pl. 9.

(4) *Lawrence v. Twentiman*, 1 Rol. Abr. Condition (G.), pl. 10.

(5) Touchst. by Atherley, 178.

(6) 3 M. & S. 267.

(7) Platt on Covenants, 583, 584.

be dissolved on both sides ; and either party, inasmuch as he has been thus compelled to abandon his contract, will be excused for the non performance of it, and not liable for damages. (1)

A covenant will be repealed by act of parliament under the following circumstances: thus, if H. covenant not to do an act or thing which it was lawful to do, and an act of Parliament be made afterwards, which compels him to do it, the statute repeals the covenant: so if H. covenant to do a thing which is lawful, and a subsequent act of Parliament hinders him from doing it, the covenant is repealed. (2) But if a man covenant not to do a thing which then was unlawful, and a statute afterwards makes it lawful to do it, such act of Parliament does not repeal the covenant. (3)

In the *Gaslight and Coke Company v. Turner* (4) it was held to be a good plea in covenant on a lease, that the lease was entered into by the plaintiff and the defendant, and that the premises were let to the defendant for the express purpose of being used by the defendant in drawing oil of tar, and boiling oil of tar, contrary to the provisions of stat. 25 Geo. 3. c. 77.

If in consequence of a subsequent statute, the performance of an agreement cannot be effected, it may be executed in such part, and to such extent, as the law will permit.

If the performance of a covenant be prevented by the prohibition of a foreign country (5), it will not discharge the covenantor or covenantee.

IV. *Covenants rendered void by the Act of Law.*

If the covenant be dependent on the enjoyment of the interest, a future destruction of that interest will defeat the covenant: thus, if lessee for years covenant to repair, and yield up at the end of the term, an eviction by elder title, absolves him from the agreement, for the land being gone the covenant is annulled. (6)

A co-covenantor cannot discharge himself from his responsibility in consequence of the infancy of his covenantor (7), and a person covenanting with an infant, will be held to such agreement. (8)

In a joint covenant, one covenantee cannot be held responsible and the other not so; and if one suffer judgment by default, or confess judgment, and the other prove performance, no writ of inquiry can be had against the former. (9)

If damages be recovered for a breach of a specific act, the covenantee becomes released. (10)

If a party covenant to do that which is impossible, as undertaking to go to China in three hours, such a covenant will be void. (11) And so

VOID AND ILLEGAL COVENANTS.

tinguish previous inconsistent covenants with its provisions.

House built in contravention of stat. 25 Geo. 3. c. 27.

Statute rendering performance of an agreement illegal.

Covenants at variance with the enactments of a foreign country.

COVENANTS
RENDERED VOID
BY THE ACT OF
LAW.

Where covenant dependent on the interest enjoyed, a future destruction of that interest will defeat the covenant.

Effect of incompetency of a minor in relation to his co-covenantor.

Effect of two persons covenanting for the execution of any duty.

Recovery of damages is an extinguishment of the covenant.

(1) *Barker v. Hodgson*, 3 M. & S. 267.

(2) *Dyer*, 27. pl. 278.

(3) *Brewster v. Kitchell*, 12 Mod. 166. 1 Salk. 198.

(4) 6 Bing. N. C. 324.

(5) *Atkinson v. Ritchie*, 10 East, 534, 535.

(6) *Andrews v. Needham*, Noy, 75. Cro. Eliz. 656.

(7) *Haw v. Ogle*, 4 Taunt. 10.

(8) *Farnham v. Atkins*, 1 Sid. 446. Platt on Covenants, 586.

(9) *Porter v. Harris*, 1 Lev. 63. *Morgan v. Edwards*, 6 Taunt. 398.

(10) *Anon.* 3 Leon. 51. pl. 72.

(11) Co. Litt. 206. (b.) Touchst. by Atherley, 164.

VOID AND
ILLEGAL
COVENANTS.VOID COV-
ENANTS.

Covenant from
its nature im-
possible to be
performed.

Impossibility
must exist at
the time of the
creation of the
covenant.

Covenants
within the
range of pos-
sibility will be
upheld.

Investment of
money.

Covenants op-
posed to public
policy.

An estate good
in its creation
but defeated by
a condition
subsequent.

Separate and
distinct cove-
nant.

Property
transferred by
a void bill of
sale.

on the same ground is a covenant by a man to make a feoffment to his wife. (1)

The impossibility must however be co-existent at the time of its creation; for if the execution of the duty stipulated for be possible at the time, but afterwards, in consequences of adventitious circumstances, become impossible, the covenantor will still be liable on his express covenant (2), unless, perhaps, the performance of the covenant be rendered impossible by the act of God, or be rendered impossible by the covenantee himself. (3)

But a covenant, if within the range of possibility, will be upheld, however absurd or improbable the event may be (4); and if a covenant be partially opposed to the common law, and partially good, it will be upheld as to that part which is good. (5)

In covenant to invest a sum in bank annuities, or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens for the time being, in trust for the support of a parish school for poor children, and in further trust for the distribution of coals, &c. among poor persons of the parish: — It was holden, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the archdeacon, vicar, and churchwardens. And this, although it was suggested in argument, that by the practice at the bank, an investment would not be received there in the above corporate names. (6)

Covenants in contravention of public policy are void, such as covenants in restraint of marriage generally, although a covenant is not void against marrying any particular individual. (7)

If an estate, valid in its creation, be defeated by a condition subsequent, a dependent covenant will still continue in operation, to answer breaches committed prior to the determination of the estate. (8)

But, if the covenant be separate and distinct, and independent of any interest embodied in the deed, the covenantor cannot discharge himself by shewing that the estate intended to be granted did not pass. (9)

Though the bill of sale for transferring the property in a ship by way of mortgage be void as such, for default of reciting the certificate of registry therein, as required by stat. 26 Geo. 3. c. 60. s. 17., still the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of money lent. (10)

(1) Touchst. by Atherley, 164.

(2) *Shubrick v. Salmond*, 3 Burr. 1637.
Atkinson v. Ritchie, 10 East, 530.

(3) Co. Litt. 206. (b.) *Win's case*, cit.
Bridges v. Biddingsfield, 2 Mod. 28.

(4) 1 Rol. Abr. Condition (D.), 420.

(5) *Pigot's case*, 11 Co. 27. (b.) Ley,
79. Platt on Covenants, 570.

(6) *Tysnell v. Robinson*, 7 A. & E. 798.
Quare, Whether, if such facts had regularly
appeared, it would have been an answer to
the action?

(7) *Lowe v. Peers*, 4 Burr. 2225. Wil-
mot, 364. *Cock v. Richards*, 10 Ves. 429.
Baker v. White, 2 Vern. 215. 1 Eq. Ca. Abr.
89. pl. 7.

(8) *Raynolds v. Woolmer*, Freem. 41. *Hill*
v. Pilkinton, Cro. Eliz. 244.

(9) *Northcott v. Underhill*, 1 Ld. Raym.
388.

(10) *Karrison v. Cole*, 8 East, 231. *Biddell*
v. Leader, 1 B. & C. 327.

VOID AND
ILLEGAL
COVENANTS.V. *Effect of a void Deed.*

The covenants in a void deed cannot be enforced, and no interest can be derived from it. (1)

If no estate passes under a covenant, no rent can be enforced: *sed aliter*, where an estate does pass, although not from the party to whom the rent is reserved. (2)

EFFECT OF A
VOID DEED.

Rent cannot be enforced under a lease where no estate passes.

10. COVENANTS SECURED BY BOND OR PENALTY.

In *Lowe v. Peers* (3) Lord Mansfield observed, "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election: he may either bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty, he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole; or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*."

COVENANTS SE-
CURED BY BOND
OR PENALTY.

Difference between covenants in general and covenants secured by penalty or forfeiture.

Another distinction is, where the penalty is only in nature of punishment, or *in terrorem*, and where it makes part of the agreement as a compensation. As if the covenant be not to plough meadow, and there be penalty of 50*l.* an acre, there a court of equity will relieve, for there the penalty is as a punishment: but if the covenant had been 'to pay 5*l.* for every acre of meadow ploughed,' this is part of the agreement, and there is no alternative; it is the particular liquidated sum agreed upon by the parties, and is the proper quantum of the damages which the jury ought to find. (4)

Where penalty is only in nature of a punishment or *in terrorem*; and where it makes part of the agreement as a compensation.

And therefore, where the covenant was by the defendant, not to marry any one except the plaintiff, and if he did, that he would pay her 1000*l.*: this sum, it was held, should be the settled quantum of the damages to be found by the jury. (5)

A difference is also to be observed between assigning a breach on an action of covenant, and in debt on a bond for the performance of covenants: thus in covenant it is sufficient to assign the breach in the words of the covenant; because all is recoverable in damages, and there shall be what the plaintiff can prove he has sustained; but in debt on the bond a certain breach must be assigned. (6)

Difference between assigning a breach on an action of covenant and in debt.

Though if the substance of the breach so assigned is proved, it is sufficient, though not precisely as laid; as bond by the lessee not to cut trees, and breach assigned in cutting twenty trees, proof of the cutting of ten will support the action, for the cutting of the trees is the substance. (7)

(1) *Soprani v. Skurro*, Yelv. 18. *Andrew v. Pearce*, 1 N. R. 158.

(2) *Stokes v. Russell*, 3 T. R. 678. *Frothing v. Small*, 2 Ld. Raym. 1418. Str. 705. *May v. Trye*, Freeman. 447. Platt on Covenants, 575.

(3) 4 Burr. 2225. 1 Esp. N. P. C. 304.

(4) Ibid. 2228. *Rolfe v. Peterson*, 6 Bro. Cas. Parl. 470.

(5) *Lowe v. Peers*, 4 Burr. 2225.

(6) *Brigstock v. Stanion*, 1 Ld. Raym. 107.

(7) Co. Litt. 282. (a.)

COVENANTS SECURED BY BOND OR PENALTY.

Stat. 8 & 9 Will. 3. c. 11. s. 8.

At common law, if debt was brought on a bond of performance of covenants, the plaintiff could assign but a single breach. But if the action was covenant, he might assign as many as he pleased.

But it is now enacted by stat. 8 & 9 Will. 3. c. 11. s. 8., that in debt on a bond or penal sum, for the performance of covenants, the plaintiff may assign as many breaches as he pleases, and the jury shall assess damages for as many as have been broken; and in case of judgment on demurrer, or by *nil dicit*, the plaintiff may suggest upon the roll as many breaches as he shall think fit, upon which a writ of inquiry shall go; but the defendant may pay all damages and costs, &c. and then there shall be a stay of execution; but the judgment shall still remain as a further security, to answer the plaintiff such damages as may be sustained for further breach of any covenant in the same indenture, upon which the plaintiff may have a *scire facias*, *toties quoties*.

The reason of enacting this statute was this, that at common law the party might bring debt, and recover the whole penalty, which, as it often exceeded the real damage, the other party was driven to equity for that relief which the statute gives.

Assessment of damages.

Under the foregoing statute it has been decided, that where debt was brought for the penalty, and issue joined on *nil debit*, the jury ought not to give a verdict for the whole, but should assess damages for each breach assigned; and therefore, where the plaintiff took a verdict for the whole penalty, a *venire facias de novo* was awarded. (1)

But where there is a judgment on demurrer, or *nil dicit*, then the plaintiff must have judgment for the whole penalty; but he cannot take out execution for the whole, but must sue out a writ of inquiry; but the judgment still remains as a security for further breaches. (2)

Bond forfeited by breach of a covenant in law.

But on the defendant's paying the penalty of the bond and the costs of the action, the court will order satisfaction to be entered on the record. (3) It may be observed, that if a bond be for performance of covenants, it is forfeited by a breach of a covenant in law, as if the lessee be evicted out of the premises demised (4); and if a man covenant to enter into a bond to the lessee for the enjoyment of certain lands demised, and does not express what the sum shall be, he shall be bound in such a sum as is equal to the value of the land. (5)

Bond omitting to state the amount of penalty.

Effect of a void bond.

Where a bond is for the performance of covenants in a void deed, the bond is also void (6); as if it be given for performance of covenants contained in a void lease (7), because it would be absurd that a statute which by destroying a lease rescinds the contract, should still suffer a bond for the payment of the rent to continue in force.

Where debt may be maintained, although the deed containing the covenants be suspended by marriage.

Debt may be maintained on a bond given to a third person for performance of covenants, although the deed containing the covenants be suspended by marriage; because, though the articles are suspended by the marriage, yet it was the intent of the parties that the things should be performed, and the bond being made to a third person is available (8); and

(1) *Drage v. Brand*, 2 Wils. 377.
 (2) *Goodwin v. Crowle*, Cowp. 357.
 (3) *Wilde v. Clarkson*, 6 T. R. 309.
 (4) *Nole's case*, 4 Co. 80.
 (5) 1 Esp. N. P. 305.

(6) *Copenhurst v. Copenhurst*, Sir T. Raym. 27.
 (7) *Champion v. Skipworth*, 1 Sid. 308.
 (8) *Gibbons v. Davies*, Comb. 242.

a bond for performance of all covenants and conditions in a mortgage is forfeited by non payment of the mortgage money. (1)

COVENANTS SECURED BY BOND OR PENALTY.

11. COVENANTS FOR TITLE.

COVENANTS FOR TITLE.

I. Generally.

GENERALLY.

Covenants for title are frequently termed real covenants, and pass by the common law to the assignees of the land, who may maintain actions upon them against the vendor and his real and personal representatives. (2) And as the covenants relate to the land, the assignee may maintain an action on them, although they were entered into with the original grantee and his heirs only. (3) And where the covenants run with the land, although they are entered into with the party, his executors and administrators, yet they will go to the heir with the land. (4) The right of action, even for a breach in the ancestor's lifetime, will descend to the heir, and not to the executor, when no actual damage was sustained by the ancestor. (5)

Covenants for title frequently termed real covenants.

By whom and against whom an action may be maintained for breach of covenant for title.

Covenant will lie by the devisee of lands in fee, though broken in the testator's lifetime. For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but it is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. (6)

Devisee of lands in fee.

Covenants for title run with the land where a term of years only is assigned, in the same manner as when the fee is conveyed. (7)

Assignment of term of years.

Cestuique use are grantees within stat. 32 Hen. 8. c. 34., and are therefore entitled to the benefit of all covenants entered into by persons selling land, for securing the title to such land. (8)

Cestuique use.

Covenants for title run with the land in the hands of alienees, who may maintain actions upon them as assignees by the common law; and this is expressly laid down without reference to stat. 32 Hen. 8. in Rolle's statement of *Middlemore v. Goodale* (9); and the statute relates only to covenants which are a charge upon, or incident to, reversions.

Alienees.

Where a lessee assigns and grants over his lease by deed, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word "grant" in the deed. And consequently, if upon such distress he has paid the rent to release his own goods, he cannot sue the assignor in *assumpsit* for the amount paid; although the assignor,

Covenant can be maintained on the word "grant" for distress for rent by the superior landlord.

(1) *Tomles v. Chandler*, 2 Lev. 116.

Nottle, 1 M. & S. 355. *King v. Jones*, 5 Taunt. 418. 4 M. & S. 188. *Orme v. Broughton*, 10 Bing. 533.

(2) 2 Sug. V. & P. 458. *Campbell v. Lewis*, 3 B. & A. 392. *Lewis v. Campbell*, 8 Taunt. 715.

(6) *Kingdon v. Nottle*, 4 M. & S. 53.

(3) Co. Litt. 884. (b.); 385. (a.) *Spencer's case*, 5 Co. 16. *Bally v. Wells*, 3 Wils. 25. *Tatem v. Chaplin*, 2 Hen. Black. 133.

(7) *Noke v. Awdler*, Cro. Eliz. 436. *Lewis v. Campbell*, 8 Taunt. 715. 3 B. & A. 392. 2 Sug. V. & P. 459.

(4) *Lougher v. Williams*, 2 Lev. 92.

(8) 4 Cruise's Dig. 409.

(5) 2 Sug. V. & P. 458. *Kingdon v.*

(9) 1 Rol. Abr. Covenant (K.), pl. 6.

**COVENANTS
FOR TITLE.**

Construction of
the words "all
persons claim-
ing under him,"
&c.

after such distress and payment, may have promised the plaintiff to repay him the amount; at least if there be not a new consideration for such promise, as forbearance. (1)

The covenant for quiet enjoyment is usually from any acts of the lessor, or any claiming under him. Those who claim under him are those who come in by privity of title, as heir, executor, assignee.

But there are others to whom this covenant extends: thus, in *Hurd v. Fletcher* (2) a feme covert, seised in fee, joined with her husband in levying a fine to the use of the husband for life, with power to make leases with the usual restrictions, remainder to trustees to secure the wife's jointure, remainder over with a joint power of revocation during their joint lives, and to declare new uses; they did revoke and declare new uses, taking away all the uses which followed the husband's estate for life, and leasing power, and limiting new uses to the wife for life, and, after several intermediate remainders, to Lord Tankerville in tail; after this new declaration of uses, the husband made the lease in question with the covenant for quiet enjoyment against him, and all claiming under him; Lord Tankerville having evicted the lessee, covenant was adjudged to lie against the executors of the husband; for, though the estate moved from the wife, yet the husband's assent being necessary to the declaring of the new uses, Lord Tankerville was a person claiming under him, and so within the covenant. (3)

Tenant for life and his eldest son, the remainder-man in tail, leased to E.S. for ninety-nine years, and gave E.S., who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. E.S. underlet to W. for sixty years, and covenanted with W. against eviction by any one claiming under E.S., or by his acts, means, consent, neglect, default, privity, or concealment. Tenant for life and his eldest son being dead without issue, W. was evicted by the next remainder-man in tail:—Held, that E. S. was not liable on his covenant to W., the eviction being by title paramount, which E. S. had no means of defeating. (4)

If a lease contain a covenant for quiet enjoyment against the lessor, and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word "demise." (5)

Acts of ser-
vants.

The act of a servant who makes an entry by command of his master in violation of the covenant for quiet enjoyment, will be considered a breach. (6)

Definition of
the words
"means,"
"title," or "pro-
curement."

And with regard to the words "*means*," "*title*," or "*procurement*," where a husband purchased lands to him and his wife and the heirs of the husband, and afterwards made a lease, and covenanted for quiet enjoyment, without any impediment, expulsion, or interruption, by himself, his heirs, executors, or administrators, or by or through any other, by his means, title, or procurement, the entry of the widow after his death was deemed to be within the covenant; because, although in point of estate the widow was in by the vendor, yet it was by means of the purchase and the procurement of the

(1) *Baber v. Harris*, 9 A. & E. 532.

(2) *Doug.* 43.

(3) *Woodhouse v. Jenkins*, 9 Bing. 431.,

vide etiam *Evans v. Vaughan*, 4 B. & C. 261.
6 D. & R. 349.

(4) *Merrill v. Frame*, 4 Taunt. 329.

(5) *Seaman v. Browning*, 1 Leon. 157.

husband, for if the husband had not procured the purchase, she would not have had any estate. (1)

The word "*acts*" signifies something done by the person against whose acts the covenant is made; and the word "*means*" has a similar import, something proceeding from the person covenanting. Accordingly, where there was a covenant by a lessor, that the lessee should hold the premises without any let, suit, interruption, &c. by the lessor, his executors, &c. or by or through his or their acts, means, right, &c.; and the under-lessor, in ignorance of a clause prohibiting the exercise of a business on the premises (a right of re-entry on such event being reserved to the landlord), underlet to a tenant who commenced the business of an auctioneer, thereby incurring a forfeiture, of which the original lessor took advantage; as the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises, it was not shewn that a breach of the covenant contained in the lease had been committed, and judgment was given for the defendant. (2)

And as to the word *default*, where a seller covenanted for quiet enjoyment, without any action, &c. or interruption, by the seller or those claiming from him, or by, through, or with his or their acts, means, default, privity, consent, or procurement, an arrear of quit-rent, which the purchaser was obliged to discharge, although not accruing while the vendor was owner of the premises, was held to amount to a breach of the covenant; for if it happened to be in arrear in his lifetime, it was a consequence of law, that it was by his default, in respect of the party with whom he covenanted to leave the estate unencumbered. (3)

Covenant for title against the acts of the covenantor, and those claiming under him, is not broken by the circumstance of the previous death of covenantor's *cestuique vie*. (4)

But, if a person conceiving that he is seised of land in fee, or possessed of a term of years, aliens and covenants that he is lawfully seised or possessed, or that he hath a good estate, or that he is able to make such an alienation &c. when in fact the estate is in some other at the time, the covenant is broken as soon as it is made. (5) So if one bargain and sell land by deed indented to B., and before the deed is enrolled grant the same land to C., and covenant that he is seised of a good estate in fee, the subsequent enrolment of the deed will work a breach of the covenant. (6) In fact, it has long been established, that when in a conveyance express covenants for warranty are introduced, none can be implied from the general words of the conveyance. (7)

In assigning a breach of this covenant, the plaintiff need not shew of what estate the covenantor was seised; but it will be sufficient to allege in the direct negative, that the party was not seised in fee. (8)

In a covenant on a demise of premises to one B. W. by the defendant

COVENANTS FOR TITLE.

Definition of the word "*acts*."

Definition of the word "*default*."

Covenant for title against the acts of covenantor not broken by death of covenantor's *cestuique vie*.
Covenant when broken.

In assigning breach, covenantee not bound to shew the estate of the covenantor.

(1) *Butler v. Swinerton*, Palm. 339. Cro. Jac. 657. Godb. 333., vide *Twiford v. Warcup*, cit. in *Musgrave v. Dashwood*, 2 Vern. 45. 63.

(2) *Spencer v. Marriott*, 1 B. & C. 457. 2 D. & R. 665.

(3) *Howes v. Brushfield*, 3 East. 491.

(4) *Stannard v. Forbes*, 6 A. & E. 572.

(5) *Northcote v. Warde*, Dyer, 303. (a.) *Salman v. Bradshaw*, Cro. Jac. 304.

(6) Touchst. by Atherley, 170. *Gray v. Briscoe*, Noy, 142.

(7) *Stannard v. Forbes*, 6 A. & E. 572.

(8) *Glinister v. Audley*, Sir T. Raym. 14. *Muscot v. Ballet*, Cro. Jac. 369.

**COVENANTS
FOR TITLE.**

for ten years, the defendant covenanting that he had full power and authority to demise, and that the said B. W., paying rent, and obeying the covenants in the lease, should have quiet possession; a declaration by the assignee of the premises from B. W., alleging that the defendant had not full power and authority as aforesaid, and that his interest lasted during the lifetime only of one S. C. who died before the expiration of the term, and that, therefore, one E. C., "lawfully claiming in that behalf, put out and evicted the plaintiff, and having a good title against the plaintiff and all persons claiming under him, entered into, and upon the said premises:"—was held ill for not shewing the manner in which the title of E. C. commenced. (1)

**COVENANTS FOR
PRODUCTION OF
DEEDS OR IN-
DIVIDUALS.**

Covenants for production of deeds run with the land.

II. Covenants for Production of Deeds or Individuals.

Covenants for production of deeds are real covenants, and run with the land for the benefit of purchasers, but not for the benefit of vendors (2), i. e. purchasers from the covenantee may take advantage of them against the covenantors themselves; but the liability will not extend to the covenantors' assignees.

When it is intended, that the purchaser shall have the legal right to the production of the deeds, he should have a regular deed of covenant for their production, entered into by the person in whose custody they are clothed with the legal right.

Without covenant for the production of deeds, a purchaser is not compellable to complete the purchase.

If title deeds be retained by another, a purchaser is not compellable to complete his purchase, without a covenant for their production. (3)

It would not, it should seem, be a sufficient reason why a seller should retain the deeds, where he sells the property in respect of which he retained them, that he had covenanted with a former purchaser of part of the estate for the production of them; but the seller would be entitled to have the covenant recited in the conveyance or indorsement, and might fairly require a covenant from the purchaser to perform it. The seller would not be at liberty, after the second sale, to deliver the deeds to the first purchaser. (4)

Where trover cannot be maintained.

Where a purchaser of a small part of an estate, takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession; on his taking a mortgage of the other part of the estate, on an assignment by him of the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for them; to entitle the plaintiff to recover, he should have a better right to the deeds than the defendant. (5)

What is a breach of a covenant to produce A. B., up-

In *Randle v. Lory* (6) it appeared that a lease for a term of years, if C. R. should so long live, contained a covenant that the lessee should, within three months after notice from the lessor, produce C. R., or other-

(1) *Brookes v. Humphries*, 7 Dowl. P. C. 118. To the above declaration the defendant having pleaded covenant to repair, of which he alleged a breach by the plaintiff, the plaintiff demurred to the plea; and it was held, that the objection might be taken to the declaration, although there was no demurrer, special or general. *Quere*, Whether the fulfilment of the covenant to repair

was a condition precedent to that, for quiet enjoyment?

(2) *Barclay v. Haine*, 1 S. & S. 449.

(3) *Ibid.* *Shore v. Collett*, Coop. 234. *Berry v. Fowag*, 2 Esp. N. P. C. 640. n.

(4) 2 Sug. V. & P. 92.

(5) *Yea v. Field*, 2 T. R. 708. *Platt on Covenants*, 232.

(6) 6 A. & E. 218.

wise make it appear to the lessor within the time aforesaid, or within a reasonable time, if C. R. should be in foreign parts, by a good and sufficient certificate that he was living, to which there was a proviso for re-entry on default. C. R. went to Brazil. The lessee being called upon under the covenant produced an affidavit, sworn in October 1834, stating that deponent had seen C. R. in Brazil in 1831, and had often heard of him from that time till January 1834, as residing at a place in Brazil, thirty miles from that in which deponent lived during the same period; and that the deponent was convinced that C. R. was alive and well in January 1834, when deponent left Brazil:—It was held, that the facts subsequent to 1831 could not be properly certified by hearsay evidence; and that the statement of occurrences in 1831, from which C. R. might be presumed alive in 1834 was not equivalent to such a certificate, as the covenant required, that C. R. was then alive; and therefore, that the affidavit was not a sufficient certificate, and a forfeiture was incurred. (1)

**COVENANTS
FOR TITLE.**

on whose life a term of years was granted.

III. *Vendor good Right to convey.*

A covenant that a vendor has a good right to convey is not confined to his title to the lands, but relates as well to his capacity to grant.

If the covenantor has not good right to convey, his covenant is broken (2); and so long as such incapacity exists, the breach continues.

If A. and wife are served in right of his wife, and A. covenants that they have good right to convey, the fact of the wife being under age at the time is a breach. (3)

The breach may be assigned in terms as general as the covenant, as that the party had not full power and lawful authority to convey; and the declaration need not shew, what person had right or estate in the premises, by which it may appear to the court, that the covenantor had not such authority to convey; the *onus probandi* the title which the defendant possessed at the period of the covenant is cast upon him. (4)

In *Raynolls v. Woolmer* (5) the defendant sold lands to the plaintiff, and covenanted that he had a good right to sell, and there was a proviso in the deed, that if 100*l.* were not paid at a future day, the grant, and bargain and sale, and all should be void. The money was not paid at the day. The court inclined to the opinion that, notwithstanding the non payment of the money on the day specified, covenant would lie; for there was a right of action attached in the bargainee immediately upon the sealing of the deed, which could not be divested by the non payment of the money, for he might have brought his action as soon as the deed was sealed. But, if the words had been, "the indenture shall be void," it would have been stronger against the plaintiff; for then there would have been nothing to ground his action upon.

**VENDOR GOOD
RIGHT TO CON-
VEY.**

Covenant that vendor has a good right to convey, relates to his capacity to grant.

Covenant when broken.

Breach may be assigned in terms as general as the covenant.

(1) *Randle v. Lory*, 6 A. & E. 218.

(2) *Raynolls v. Woolmer*, Freem. 41.

(3) *Nash v. Aston*, Sir T. Jones, 195.

(4) *Bradshaw's case*, 9 Co. 60. (b.) Jenk Cent. 305. Case, 79.

(5) Freem. 41.

COVENANTS
FOR TITLE.IV. *Quiet Enjoyment.*

QUIET ENJOYMENT.

To support covenant, some positive act of molestation, or some deed amounting to a prohibition of enjoyment, must be proved.

An ouster or expulsion need not take place.

Covenant for quiet enjoyment extends only to those claiming under a lawful title.

To maintain an action for a breach of a covenant for quiet enjoyment, some positive act of molestation, or some deed amounting to a prohibition of enjoyment, must be proved: it is from the *commission* of an absolute disturbance, or from a prevention of enjoyment, not from an *omission* to perform something, which, if executed, might add to the security of possession, that a breach arises: mere passive neutrality is insufficient to give the covenantee a right of action; but from active measures, or from hindrance of enjoyment only, can this right arise (1); thus, an action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. (2)

It is not to be understood that an ouster or expulsion must take place in order to found a suit: it is enough that the quiet enjoyment of the covenantee be invaded or prevented. In the case of landlord and tenant, the covenant means a legal entry and enjoyment without the permission of any other person. Thus, in covenant for quiet enjoyment, the declaration stated, that, before the demise to the plaintiff, the defendant had made a demise to A., which was then subsisting; that, in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he had never been in possession; to which it was pleaded that, for the first half year of the plaintiff's lease, the plaintiff might have enjoyed, &c. but that, for non payment of the rent for twenty-one days after that half year, the defendant had a right to re-enter, according to a proviso in the lease, and that he did re-enter, &c.:—It was held on demurrer, that this plea was no answer to the plaintiff's demand. (3)

Where there is a covenant for quiet enjoyment, this will not extend to a tortious ejectment or eviction by a stranger, because that for this wrong the lessee may have his remedy by action against the stranger himself; but if the lessee be ejected by the lessor himself, there the lessee may have covenant. (4) But if the stranger claim by older title than the lessors, the lessee may have covenant against the lessor; for he then can have no redress against the stranger, whose title is good in law. (5)

In *Hayes v. Bickerstaff* (6) it was adjudged, that unlawful molestations were not included under a covenant for quiet enjoyment, and the following reasons were assigned, that it was, 1. "unreasonable that a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing; 2. the covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrong-doer, and the covenantor made to defend a man from that from which the law defends every man, that is, from wrong; 3. a man shall have double remedy for the same injury against the covenantor, and also against the wrong-doer; 4. a way is opened to damage a third person (that is, the covenantor) by undiscoverable practice between the lessee and a

(1) *Warn v. Bickford*, 9 Price, 43., vide *Killigrew v. Sayer*, Carth. 196.

(2) *Per* Mansfield C. J. in *Morris v. Edgington*, 3 Taunt. 24.

(3) *Ludwell v. Newman*, 6 T. R. 458. *Levett v. Withrington*, Lutw. 97. *Hacket v.*

Glover, 10 Mod. 142. *Coleman v. Painter*, Aleyn, 19.

(4) *Tisdale v. Essex* (Sir William), Hob. 35. *Foster v. Mapes*, Cro. Eliz. 213. *Anon.* Loft. 460.

(5) F. N. B. 342. (K.)

(6) Vaugh. 122.

stranger, for there is no difficulty for the lessee secretly to procure a stranger to make a tortious entry, that he may therefore charge the covenantor with an action."

Although the covenantor after the wrongful act committed admits the wrong done, and the covenantee's right to compensation, and *promises* to make satisfaction in damages if the wrong-doer will not, this subsequent promise will not make that a breach of covenant which was no breach before, and consequently is not sufficient to found an action of covenant. (1)

If it be the intention of the parties to protect the purchaser against claims by *tort* as well as by *droit*, as if the covenant be, that the party shall enjoy against all claiming or pretending to claim any right, &c. these words will extend to all interruptions, legal or illegal. (2)

Though the general covenant to save harmless, or for quiet enjoyment, does not extend to the tortious acts of a stranger, yet the lessor may covenant against the acts of a particular person or persons; in which case covenant will lie, in case of a tortious ejectment by them. (3)

The breach of the covenant for quiet enjoyment must be by some act inconsistent with the covenant; for when the covenant was for quiet enjoyment, without let, trouble, or interruption, and the breach assigned was, that the lessee having underlet, the lessor had forbid the tenant to pay his rent: — It was held to be no breach, for there was no act causing a breach. (4)

No action by a landlord against his tenant, for any object unconnected with the tenant's estate or title, is a breach of the covenant for quiet enjoyment. (5)

In a demise of a mill and the stream of water flowing in the leat, belonging to the lessor; except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with, or should thereafter contract to supply, provided that such a quantity should be left as would be sufficient to supply the mill for twelve hours a day; it was covenanted, that the lessee should enjoy without interruption of the lessor, or of persons claiming by this act, means consent, default, privity, or procurement, and it was alleged as a breach, that by certain diversions authorised by the lessor, and other diversions by certain acts of parliament, all previous to the demise, there was not a supply of water for twelve hours a day: — It was holden no demise of water for twelve hours a day, and that diversions occasioned by contracts previous to the demise, were no breach of the covenant for quiet enjoyment. (6)

In *Upton v. Fergusson* (7) the plaintiff took of the defendant a house at a yearly rent, under an agreement, by the terms of which the latter undertook that, up to the date of the agreement, he had paid, or would pay, "all arrears of rent, rates, taxes, or assessments;" and the former agreed, that, "from and after that day, the same should be kept paid by him for the time he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent: — It was holden, that there was

COVENANTS
FOR TITLE.

Promise from covenantor to indemnify covenantee for the acts of a wrong-doer will not constitute a breach of covenant.

Where purchaser to be protected against claims of *tort* as well as *droit*.

Covenant against the acts of particular persons.

Forbidding an under tenant to pay rent.

A suit by a landlord against his tenant for a collateral purpose, unconnected with title, not a breach of covenant for quiet enjoyment.

Where diversions of water, occasioned by contracts previous to the demise, no breach of covenant for quiet enjoyment.

Where distress for rent by superior landlord, no breach of covenant for quiet enjoyment.

(1) *Griffiths v. Brome*, 6 T. R. 66.

(2) *Southgate v. Chaplin*, Com. 230. *Lucy v. Levington*, 1 Vent. 175. *Hunt v. Allen*, Winch, 25.

(3) *Arg. Hob. 35. Perry v. Edwards*, Str. 400.

(4) *Witchcott v. Nine*, 1 Brownl. 81.

(5) *Morgan v. Hunt*, 2 Vent. 213. *Gervis v. Peade*, Cro. Eliz. 615.

(6) *Blatchford v. Plymouth (Mayor of)*, 3

Bing. N. C. 691.

(7) 3 M. & Sc. 88.

COVENANTS FOR TITLE.

Implied covenant for quiet enjoyment under the words "granted" and "demised."

Covenant does not extend to lessor to rebuild in case of accident.

Assignment of breach

INDEMNITY
AGAINST INCUMBRANCES.
Distinction between an "estate free from incumbrances," and "to enjoy free from incumbrances."

no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a yearly rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid.

There is an implied covenant for quiet enjoyment under the words "granted and demised." (1) The whole covenant implied in the word "demise," is restrained by an express covenant for quiet enjoyment. (2) And it seems, under the word "demise," the lessee may maintain an action of covenant against the lessor for not having sufficient power to demise for the whole term, whereby plaintiff was put to expense in procuring a better title for the whole term. (3)

A covenant for quiet enjoyment does not extend to oblige a lessor to rebuild in case of accident by fire. (4)

1. A license to search for and raise metals, and also to carry them away, and convert them to the licensor's own use, passes an interest, which is capable of being assigned.

2. A license to mine was granted, with a proviso, that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed a notice on the premises, that he intended to avoid the license, it should be lawful for the grantor to re-enter within a month after fixing the notice, and then the license should be void: — It was held, that notice to the grantee that unless he kept six miners at work, the grantor would re-enter at the expiration of a month, did not avoid the license, or render the grantor's re-entry lawful. (5)

In assigning a breach of covenant which was for quiet enjoyment, it is sufficient to allege, that, at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c. without shewing what title A. B. had, or that he evicted the plaintiff by legal process, &c. (6)

If a lessor covenant for quiet enjoyment against the lawful let, suit, entry, &c. of himself, his heirs, and assigns, the declaration for a breach of the covenant need not expressly allege that he entered "claiming title," if the disturbance complained of be such, as clearly appears to be an assertion of right. (7)

The common covenant for indemnity against incumbrances, is not a covenant that the estate is free, and shall remain free from incumbrances, but that the purchaser shall enjoy it free from such incumbrances. It was the opinion of Lord Chancellor Cowper (8), that there was a difference between a covenant, that the estate was free from incumbrances, and a covenant that the party should enjoy free from incumbrances; as, in the latter case, the covenant was not broken, notwithstanding the existence of incumbrances so long as undisturbed possession was enjoyed. The consequence is, that in order to justify legal proceedings on this covenant against

(1) *Iggulden v. May*, 9 Ves. 330. 7 East, 237. 3 Smith, 269. 2 N. R. 449.

(2) *Line v. Stephenson*, 4 Bing. N. C. 678.

(3) *Fraser v. Shey*, 2 Chitt. 646.

(4) *Brown v. Quilter*, Ambl. 621. 2 Eden, 219.

(5) *Musket v. Hill*, 5 Bing. N. C. 694. It was also holden, that for such re-entry and intrusion the grantee might sue in case.

(6) *Foster v. Pierson*, 4 T. R. 617. *Holmes v. E. I. Comp.* 8 ibid. 278.

(7) *Lloyd v. Tomkies*, 1 ibid. 671.

(8) *Vane v. Barnard (Lord)*, Gilb. Ca. Eq. 7. *King v. Standish*, 1 Keb. 927. *Platt on Covenants*, 331., and vide *Andrew v. Tanner*, 1 Keb. 937.

incumbrances, it is requisite that an actual interruption, claim, or demand, be made on the purchaser, some hindrance or prevention of enjoyment proved; for the chance alone of his being disturbed and his liability to satisfy claimants, or in other words, the mere existence of outstanding incumbrances, unless they prevent entry and enjoyment, as in the case of a prior unexpired lease, will not constitute an immediate breach.

V. *Further Assurance.*

The covenant for further assurance equally applies to the title of the vendor, and to the instrument of conveyance to the vendee; and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter.

FURTHER AS-
SURANCE.

If the covenant is, "that the party shall make such further assurance to the lessee or purchaser as his counsel shall devise," in this case the lessor or purchaser himself cannot devise the assurance, for then it would be no plea to say, *quod consilium non dedit advisamentum*; but the counsel should devise it. (1)

What acts may
be required.

If a bad title be sold with a covenant for further assurance, the vendor will in equity be decreed to convey to the purchaser such title as he (the vendor) shall afterwards obtain, even although he acquired it by purchase for a valuable consideration. (2)

Bad title sold
with a cove-
nant for further
assurance.

A covenant to do all lawful and reasonable acts for further assurance, includes the levying a fine, though not particularly named. (3) So the satisfying of a judgment. (4) It would seem, also, that the purchaser may obtain a recovery from the vendor, the right, however, not extending to bind his issue in tail or remainder-men; nor to enforce the vendor to procure a recovery by a tenant in tail from whom the title was derived. (5)

A mortgagor under his covenant for further assurance, is not compellable to release his equity of redemption, nor the mortgagee entitled to a warranty in such further assurance. (6)

Mortgagor re-
leasing his
equity of re-
demption.

It was debated, but not decided, in *Fain v. Ayers* (7), whether under a covenant for further assurance, a purchaser who has not obtained the title deeds, or a covenant to produce them, can require a covenant to produce them to be executed to him. But the better opinion is, that he has no such right, for the covenant for further assurance seems to be confined to an assurance by way of conveyance, and not to extend to further obligations to be imposed on the covenantor by way of covenant. (8)

Right of pur-
chaser to a co-
venant for the
production of
title deeds un-
der vendor's
covenant for
further assur-
ance.

If A. covenant with B. to make such assurance as B.'s counsel should advise; B. must give notice of the assurance, otherwise A. cannot know how to make it; B. must also give the assurance to A. for his perusal, and to take advice on it; and A. must have convenient time to perfect it. (9)

(1) *Roswell's case*, 5 Co. 19. (b.)

(2) *Taylor v. Debar*, 27 & 28 Car. 2. 1 Ch. Ca. 274. 1 Eq. Ca. Abr. 26. (F.) pl. 2., vide *Seabourne v. Powell*, 2 Vern. 11. *Langford v. Pitt*, 2 P. Wms. 680.

(3) *King v. Jones*, 5 Taunt. 418. 1 Marsh. 107.

(4) *Ibid.*

(5) 1 Prest. Abst. 257.

(6) *Atkins v. Urton*, 1 Ld. Raym. 36. S. C. nom. *Atkin v. Uton*, Comb. 318.

(7) 2 S. & S. 583.

(8) 2 Sug. V. & P. 99. *Hallett v. Middleton*, 1 Russ. 256, 257.

(9) *Bennet's case*, Cro. Eliz. 9.

COVENANTS
FOR TITLE.Variation in
words.Definition of
the term "rea-
sonable acts."Reasonable
time for per-
formance.

A covenantor will not be justified in refusing to execute a deed of assurance, because the language does not precisely correspond with the covenant for assurance; but he would be justified if an essential difference existed. (1)

A covenant to do all "reasonable acts," means such acts as the law requires; and if it be an unnecessary act which is called for, it is not a reasonable act, or one which would be required by law. (2)

If the covenant be to make farther assurance *at all times* at the charge of the covenantee, the covenantor will have a reasonable time to do it, after having notice of what is intended. (3)

PAYMENT OF
RENT.Covenants for
payment of rent
run with the
land.

12. PAYMENT OF RENT.

Covenants for the payment of rent run with the land, and are binding on an assignee without his being specially named. (4)

If A. covenant to pay his lessor 10*l.* a year more rent in case another piece of land should be adjudged to the plaintiff, or the defendant should enjoy the same by any ways or means, A. is liable to pay the additional rent, although he derives a lease of a piece of land from another person. (5)

And if a tenant under a lease made by a jointress pays rent to the remainder-man with her knowledge, under a supposition that her estate was forfeited by her second marriage, which afterwards proved to be void, he is liable on her covenant to repay the same to her executors after her decease. (6)

By indenture certain lands were granted, bargained, sold, &c. to R. H. and the defendant, to the use and intent, that the plaintiff should receive out of the land a clear yearly rent of 6*l.*, and the said R. H. and the defendant covenanted, that they would well and truly pay the said rent to the plaintiff:—It was held, that debt could not be maintained for arrears of the annuity, but that covenant was the proper remedy. (7)

In an indenture executed by the lessee, a covenant for the payment of rent will arise on the words "yielding and paying."

Where, in an indenture, by which premises were demised by the plaintiff to one A. C., by whom they were assigned to the defendant, it was provided that, in the event of there being rent in arrear, the plaintiff should re-enter "as if the indenture had never been made:"—It was held, that the plaintiff was entitled to recover in an action of covenant for the rent reserved which accrued before the re-entry. (8)

In *Hopkins v. Helmore* (9) it appeared, that by indenture of the 21st March, 1828, the plaintiff demised a messuage to the defendant, *habendum* from 25th March then instant for the term of seven years then next ensuing, wanting seven days, yielding and paying yearly and every year during the

Covenant to
pay rent will
arise on the
words "yield-
ing and pay-
ing."Landlord to
re-enter "as if
the indenture
had never been
made" renders
tenant liable to
rent, up to the
period of re-
entry.

Liability to pay

(1) *Keble v. Brown*, Cro. Eliz. 660.(2) 2 Sug. V. & P. 542. *Warn v. Bickford*, 9 Price, 43., vide *Pudsey v. Newsam*, Yelv. 44. *Nash v. Aston*, Sir T. Jones, 195.(3) *Pezpoint v. Thimbleby*, 1 Rol. Abr. Condition (L.), pl. 2.(4) *Porter v. Sweetnam*, Sty. 406. *Isteed v. Stoneley*, 1 And. 82. *Parker v. Webb*, 3 Salk. 5. *Holford v. Hatch*, 1 Doug. 83.*Stevenson v. Lambard*, 2 East, 575. *Fyson v. Arthur*, 1 B. & C. 416.(5) *Heath v. Baker*, C. T. H. 319.(6) *Williams v. Bartholomew*, 1 B. & P. 326.(7) *Randall v. Rigby*, 6 Dowl. P. C. 650.(8) *Hartshorne v. Watson*, *ibid.* 404.

(9) 8 A. & E. 263.

term the yearly rent of 285*l.*, by four equal quarterly payments, 25th March, 24th June, 29th September, 25th December, in every year commencing 25th March then instant, and defendant covenanted to pay the said yearly rent of 285*l.* on the days and in the manner appointed. The breach alleged was, that in the last year the defendant only paid half the yearly rent, and on 25th March, 1835, two quarters came payable and were in arrear. The defendant paid into court the first of the two quarterly payments alleged to have become due on 25th March, 1835, but demurred to so much of the breach, as respected the non-payment of the second and last quarterly payment: — It was held, that 285*l.* was payable for each year; and that either the first payment was to be made on 25th March 1828, or a payment on the 25th March 1835, though after an expiration of the term, Lord Denman observing, “The defendant has contracted to pay 285*l.* in each year; one year wanting seven days is one of the years in popular language. Take this as a forehand rent: then there will be an equal quantity payable on each of the four days in each year, beginning with 25th March 1828: that will reconcile the whole.”

**PAYMENT
OF RENT.**
rent after ex-
piration of
term.

If the covenant be to pay rent half yearly from Michaelmas 1661 to Michaelmas 1668, the last day of the latter half year is inclusive, because, although in pleading *usque tale festum* will exclude that day, yet in a case of a reservation the construction is to be governed by the intent. (1)

Computation of
time of pay-
ment.

A covenant to pay rent at Christmas or Midsummer or within fourteen days after, the first payment to be made on Christmas Day, is not broken by non-payment on that day. (2)

So a covenant to pay rent contained in a lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is binding for rent accrued within the first seven years, as the lease is valid at least for that period. (3)

If a lease be made for seven, fourteen, or twenty-one years, the lessee only has the option of determining it, at the end of the first seven years, every doubtful grant being construed in favour of the grantee. (4) Where a lessee covenanted to pay rent, and not to assign without leave, provided, if the rent were in arrear, or the covenants on the lessee's part hereinafter contained were broken, the lessor might re-enter, and there were no covenants by the lessee after the proviso: — It was held, that the lessor could not re-enter on an assignment, as the court could not reject the word *hereinafter*, the intention of the parties not being clear. (5)

When the lessee has covenanted to pay his rent during the continuance of the term, so long will he be held liable *at law*, on his express agreement, however ruinous may be the condition of the premises, either from fire, floods, or other causes (6); but whether it is a good defence to an action on an agreement to take, assigning a breach in the not taking the house pursuant to the agreement, and the occupying the house and not paying rent

Fire, floods, &c.
no excuse for
non-perform-
ance of the co-
venant for pay-
ment of rent.

(1) *Pigot v. Bridge*, 1 Vent. 292.

(2) *Anon.* 2 Show. 77.

(3) *Ferguson v. Cornish*, 2 Burr. 1032.

(4) *Doe d. Webb v. Dixon*, 9 East, 15.

(5) *Ibid.* d. *Spencer v. Godwin*, 4 M. & S. 265.

(6) *Belfour v. Weston*, 1 T. R. 310. *Doe*

d. *Ellis v. Sandham*, *ibid.* 710. *Richard Le Taverner's case*, Dyer, 56. (a.) pl. 15. *Monk v. Cooper*, Str. 763. *Paradine v. Jane* Sty. 47. *Steele v. Wright*, cit. 1 T. R. 708. *Brown v. Quilter*, Ambl. 621., cit. 1 T. R. 708. *Weigall v. Waters*, 6 *ibid.* 488.

**PAYMENT
OF RENT.**

Where covenant for payment of rent will be implied.

for half a year, that the house was destroyed by fire before the day on which it was arranged that the defendant should enter and enjoy, does not appear to be settled. (1)

The case of *Attins v. Sealey* (2) affords an instance of the implication of a covenant for payment of rent. It appeared that R. S. A. being seised in fee of certain lands, devised life estates to his sons, R. A. and W. A. successively, with a general leasing power for three lives, or thirty-one years: R. A. the first tenant for life demised the lands to E. M., by indenture of lease containing the usual covenants and conditions. Upon his death, W. A., the second tenant for life, executed an instrument in the form of a deed-poll, but which was also executed by E. M., and was affixed with wax to the former lease, and which contained the following clause: "Now be it known, that I W. A., do renew the annexed indenture of lease, for and during the full space, time, and term of thirty-one years, subject to the payment of 100*l.* sterling, yearly, during the said term; and likewise subject to the covenants, provisions, and limitations in the said lease mentioned:" and it also contained the following covenant for quiet enjoyment: "And the said W. A., &c. doth covenant, promise, and agree with the said E. M., &c. that he the said E. M., &c. only paying the reserved yearly rent, and performing the covenants and agreements herein contained, which on his part, and their parts, are and ought to be performed, shall and may peaceably and quietly, enjoy the said demised premises, &c. during the continuance of the term:"—It was held, that though the words of the power were general, a covenant by the lessee for payment of rent was implied, in order to constitute a valid execution of the power; and that this instrument did not contain a valid covenant by the lessee for payment of the rent.

Liability of lessee not destroyed by assignment.

Liability of assignee.

The liability of the lessee on the covenant to pay rent will not be destroyed or diminished by his act of assigning over, but will endure against him (3), and his executors having assets. (4)

In case of the tenant's alienation, the assignee becomes chargeable in respect of privity of estate, and the original lessee continues amenable in respect of privity of contract; but a landlord cannot maintain an action of covenant for rent against an under-tenant. (5)

"Subject to the payment of the rent" are words of qualification and not of contract.

A. by indenture, executed by himself and B., assigned to B. certain premises, subject to the payment of the rent, and to the performance of the covenants and agreements reserved and contained in the original lease. B. entered under this assignment, and afterwards assigned over to a third person: and it was held, that B. was not liable in covenant to A. for rent, which the latter had been called upon to pay in consequence of the default of B.'s assignee, the words "subject to the payment of the rent, &c." being words of qualification and not of contract. (6)

Where covenant in gross and only personal.

Where J. B., being seised in fee, conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain, to be issuing out of the premises, and subject

(1) *Phillipson v. Leigh*, 1 Esp. N. P. C. 398. *Holtzapffel v. Baker*, 18 Ves. 117. *Platt on Covenants*, 198. *Hare v. Groves*, 8 Anat. 687. *Cutter v. Powell*, 6 T. R. 323. *Leeds v. Cheetham*, 1 Sim. 146.

(2) 1 *Alcock & Napier* (Irish), 359.

(3) *Edwards v. Morgan*, 3 Lev. 233. *Staines v. Morris*, 1 Ves. & B. 11. *Buckland v. Hall*, 8 Ves. 95.

(4) *Pitcher v. Tovey*, 1 Salk. 81.

(5) *Halford v. Hatch*, Doug. 183.

(6) *Walveridge v. Steward*, 3 M. & Sc. 561.

to the said rent, to the use of the defendant, his heirs and assigns; and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent; and to build, within one year, one or more messuages on the premises, for better securing the said rent; and J. B., within one year, demised the said rent to the plaintiffs for 1000 years:— It was held, that covenant would not lie by the plaintiffs for non payment of the rent, or for not building the messuages, for that the covenant was in gross, and only personal to J. B. (1)

PAYMENT
OF RENT.

In *Parnell v. Stewart* (2) the declaration stated, that E. demised certain premises to the plaintiff at a yearly rent, and that the plaintiff assigned all his estate and interest in the lease to the defendant, subject to the covenants and conditions contained in it; and that the defendant covenanted with the plaintiff, that he would pay the yearly rent to E. on the days and at the times as in the lease was reserved. The breach alleged, was non payment of the rent to E.; to which it was pleaded, that before the rent accrued due, the defendant assigned the lease to a third person: but such plea was held ill, Mr. Baron Pennefeather observing, "Here there is an express covenant by the defendant to pay the rent, at the days and times mentioned in the lease." "A covenant to pay at the days and times mentioned in the lease, must mean to pay at all the days and times mentioned in the lease; that is, during the term."

Where plea of
assignment bad.

Where a lease of lands in Ireland executed in 1721, reserved a rent of 100*l.* sterling, current and lawful money of Great Britain:— It was held, that this rent was discharged by a payment of 92*l.* 6*s.* 1*3d.* of the present currency. (3)

Calculation of
rent when re-
served in Irish
currency.

By stat. 4 Geo. 2. c. 28. s. 4., "if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the said ejectment shall cease, and be discontinued."

Relief at law
from forfeiture
on breach of
stat. 4 Geo. 2.
c. 28. s. 4.

This statute was intended to legalise the application of the tenant *before trial*, and the court has refused to extend the same after trial, lest they should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn. (4)

In *Doe d. Hitchings v. Lewis* (5) Lord Mansfield said, "The true end and professed intention of this act of parliament was, to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at *any* time, in order to found an application for relief in equity, and to *limit* and *confine* the tenant to six calendar months after execution executed, for his doing this, or else, that the landlord should thenceforth hold the demised premises discharged from the lease." This relief will not be withheld from the tenant, although he may have committed breaches of other covenants contained in the lease. (6)

Judgment of
Lord Mansfield
in *Doe d.*
Hitchings v.
Lewis.

(1) *Milnes v. Branch*, 5 M. & S. 411.

(2) 2 Jones (Irish), 294.

(3) *Neville v. Ponsonby*, 1 Jones & Carey (Irish), 113.

(4) *Roe d. West v. Davis*, 7 East, 363.

(5) 1 Burr. 619.

(6) *Swanton v. Biggs*, 1 Beat. 170., cit. Platt on Covenants, 208.

PAYMENT
OF RENT.Stat. 4 Geo. 2.
c. 28. s. 4.

Where an original contingent covenant may be declared on as an absolute covenant.

Ill assignment of breach.

Stat. 4 Geo. 2. c. 28. s. 4. also dispenses with the formality of a fresh demise, by enacting, that "if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them." (1)

Where an indenture of lease contained a proviso, that if a certain event should happen after the execution of the lease, the rent reserved should be reduced:—It was held, that, in an action of covenant for non payment of rent, the covenant might be declared upon as an absolute covenant. (2)

Sickleman v. Thissleton (3) will afford an illustration of what is considered an ill assignment of a breach. It appeared in a lease by the plaintiff to J. T. for years, of a messuage and farm, at a yearly rent payable quarterly, that J. T. covenanted to pay the rent at the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and that the defendant covenanted that J. T. should, at all times during the term, well and truly pay to plaintiff the said rent at the respective days, and also interest, and should duly observe all the covenants; and that in case J. T. should neglect to pay the rent for forty days, the defendant would pay it on demand:—It was held, that the defendant was not chargeable until after forty days and demand made; and that the plaintiff having declared generally, assigning for breach rent in arrear, and it appearing upon oyer that the lease contained the qualification above stated, the breach was ill assigned; and that there being general damages upon the whole declaration, which contained other breaches which were well assigned, judgment nevertheless should be arrested.

In covenant for seven quarters' rent, a plea shewing a surrender before the last four of the seven quarters' rent accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved. (4)

Lease entered into against statutable enactments.

It was held a good plea in covenant for rent, that the lease was entered into by the plaintiff and the defendant, and that the premises were let to the defendant, for the express purpose of being used by the defendant in drawing oil of tar and boiling oil and tar, contrary to the provisions of the Building Act. (5)

What a discharge.

Eviction by title, discharge of covenant for payment of rent.

An eviction by *title*, or a wrongful eviction of the tenant by the lord *himself*, will operate as a suspension of rent, and is a good plea in bar to an action of covenant for non-payment. (6)

Where there is a covenant in a lease to allow so much of the rent as may be necessary to be expended in repairing the premises, evidence of repairs

(1) Stat. 4 Geo. 2. c. 28. s. 4. Liability on covenants for payment of rent in cases of bankruptcy and insolvency; *antè*, 595. 695.

(2) *Grogan v. Magan*, 1 Alcock & Napier (Irish), 366.

(3) 6 M. & S. 9.

(4) *Barnard v. Duthy*, 5 Taunt. 27.

(5) *The Gas Light and Coke Comp. v. Turner*, 5 Bing. N. C. 666.

(6) *Dalston v. Reeve*, 1 Ld. Raym. 77. *Jordan v. Twells*, C. T. H. 171. *Cooper v.*

Young, Fortes. 360. Co. Litt. 148. (b.) *Walker's case*, 3 Co. 22. *Hodgkins v. Robson and Thornborrow*, 1 Vent. 276., et vide *Bushell v. Lechmore*, 1 Ld. Raym. 369. *Roper v. Lloyd*, Sir T. Jones, 148. *Hunt v. Cope*, Cowp. 242. *Lloyd v. Tomkies*, 1 T. R. 671. *Seddon v. Senate*, 13 East, 79. *Reynolds v. Buckle*, Hob. 326., sed vide contra, *Jones v. Bodinner*, Comb. 380. Platt on Covenants, 197.

and money expended thereon, will support the plea of *riens in arriere* to an avowry for rent. (1)

PAYMENT
OF RENT.

In covenant for five years' rent, due at the expiration of a term of years, the rent day for the last half year not falling within it, the plaintiff may recover damages for all, except the last half year's rent. (2)

What will support plea of *riens in arriere*.

Where in covenant on a lease it was stated as a breach, that during the term, to wit, on the 25th of March, 1826, the sum of 66*l.* 5*s.* for two quarters ending as aforesaid, became and was still due and in arrear; to which it was pleaded, that no quarter's rent ending the 25th of March then became due according to the provisions of the said indenture in manner and form as the plaintiff alleged; such plea was held ill, because "the substantial allegation is, that the rent became due during the term. It is no answer to that allegation to say, that the rent did not become due on a particular day, for, according to the older authorities, *riens en arriere* is no plea to a covenant for payment of rent on a particular day." (3)

Ill pleading.

To an action of covenant upon an indenture of demise for rent, the defendant pleaded stat. 3 & 4 Will. 4. c. 27. s. 42.; and it was held, that the statute did apply to such a case. (4)

Stat. 3 & 4 Will. 4. c. 27. applies to a covenant upon an indenture of demise for rent.

13. PAYMENT OF TAXES AND RATES, &c.

Where a party took a part of certain premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof, Mr. Justice Holroyd observed (5), "The lessor does not covenant to pay the taxes then paid or charged, but such as are payable and chargeable. The covenant, therefore, extended to all such taxes as were liable to be paid in respect of the premises, whether jointly or separately assessed. It was the duty of the parish officer to make separate assessments, and that is a strong circumstance to shew, what must have been the intention of the parties in framing these covenants. The lessee's covenant only extends to the payment of fresh taxes charged upon the premises; and the proper construction of it seems to me to be this, to hold that it extends either to new taxes or to such additional or further taxes as might be imposed in consequence of any improvement of the premises. But I think that the covenant ought not to be so construed as to make it depend on the misconduct of third persons, whether the lessor be or be not chargeable; I entirely agree, therefore, with my brother Bayley in thinking, that the lessor ought to pay such rates and taxes as are chargeable in respect of seven-sixteenths of premises, the whole of which are of the annual value of 35*l.* I think, therefore, that the rule should be made absolute to that extent."

PAYMENT OF
TAXES AND
RATES, &c.

Premises improved in value under a lease, by which the lessor covenanted to pay all taxes chargeable thereon, and the lessee to pay all fresh taxes.

Judgment of Mr. Justice Holroyd in *Watson v. Atkins*.

(1) *Woods v. Rock*, 1 Alcock & Napier (Irish), 57. *sed vide* *ibid.* 273. Com. Dig. Pleader, 2. (V. 14.) *Warner v. Theowald*, Cowp. 588.

(2) *Long v. Burroughs*, 1 Ld. Ken. 247.

(3) *Per* Tindal C. J. in *Baden v. Flight*, 3 Bing. N. C. 685. 1 Brownl. & Gold. 19.,

(4) *Bruen v. Nowlan*, 1 Jebb & Symes (Irish), 346.

(5) *Watson v. Atkins*, 3 B. & A. 647., *vide etiam* *Graham v. Wade*, 16 East, 29.

**PAYMENT OF
TAXES AND
RATES, &c.**

Where lessor only liable to pay taxes in proportion to the rent received, and not according to the improved value.

Judgment of Mr. Justice Holroyd in *Watson v. Home*.

The tenant of a piece of ground at a fixed annual rent, covenanted not to build without the license of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term. At the time of executing the lease the lessor gave the lessee license to build, which he did, and thereby much increased the annual value of the premises: — It was held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved value (1); Mr. Justice Holroyd observing, “The assessments ought to be made on the land in proportion to its annual value. If these taxes, therefore, had been payable in the first instance, partly by the landlord and partly by the tenant, each of them must have been assessed in proportion to that annual value which the land produced to him; but by law these taxes are payable by the tenant. It seems to me that the effect of the covenant in this case is to make the landlord and tenant contribute respectively to the taxes, in proportion to the benefit they received from the land. The defendant in terms covenanted to pay all taxes charged or to be charged on the demised piece or parcel of ground during the continuance of the term. The parties by the *reddendum* agreed that the annual value of that piece or parcel of ground should, during the continuance of the term, be of the annual value of 79*l.* 12*s.* 6*d.* The covenant to pay taxes must, therefore, be construed with reference to that value. By this construction each party will contribute to the taxes in proportion to the benefit which he receives from the land. The lessor will pay taxes upon the original value, and the tenant upon the improved value, of which he alone reaps the whole benefit. I think, therefore, that the landlord must pay that proportion of the taxes which would have been payable by the tenant if the premises had remained in their original state, and of the annual value of 79*l.* The improved value is 584*l.*; and although the tenant has compounded under the act of parliament, and pays only an annual value of 168*l.*, still he pays taxes in respect of the full improved value. The landlord must therefore pay a share of the taxes in the proportion of 79*l.* to 584*l.*” (2)

Taxes created by statute after execution of lease.

Where one makes a lease, and covenants to discharge the lessee of all burdens and charges, there being no tax at that time, but afterwards a fifteenth be granted by parliament, and the tenant distrained on for it, this would be within the covenant, because taxes are always a charge *in viris* or *in usu*. (3)

Covenant on a demise by a bishop.

A covenant on a demise by a bishop, “for him and his successors to discharge all public taxes assessed upon the land,” does not extend to a tax afterwards assessed by act of parliament. (4)

Words “taxes,” “assessments,” and “impositions,” do not extend to the erection of a party wall.

If a lessee covenant to pay, “from time to time, and at all times during the term, the land tax, and all other taxes, rates, assessments, and impositions, whatsoever, already laid, assessed, or imposed upon the said premises, or any part thereof, or upon the said (landlord) his heirs and assigns, in respect thereof, by authority of parliament, or otherwise how-

(1) *Watson v. Home*, 7 B. & C. 285. 1 M. & R. 191.

(2) Et vide *Hyde v. Hill*, 3 T. R. 377. *Rex v. Scott*, *ibid.* 602.

(3) *Hopwood v. Barefoot*, 11 Mod. 237. *Anon. Comb.* 211. *Blandford (Marchioness*

of) v. Marlborough (Dowager Duchess of), 2 Atk. 542, 543.

(4) *Davenant v. Salisbury (Bishop of)*, 1 Vent. 223. 3 Keb. 69. 2 Lev. 68., vide etiam *Chichester (Bishop of) v. Freedland*, Cro. Car. 47.

soever," he is not obliged by this covenant to bear the expense of erecting a party wall, since the words "taxes," "assessments," "impositions," &c. extend to the land tax and all other taxes *ejusdem generis*, but not to the erection of a party wall which is not a tax. (1)

PAYMENT OF
TAXES AND
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By stat. 38 Geo. 3. c. 5. s. 17. (made perpetual by 38 Geo. 3. c. 60. s. 1.) the tenants of all houses, lands, tenements, and hereditaments which shall be rated by virtue thereof, are required and authorised to pay such sum or sums of money as shall be rated upon such houses, &c. and to deduct out of the rent so much of the said rate as in respect of the said rents of any such houses, &c. the landlord should and ought to pay and bear. And the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions and payments upon the receipt of the residue of the rents.

LAND TAX.
Stat. 38 Geo. 3.
cc. 5. & 60.

The land tax acts also provide, that nothing therein contained, shall be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever, between landlord and tenant, or any other persons, touching the payment of taxes and assessments.

Chief Justice Holt in *Brewster v. Kitchin* (2) observed respecting this latter provision, that it was not absolutely necessary; "first, because these taxes lately assessed are subject-matter for the covenant, and therefore, though the act allows the tenant to make a deduction, that could never be a repeal of the covenant, because it is the thing upon which the covenant is grounded, and against which it provides: secondly, this provision for the tenant to deduct is for his advantage, which he might well waive by covenant, since he might well foresee it by the usage of the times; and a man may as well waive the benefit of a future law as of a law already made: thirdly, the tenant might well pay his rent without deduction, and not violate the law; for the difference where an act of parliament will amount to a repeal of a covenant, and where not, is this: where a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant, and *vice versa* (3): but where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant (4): so here, since the act does not compel the tenant to deduct, the act leaves the covenant in full force: fourthly, this clause was only inserted to expedite the payment to the crown; and where an act of parliament is made for a particular purpose, it will not extend to collateral qualities; and Barrington's case (5) is a strong case, where a grant to be free from a future tax was allowed by all the judges."

Judgment of
Chief Justice
Holt in *Brew-
ster v. Kitchin*.

With respect to the public the land tax is a tenant's tax, and consequently, where both landlords' and tenants' names are upon the rate, it is *prima facie* a rating of the tenant. (6)

Land tax con-
sidered as a
tenant's tax.

A net rent is a sum to be paid to the landlord clear of all deductions; A net rent is a

(1) *Southall v. Leadbetter*, 3 T. R. 458, affirmed in *Barrett v. Bedford (Duke of)*, 8 ibid. 605.

(2) 1 Ld. Raym. 320.

(3) *Dyer*, 27. pl. 178. 186—188.

(4) Ibid. 48. (b.) pl. 5.

(5) 8 Co. 138. (a.) 19 Hen. 6. c. 62.

(6) *Rex v. Mitcham*, Cald. 276. Re *St. Lawrence, Winchester*, ibid. 379.

**PAYMENT OF
TAXES AND
RATES, &c.**

sum to be paid to the landlord clear of all deductions.

Amount of land tax which tenant ought to pay on behalf of his landlord.

Redemption of land tax by landlord during the existence of a lease of property demised at one-third of its annual value.

Judgment of Mr. Justice Bayley in *Ward v. Const.*

Grantee of a fee-farm rent when entitled to receive the entire.

Judgment of Mr. Justice Dallas in *Andrew v. Hancock*.

and if a party agree to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the land tax and sewer's rate. (1)

Where a tenant verbally agreed "to pay all taxes:" — It was held, that, under this agreement, he was bound to pay the land tax, although it was not specifically mentioned. (2)

And where the landlord covenants to pay the land tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may actually have paid more. (3)

Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax: — It was held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed (4), Mr. Justice Bayley observing, "In substance the transaction was, that the part of the tax formerly payable by the landlord was extinguished by the purchase, and the tenant was redeemed from the payment of the residue, and, therefore, the landlord is now entitled to receive from the tenant a payment equal in amount to that portion only of the land tax which he can be said to have redeemed. This construction of the act is in conformity with the cases of *Yeo v. Leman* (5) and *Hyde v. Hill* (6); for although improvements were then made after the leases had been granted, and the land tax was on that ground raised, they establish this principle — that of the land tax imposed on any premises, the landlord is to bear a part only in proportion to the rent that he receives; for these reasons, I think the plaintiff is entitled to a verdict for 10*l*."

On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement for or in any respect whatsoever," the grantee is entitled to receive the full rent without deducting the land tax. (7)

Where the tenant of premises under a lease which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax: — It was held, that such acquiescence was equivalent to a dereliction of his claim in the first instance. (8)

A tenant having paid land tax and paving rates for six successive years, without claiming any deduction from his landlord for these payments when he paid his rent, it was held, that such deduction should be made from the rent of the current year, and that the tenant could not claim it from his landlord at any subsequent period (9), Chief Justice Dallas observing, "It is clear, that the landlord was liable to pay this land tax, and that the tenant has paid it: the question therefore is, whether the tenant should not have deducted it at the time when it was due, or whether he can set up the amount of six years' land tax against the last quarter's rent. The land tax

(1) *Bennett v. Womack*, 3 C. & P. 96. 1 M. & R. 624. 7 B. & C. 627.

(2) *Amfield v. White*, R. & M. 246., vide etiam *Bennett v. Womack*, 7 B. & C. 627. 3 C. & P. 96.

(3) *Whitfield v. Brandwood*, 2 Stark. 440.

(4) *Ward v. Const.*, 10 B. & C. 634.

(5) Str. 1191.

(6) 3 T. R. 377.

(7) *Bradbury v. Wright*, Doug. 624. *Brewster v. Kitchen*, 1 Ld. Raym. 317.

(8) *Spragg v. Hammond*, 4 Moore, 431. 2 B. & B. 59.

(9) *Andrew v. Hancock*, 3 Moore, 276. 1 B. & B. 37.

act requires three things : — First, that the tenant should pay the tax ; secondly, that he should deduct it (and he is not only allowed but required to do so) ; thirdly, that the landlord should allow the deduction upon the receipt of the residue of the rent. By the common construction of these words, the tenant ought to deduct the tax out of each payment, and the landlord ought to receive the residue. So the case stands on the words of the statute. But how is the case on plain reason ? Laws are adapted to common cases and common understandings, but to go on for six years in silence, and then deduct the tax for so long a period out of one quarter's rent, is most unusual : the inconvenience of such a construction of the act is manifest." " If the meaning of the statute be clear, then the question whether the landlord be or be not bound in conscience to refund this money, independently of the statute, is perfectly immaterial. But is the landlord in point of conscience, bound to allow this ? how can I know, that an understanding has not existed during the last six years, that the tenant shall have his house cheaper, or have a longer term in consideration of his not deducting the land tax ? Such a presumption is raised by the acquiescence of the tenant in this payment for so long a period." " I cannot say that this is against conscience." " The language of Gibbs J. (1) applies also to this case on the broad ground of conscience and convenience : ' he who receives the money, has a right to consider it his without dispute : he spends it in confidence that it is his ; and it would be most mischievous and unjust, if he who has acquiesced in the right of such voluntary payment, should be at liberty, at any time within the Statute of Limitations, to rip up the matter and recover back the money. He who received it, is not in the same condition : he has spent it in the confidence it was his, and perhaps has no means of repayment.' Sir James Mansfield C. J. said (2), ' I think it would be most contrary to *æquum et bonum*, if the party were obliged to repay the money back. For see how it is ! If the sum be large, it probably alters the habits of his life : he increases his expenses ; he has spent it over and over again ; perhaps he cannot repay it at all, or not without great distress. Is he then, five years and eleven months after, to be called on to repay it ?' If therefore the case turns on the broad ground of conscience, this is decisive. But further, I think that the case on the property tax is decisive : the cases are exactly the same, except, that in the language of one act the party is ' required,' in the other he is ' ordered,' to deduct the tax : the court there held it a voluntary payment. Lord Ellenborough said, ' I go on its being a voluntary payment ; and I know of no principle of law which gives a right to recover back money so paid.' Bayley J. said, ' The payment was made at a time when it was in the tenant's power to have deducted the sum in question : he must have known that he had a right so to deduct it ; knowing this, he chooses nevertheless to make this payment. Then that is a voluntary payment, which he cannot recover back by this action.' " (3)

The tenant is bound to pay the land tax when he covenants to pay the rent " without any deduction or abatement whatsoever." (4)

A plea in bar to a cognisance for a distress for rent stated, that " divers

Where tenant
not bound to
pay the land
tax.

(1) In *Brisbane v. Dacres*, 5 Taunt. 143.

(2) Ibid.

(3) Vide etiam *Spragg v. Hammond*, 2 B. & B. 59. 4 Moore, 431.

(4) *Cranston v. Clarke*, Say. 78.

PAYMENT OF TAXES AND RATES, &c.

Plea in bar held bad for not specifically stating when amount of taxes were assessed, paid, or had become due.

sums, amounting to a certain sum, had been from time to time duly assessed and rated on the premises for land tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant, as landlord, was liable to bear in respect of the rent:" but, which was held bad, for not stating the specific periods for which the respective sums were assessed or paid, and in not shewing that the payment claimed to be deducted was made after the rent distrained for had accrued, or was then accruing (1); Mr. Justice Holroyd observing, "It appears to me, if a party were allowed to deduct a payment for land tax paid previously, this inconvenience would follow, that if a lessor assigned over his interest, the assignee might be made liable to this deduction, which the tenant had neglected previously to make; and, for any thing that appears in this plea, that may be the case here; for, consistently with the facts there stated, the present defendant may not be the person from whom this land tax ought in justice to be deducted. The occupier has, it seems to me, a lien on the next rent given him by the legislature for the land tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his *remedy by action or set-off*, and the latter is not allowed in replevin. The plea, therefore, is bad, and our judgment must be for the defendant."

CHURCH AND POOR'S RATES.

Church and poor's rates being charges on the person and not on the land, are not comprised within a covenant by a lessor to pay all the taxes on the land demised (2), nor within a covenant by him to indemnify the lessor against all duties, charges, and taxes whatsoever, to be imposed upon the lands, except tithes. (3) This exception of tithes was not allowed to influence the construction of the covenant, for the tithes being a duty payable out of land, the exception was necessary in opposition to the word *duties*. (4)

INSURANCE OF PROPERTY.

Where covenant to insure does not run with the land, so as to oblige landlord to re-instate the premises.

Where covenant to insure premises runs with the land.
Construction

14. INSURANCE OF PROPERTY.

Whether a covenant to insure be a covenant which runs with the land, is a question seemingly undecided. Supposing the lease to contain a covenant that the lessee shall insure, and in case of fire, pay over the insurance money to the lessor; there seems little doubt but such a covenant, giving double security to the lessor for the rebuilding of the house, must be taken as falling within the definition of a covenant running with the land. But upon the same covenant to insure, the law presents to the landlord no means of recovering from the tenant the money he may receive from the insurance office, whatever equity might do between the parties.

A covenant to insure against fire, premises which are situated within the weekly bills of mortality, as specified in the statute 14 Geo. 3. c. 78., runs with the land. (5)

In a covenant on a policy of insurance, the words "usurped power" were

(1) *Stubbs v. Parsons*, 3 B. & A. 516.
(2) *Theod. v. Starkey*, 8 Mod. 314. *Jeffrey's case*, 5 Co. 66. (b.) *Anon.* 4 Mod. 148.
Rex v. St. Luke's Hospital (Occupiers of), 2 Burr. 1064. *Rex v. St. Bartholomew (Inhabitants of)*, 4 ibid. 2439. *Harrison v. Bul-*

cock, 1 Hen. Black. 68. *Milward v. Caffin*, 2 W. Black. 1330. *Bute (Lord) v. Gurdall*, 1 T. R. 338.
(3) *Case v. Stephens*, Fitz.-Gib. 297
(4) *Platt on Covenants*, 223.
(5) *Vernon v. Smith*, 5 B. & A. 1.

construed not to extend to the acts of a mere mob, who had set fire to the premises insured. (1)

When a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire, on their being burned down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter, the covenant to insure, being introduced for the security of the landlord, leaving the tenant still absolutely responsible on the covenant to repair. (2)

A lessee covenanted to insure a specified sum upon the premises, and effected an insurance, the policy containing a memorandum, that, in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death; the lessee dies, and an indorsement continuing the policy to his personal representative was made after the expiration of three months from the time of his decease:—It was held, that, under these circumstances, there was no breach of the covenant to keep the premises insured. (3)

A covenant in the lease of a house, “to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office,” is not void for uncertainty. (4)

Where a lessee covenanted to insure, and effected an annual policy in the usual form, allowing fifteen days’ grace, and expiring on the 25th March, but did not pay the premium for a renewal till the 25th April:—It was held, that the covenant was broken by reason of the non payment of the premium on or before the 9th April, and that the lease was forfeited upon a clause of re-entry. (5)

In ejectment by landlord against tenant, on an alleged forfeiture by breach of a covenant to insure in some office in or near London, the omission to insure must be proved by the plaintiff: and it is not sufficient in proof of such omission, that the defendant, being asked to shew a policy or receipt for premium refused (after which the plaintiff accepted rent, and made no further inquiry till the action was commenced), and that the plaintiff gave notice to produce such policy or receipt at the trial, which was not done on demand. (6)

A court of equity will not relieve a tenant against the breach of a covenant to insure. (7) And an injunction against an ejectment for breach of covenant to insure against fire was refused (8); the principle being, that where such relief is granted, “the omission and consequent forfeiture must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation; but that where the trans-

INSURANCE
OF PROPERTY.

of “usurped power.”

Tenant to keep premises in repair, and effect an insurance thereon, does not release him from liability to repair irrespective of the insurance.

To keep insured in some sufficient insurance office not void for uncertainty.

Where covenant broken by reason of the non payment of the premium.

Omission to insure must be proved by the plaintiff.

Effect of non production of policy or receipt.

EQUITABLE
RELIEF.

(1) *Drinkwater v. Corp. Lond. Assur.* 2 Wils. 363.

(2) *Digby v. Atkinson*, 4 Camp. 275.

(3) *Doe d. Pitt v. Laming*, *ibid.* 73. Stat. 14 Geo. 3. c. 78. s. 86., which enacts, that no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, or any recompense be made by such person for any damage suffered thereby, also provides,

that no contract or agreement made between landlord and tenant shall be thereby defeated or made void.

(4) *Doe d. Pitt v. Shewin*, 3 Camp. 134.

(5) *Ibid.*, vide etiam *Tarleton v. Stanforth*, 5 T. R. 695. *Salvin v. James*, 6 East, 571.

(6) *Doe d. Bridger v. Whitehead*, 8 A. & E. 571.

(7) *Green v. Bridges*, 4 Sim. 96

(8) *Reynolds v. Pitt*, 19 Ves. 134.

INSURANCE
OF PROPERTY.

gression is wilful, or the compensation impracticable, the court will refuse to interfere." As it is impossible to estimate in damages the *quantum* of risk run by non-insurance, the effect of giving relief would be, that any tenant might break the special covenant with impunity, and every landlord must then be content to take his tenant for his insurer for want of power to enforce his covenant. Whatever, therefore, may be done in other cases, the court will not relieve a tenant from a forfeiture occasioned by his neglect to insure. (1)

Tenant has no equity to compel his landlord to expend money received from an insurance office.

A tenant has no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. (2)

15. TO REPAIR.

TO REPAIR.

The liability of the lessee to keep the premises in repair is frequently enlarged, controlled, or at least defined by an express covenant in the lease.

Usually the lessee covenants to maintain, sustain, and repair all the buildings, and to keep the same in repair, and deliver them up so repaired at the end of the term. Such a covenant runs with the land, for it affects the estate and reversion in the hands of every person that may have them. (3)

The tenant's responsibility is usually limited by an express covenant to repair: and this covenant extending to the thing *in esse*, parcel of the demise, and being *quodammodo* annexed and appurtenant to the property demised, will run with the land, and bind an assignee, although he be not named (4), even if he be assignee of part of the premises only. (5)

Where A. makes an agreement with B. for the sale of premises at the time in the possession of C. under an agreement for four years (three of which had expired), and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy; and B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair; it seems, that A. is bound to perform the repairs at the time of C.'s quitting, though it be before the expiration of the tenancy, as created by the agreement between A. and C. (6)

Liability of assignees under a void lease.

Where defendants had for several years, as assignees under a void lease, paid the rent reserved, without having re-assigned, they were held liable to repair to the end of the term according to the covenant in the lease. (7)

Yearly tenants not bound to do substantial repairs.

A tenant from year to year is not bound to do substantial repairs, such as new roofing; he is only bound to keep the premises wind and water tight (8):

(1) *Rolfe v. Harri*, 2 Price, 206. n. *Williams*, 2 Lev. 92. *Keeling v. Morris*, 13 Reynolds v. Pitt, *ibid.* 212. n. *White v. Warner*, 2 Meriv. 459. *Mod.* 371.

(2) *Leeds v. Cheetham*, 1 Sim. 146.

(3) *Buckley v. Pirk*, 1 Salk. 317.

(4) *Spencer's case*, 5 Co. 16. (a.) *Dean & Chapter of Windsor's case*, *ibid.* 24. (a.) *Buckley v. Pirk*, 1 Salk. 317. *Lougher v.*

(5) *Congham v. King*, Cro. Car. 221. *Conan v. Kemise*, Sir W. Jones, 245.

(6) *Goodson v. Gouldsmith*, 2 C. & P. 555.

(7) *Beale v. Sanders*, 3 Bing. N. C. 850.

(8) *Leach v. Thomas*, 7 C. & P. 328. *Auworth v. Johnson*, 5 *ibid.* 239. *Ferguson v. —*, 2 Esp. N. P. C. 590.

and not being liable to general repairs, he is only bound to use the premises in a husband-like manner, but no farther. (1)

TO REPAIR.

A tenant from year to year is not liable for permissive waste, or to make good mere wear and tear of the premises. (2)

Where a lessee covenants to yield up the premises at the end of the term in as good condition as they were in, when the lease was granted, and after the expiration of the term holds over as tenant from year to year, no implied promise arises to yield up the premises at the expiration of the new tenancy, in the state in which they were, when the original lease was granted. (3)

A tenant holding over after the expiration of his term, impliedly holds, subject to all the covenants in the lease which are applicable to his new situation; and therefore, if after the expiration of a written lease containing a covenant by the lessee to keep the premises in repair, he verbally agrees to hold over paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises afterwards become ruinous by accidental fire, he is bound to rebuild them; and the mere advance in the amount of rent to be paid makes no difference; for the advanced rent incorporates the old terms with the new contract, the parties still being supposed, in other respects, to have had reference to the old lease. The usage in such cases is, to declare in *assumpsit* on the implied promise raised by the continued holding. (4)

Tenants holding over after expiration of their terms.

A general covenant to repair extends to all buildings erected during the term, as well as the buildings demised. Therefore, if upon a demise of three houses with such a covenant, the lessee builds a fourth, he will be bound to repair this also: and if he covenant to pull down the three and rebuild them, and leave the said premises in repair, and he pull down the three, and build five in their place, he is bound by his covenant to deliver up all in repair. (5)

To what buildings a covenant to repair extends.

A tenant must keep the premises in tenantable repair, and surrender them at the end of the term in as good condition as the ordinary and natural decay of the premises will admit.

Construction of agreements for premises to be kept in tenantable repair.

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair; a literal performance of the contract is not to be required. (6)

Where a very old house was demised, with the usual covenants to repair, it was held not to mean that the house should be restored in an improved state, or that the consequences of the elements should be averted; thus in *Gutteridge v. Munyard* (7) Chief Justice Tindal said, "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss

Judgment of Chief Justice Tindal in *Gutteridge v. Munyard*.

(1) *Horae fall v. Mather*, Holt's N. P. C. 7.

(2) *Torriano v. Young*, 6 C. & P. 8.

(3) *Johnson v. St. Peter's, Hereford*, 6 N. & M. 106.

(4) *Digby v. Atkinson*, 4 Camp. 275.
Bromfield v. Williamson, Sty. 407. *Kempton*

v. Eve, 2 Ves. & B. 353., et vide *Brudnell v. Roberts*, 2 Wils. 143.

(5) *Douse v. Earle*, 3 Lev. 264.

(6) *Harris v. Jones*, 1 M. & Rob. 173.

(7) *Ibid.* 336. 7 C. & P. 129.

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which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised."

Tenant can quit his premises, if they cannot be kept dry without extravagant expenses.

A tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, and they cannot be kept dry without extravagant and unreasonable labour and expense on his part. (1)

Premises being unsafe and useless from want of repair.

A tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable, in an action for use and occupation, for any rent after the occupation has ceased to be beneficial. (2)

Therefore, where the lessee of a house underlet the same at Lady Day to A. as tenant from year to year, and before the end of the half year put workmen into the house with A.'s consent, for the purpose of repairing a party wall, but the inconvenience occasioned thereby was so great that A.'s lodgers quitted the house, and he was obliged to take lodgings for his own family elsewhere, and, after paying the rent up to Midsummer Day, he remained in possession, carrying on his trade till the 5th of July, and then quitted without notice to his landlord; it was held, that the latter could not maintain an action for use and occupation for the second half year which had thus commenced, the jury finding that there had been no beneficial occupation. (3)

Covenant to take down four messuages as occasion might require, satisfied by making the old houses substantially as good as new houses.

Where a lessee covenanted, within the first two years of the term, to put the premises in good and sufficient repair, and at all times during the term to repair, pave, scour, cleanse, empty, and keep the messuages, ground, and other the premises, when, where, and as often as need should require; and within the first fifty years of the term to take down four demised messuages, as occasion might require, and in the place thereof erect upon the demised premises four other good and substantial brick messuages: — It was held, that, if within the fifty years the houses should be so repaired as to make them completely and substantially to every purpose as good as new houses, the covenant would be satisfied without taking down the old houses. (4)

A lease, containing a covenant by the lessee to repair the premises at all times "as often as need or occasion should require," and "at farthest within three months after notice," is one entire covenant, the former part of which is qualified by the latter. (5)

Where "inside painting" must be kept up.

Under a covenant that the tenant "should and would substantially repair, uphold, and maintain" a house, he is bound to keep up the inside painting. (6)

Where cove-

A covenant in a building and repairing lease to leave the demised pre-

(1) *Collins v. Burrow*, 1 M. & Rob. 112.

(2) *Edwards v. Etherington*, 7 D. & R. 117. R. & M. 268.

(3) *Ibid.*

(4) *Evelyn v. Raddish*, 7 Taunt. 411., sed

vide contra, *London (City of) v. Nash*, 1 Ves. sen. 12. 3 Atk. 512.

(5) *Horsfall v. Testar*, 1 Moore, 89. 7 Taunt. 385.

(6) *Monk v. Noyes*, 1 C. & P. 265

mises, with all new erections, well repaired, extends to the new erections only. (1)

A mere covenant to repair is not broken by alterations and improvements, where improvements are contemplated by the lease: thus, enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and to keep in repair a dwelling house, together with all such buildings, improvements, or additions, as shall be erected, set up, or made by the lessee. (2)

A landlord has no right to enter his tenant's premises to repair them, unless there were some stipulation at the time of the letting to that effect. (3)

A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. (4)

A general covenant to repair has been construed to comprehend as well buildings erected by the tenant, as the buildings originally demised. (5)

A covenant to repair a house, outhouses, and stables, will oblige the party to repair the racks in the stable. (6) So if a lessee, who has erected fixtures for the purposes of trade upon the demised premises, afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair, he will be bound to repair those fixtures, unless strong circumstances exist to shew, that they were not intended to pass under the general words of the second demise; but it is doubtful whether any circumstances *dehors* the deed can be alleged to shew that they were not intended to pass. (7)

It seems (8) that a general covenant "to make all needful and necessary reparations and amendments whatsoever," will not bind a tenant to contribute to the expense of erecting a party wall under stat. 14 Geo. 3. c. 78. (9), unless he be also owner of the improved rent (10), that is, the man who, in all the subsisting leases, has the best rent (11); which improved rent is not construed to signify the improved value, nor can the owner thereof be charged (12); the object of the legislature in enacting that statute (13) being to throw the burden of paying the expense of party walls on persons to whom long leases had been granted, with a view to an improvement of the estate, and who afterwards underlet at a considerable increase of rent. (14)

If a tenant under a covenant to repair, pull down a party wall (being in a ruinous condition), and rebuild it at the joint expense of himself and the occupier of the adjoining house to whom he had given the notice required by the statute in his landlord's name, but without his authority, he cannot

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nant only extends to new erections.

Mere covenants to repair not broken by alterations and improvements.

Qualification of the rights of landlord to enter his tenant's premises to view repairs.

PREMISES WHICH FALL WITHIN A COVENANT TO REPAIR.

Racks in a stable.

Trade fixtures.

Erection of party walls under stat. 14 Geo. 3. c. 78.

(1) *Lant v. Norris*, 1 Burr. 287.

(2) *Doe d. Dalton v. Jones*, 1 N. & M. 6. 4 B. & Ad. 126.

(3) *Barker v. Barker*, 3 C. & P. 557.

(4) *Doe d. Wetherell v. Bird*, 6 ibid. 195.

(5) *Brown v. Blunden*, Skin. 121. *Lant v. Norris*, 1 Burr. 287.

(6) *Platt on Covenants*, 270.

(7) *Thresher v. Comp. of Proprietors of East London Water Works*, 2 B. & C. 608.

(8) *Platt on Covenants*, 270. *Moore v.*

Clark, 5 Taunt. 90., et vide *Robinson v. Lewis*, 10 East, 227.

(9) *Sangster v. Birkhead*, 1 B. & P. 303.

Barrett v. Bedford (Duke of), 8 T. R. 602.

(10) *Peck v. Wood*, 5 T. R. 130. *Taylor v. Reed*, 6 Taunt. 249.

(11) *Sangster v. Birkhead*, 1 B. & P. 305.

(12) *Beardmore v. Fox*, 8 T. R. 214.

Lambe v. Hemans, 2 B. & A. 467.

(13) S. 41.

(14) *Platt on Covenants*, 271.

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Property destroyed by lightning or king's enemies.

maintain an action against his landlord for a moiety of the expense of rebuilding such party wall. (1)

"Where the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity;" because, *conventio vincit legem*: consequently, if a lessee covenant to repair a house, and it be destroyed by lightning or by enemies, he is bound to repair it. (2)

Liability of tenant to repair property destroyed by fire.

A lessee of a house, who covenants generally to repair, is bound to rebuild it, if it be burned by an accidental fire (3); and the assignee of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair, notwithstanding they are destroyed by fire. (4)

A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire. (5)

By the law of Scotland the tenant is liable to his landlord, if premises demised are burnt down by the negligence or misconduct of the tenant's servant, in the ordinary scope of his employment. Thus, in an action brought by a landlord, where the defendant's servant burnt down a house in Scotland, demised to the defendant, by lighting furze and straw, with a view to cleanse a chimney which smoked, although she had been cautioned against the danger of such a proceeding, it was held to have been properly left to the jury to say whether the servant was acting within the general scope of her duty; and the jury having found for the defendant, the court refused to grant a new trial. (6)

If a lease contain a covenant to keep in repair, as well as a covenant to insure for a specific sum, and the premises be burnt down, the lessee is liable on the former covenant, and the amount is not limited to the sum mentioned in the latter. (7)

By stat. 14 Geo. 3. c. 78., tenant not bound to reinstate premises destroyed by fire unless compelled by his lease.

A tenant under stat. 14 Geo. 3. c. 78. is not under any necessity to reinstate premises destroyed by fire, unless the terms of his lease impose this obligation upon him.

If a lessor covenant in a lease with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and is not bound to rebuild any additional parts which may have been erected by his tenant. (8)

Effect of lessor covenanting to "rebuild and replace" premises.

The lessee of a house and wharf covenanted to repair, accidents by fire excepted; the house was burnt down, and the lessor, having insured, received the insurance money, but neglected to rebuild, and brought an action at

(1) *Pizey v. Rogers*, R. & M. 357.

(2) *Brecknock Canal Comp. v. Pritchard*, 6 T. R. 750. *Anon. Dyer*, 93. (a.) pl. 10. *Paradine v. Jane*, Aleyn, 26. Sty. 47. *Chesterfield (Earl of) v. Bolton (Duke of)*, Com. 627. *Bullock v. Dommitt*, 6 T. R. 650.

(3) *Bullock v. Dommitt*, 6 T. R. 650. 2 Chitt. 608. *Digby v. Atkinson*, 4 Camp.

275., et vide *Phillipson v. Leigh*, 1 Esp. N. P. C. 398.

(4) *Ibid.*

(5) *Hare v. Groves*, 3 Anst. 687.

(6) *McKenzie v. McLeod*, 10 Bing. 365.

(7) *Digby v. Atkinson*, 4 Camp. 275.

(8) *Loader v. Kemp*, 2 C. & P. 375.

law for the rent; it was held, that the lessee was entitled to an injunction to restrain the proceedings at law, till the house was rebuilt. (1)

If a lessee covenant to repair, &c. "casualties by fire and tempest excepted," it is questionable if the landlord be bound to repair, in either of the excepted cases. (2)

Where a lessee covenants to repair buildings and *keep* them in repair, but pulls them down, and does not repair them within a convenient time, or suffers them to decay, he is immediately guilty of a breach of his covenant, and an action may be maintained against him before the term has expired. (3) But if he covenant to *leave* them in as good a state as he found them in, and then pull them down, he will be guilty of no breach of covenant, for he may rebuild them; and therefore no action will lie until the end of the term. (4)

A lessee covenanted to *maintain, sustain, and repair* two messuages; to an action on a bond given for the performance of these covenants he pleaded, that he had repaired all the messuages with the exception of one kitchen, which was so ruinous, that he could not repair it, but pulled it down, and rebuilt another in as short a time as possible, and that he had at all times repaired the new kitchen; the court upon demurrer to this plea decided, that though it would have been good in an action of waste, yet that it was bad in that action upon a covenant, by which he had tied himself down to an inconvenience, for which he ought at his peril to have provided. (5)

If a man covenant to repair a house, and it become ruinous by accident, the covenant will not be broken till after a convenient time for its reparation has elapsed. (6) And if he covenant to repair it before a particular day, and the reparation by such day be rendered impossible by the act of God, this is no breach of the covenant. But he is bound to repair it as soon as possible. (7)

If a lessee covenant to do all the reparations of a house, at his own costs and charges, and he cut trees upon some of the ground demised to amend the house, it seems this is a breach of his covenant. (8)

The breaking up of a pavement, carrying away the locks and keys of a cupboard, breaking the glass in the windows, and carrying away a shelf, amount to a breach of covenant to repair.

Where the tenant of a house covenanted to repair the premises and all erections, buildings, and improvements erected on the same during the term, the court held that it was a breach of the covenant in the lessee to remove a verandah erected during the term, the lower part of which, was affixed to the ground by means of posts. (9)

A covenant by a lessee, that he will, during the term, repair, uphold, support, sustain and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house. (10)

TO REPAIR.

WHAT IS A BREACH.

Covenant to *keep* buildings in repair.

To *leave* buildings in as good a state, as they were upon entry.

To *maintain, sustain, and repair* buildings.

Buildings become ruinous by accident.

Improperly cutting down timber for repairs.

Breaking pavement or glass, carrying away locks, shelves, windows, verandah, &c.

Pulling down brick walls.

(1) *Brown v. Quilter*, Amb. 620.

(2) *Weigall v. Waters*, 6 T. R. 488.

(3) *Touchst. by Atherley*, 173. *Luxmore v. Robson*, 1 B. & A. 585.

(4) *Touchst. by Atherley*, 173.

(5) *Wood v. Avery*, 3 Leon. 189.

(6) *Touchst. by Atherley*, 173.

(7) *Ibid.* 174.

(8) *Ibid.*

(9) *Penry v. Brown*, 2 Stark. 403.

(10) *Doc d. Wetherell v. Bird*, 6 C. & P. 195.

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Door way
broken through
party walls.

Converting a
dwelling house
into a store.

Breaches com-
mitted before
term has ex-
pired.

**DECLARATION
AND PLEAD-
ING.**

Where the al-
legation of the
exception is
either satisfied
in the lease or
rejected as sur-
plusage.

If the covenant
be entire, it
must be de-
clared upon as
such.

If a covenant
be qualified, it
cannot be de-
clared upon as
a general co-
venant.

Mixing the
claim of

If a doorway be broken through the wall of a demised house into an adjoining house, and kept open for a long space of time, it amounts to a breach of covenant to repair. (1)

A covenant to maintain, support, and keep a dwelling house, and all improvements made or to be made thereon in good and sufficient tenantable order, repair, and condition, is broken by taking away the partition walls, removing the stairs and converting the house into a store, though the value of the premises be thereby increased; because the "identical thing demised is not preserved;" for "although the alteration of a house into a shop is done every day, the house still remains a dwelling house; here the dwelling house is altered into a store, and no person could take the premises in the state in which they are as a dwelling house; they would require to be again altered to make them a dwelling house." (2)

Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired. Thus, in *Luxmore v. Robson* (3) Lord Ellenborough observed, "By the terms of the covenant the lessee is bound to keep the premises in repair; then to keep them in repair, he must have them in repair, at all times during the term; and if they are at any time out of repair, he is guilty of a breach of covenant, which is the proper subject of an action."

In an action of covenant for not repairing premises demised, the declaration stated, that the plaintiff "demised certain premises, with the appurtenances (except as therein is excepted), to hold, &c. except, &c. for the term of twelve years, except the last day thereof;" but upon the lease being produced in evidence in support of the declaration, it was found to contain no exception "of any part of the premises," but only an exception of the "last day of the term:"—It was holden not to be a fatal variance, on argument of a rule for entering a nonsuit on that objection, the allegation of the exception being either satisfied by the exception in the lease, or it might be rejected as surplusage. (4)

A lease, containing a covenant by the lessee to repair the premises at all times as often as need or occasion should require, "and at furthest within three months after notice," is one entire covenant, the former part of which is qualified by the latter; and the plaintiff having treated this in his declaration as an absolute covenant to repair, and omitted the latter part of the clause containing the notice, it was held, that the variance was fatal. (5)

In covenant for not repairing, if the covenant to repair contain an exception of "fire and all other casualties," it is fatal on *non est factum*, to state it as a general covenant to repair, omitting the exception. (6)

The following covenant was declared upon in a lease, viz. to repair and keep in repair the premises, reasonable use and wear only excepted, and to leave the same in repair with the like exception; that the lessor might

(1) *Doe d. Vickery v. Jackson*, 2 Stark. 293.

(2) *Per* Joy C. B. in *Elliott v. Watkins*, 1 Jones (Irish), 308.

(3) 1 B. & A. 584.

(4) *Williams v. Hayes*, 9 Price, 642.

(5) *Horsefall v. Testar*, 1 Moore, 89. Taunt. 385.

(6) *Tempany v. Burnand*, 4 Camp. 20. *Browne v. Knill*, 5 Moore, 164. 2 B. & B. 395.

enter and view, &c. ; and, in case of defect, the defendants should repair within one month after notice in writing ; also that defendants might put an end to the lease in three years, giving six months' notice in writing. The averment was, that the demise was put an end to, defendants having given plaintiffs six months' notice of their desire to end the demise in three years, and that plaintiff during the said demise gave defendants notice of certain defects. The breach assigned was, that defendants did not within one month after such last-mentioned notice, or at any other time before or afterwards during the demise, and while they were in possession, repair, &c. or keep in repair ; nor did they leave in repair, &c. at the determination of the term as aforesaid, according to the indenture ; but, on the contrary, after the making of the same, and during the continuance of the demise and of their possession, and until the determination of the term as aforesaid, they suffered the premises to be out of repair, and so left the same &c. contrary to the indenture, whereby &c. The plea was payment of money into court generally ; and the replication was of damages *ultra* ; and upon the issue thereon it was held—

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damages on the breach of the covenant to repair generally.

1. That the declaration would have been bad on special demurrer, though not so after verdict, for mixing the claim of damages on the breach of the covenant to repair generally :

2. That the breach was demurrable, though sufficient, as it seems, after verdict, for not noticing the exception of reasonable wear and tear :

3 & 4. That the averments of notices were demurrable, for not stating that the notices were in writing ; but,

5. That the defendants, by pleading payment into court generally, had acknowledged something to be due on every part of the breach, and could not, therefore, allege the last three objections in arrest of judgment. (1)

To a declaration on a covenant in a lease, to deliver timber growing on the demised premises, sufficient for the repair thereof, it was averred, that there was timber growing on the premises sufficient for the repairs, but that defendant did not deliver it, the defendant pleaded, that there was not timber growing on the premises sufficient and proper for the repairs ; issue thereon ; and it was held, that the plea was good, not having been demurred to, although it did not allege, that there was not timber growing on the premises sufficient for any part of the repairs. (2)

“ To deliver timber growing on the demised premises, sufficient for the repair thereof.”

If the plaintiff in covenant assign as a breach, that the defendant did not repair, a plea that the defendant did not break his covenant is bad, on special demurrer, although the declaration concludes by averring, that so the defendant hath broken his covenant ; but it would be good after verdict. (3)

Where defective plea aided by verdict.

If an estate be created by deed-poll, *ne lessa, ne granta, ne chargea, ne enfeoffa, ne dona, &c.* are good pleas for a stranger to the deed. (4)

Good pleas for a stranger to the deed.

To a declaration upon a joint and several covenant of A. and B. to repair during the term, alleging as a breach, that neither A. nor B., whilst the latter was unmarried, nor A., nor B., nor C. her husband, since the marriage of B. with C., did repair during the term, &c. a plea

(1) *Wright v. Goddard*, 8 A. & E. 144.

(3) *Taylor v. Needham*, 2 Taunt. 278.

(2) *Snell v. Snell*, 7 D. & R. 249. 4 B. & C. 741.

(4) *Ibid.*

TO REPAIR.

What is considered a departure from the declaration.

that A. and B. and C. did, during the term, repair, &c. is bad on special demurrer. (1)

To a declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B., and C. to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term; the plea was, that A., B., and C. from the time of making the demise, until the death of B., and A. and C. afterwards, had a reversion for a longer term of years, expectant on the lease, and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises: to which it was replied that A., B., and C. were not until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the said demised premises, in manner and form as alleged in the plea, which was held bad on demurrer, as being a departure from the declaration. (2)

Substituted contract stated by way of accord.

To covenant for neglecting to repair, a plea, that after covenant broken, an agreement was entered into between the plaintiff and defendant, that in consideration that the defendant at the request of the plaintiff had become tenant of the premises from year to year at a certain rent, and had, at the request of the plaintiff, promised to repair the premises before the 12th of April then next ensuing, the plaintiff would give time until the 12th of April for such reparation without bringing an action, and, in case the premises should be repaired by the 12th of April, would relinquish all claim in respect of the breach of the covenant; with an averment, that notwithstanding the defendant was ready and willing to perform the agreement, the plaintiff commenced his action before the 12th of April, was held to be ill, on motion in arrest of judgment; for no action could be supported against the plaintiff or the defendant, upon the substituted contract stated by way of accord. (3)

Evidence may be given as to state of the premises at the commencement of the term.

In an action for breach of covenant to keep a house in repair, though the defendant may shew generally in what state the premises were at the commencement of the term, and whether they were old or new, it is not competent for him to shew it in matters of detail. (4)

What is not a sufficient acknowledgment by tenant of his liability to repair, to entitle plaintiff to a verdict.

Where a landlord being sued for repairs done upon his estate, it was agreed, that the tenant should advance the amount out of the rent, and that the landlord should pay two-thirds of the defendant's costs, but the costs not being paid, the action proceeded, it was held, that this arrangement was not such an acknowledgment of the defendant's original liability as would entitle the plaintiff to a verdict, even supposing that it was not inadmissible in evidence, as being in the nature of a compromise. (5)

Where an agreement is evidence against a defendant, though no party to it, to prove a promise to keep in repair. House thrown

A stamped agreement for a lease to which the plaintiff was no party, but made between the defendant and other persons, from whom the plaintiff derived title, is admissible in evidence to prove the defendant's promise to keep the premises in repair. (6)

On a covenant to repair, it is not sufficient to maintain the breach to shew, that the house has been thrown down by a tempest, unless the covenantor

(1) *Marshall v. Whiteside*, 4 Dowl. P. C. 766.

(2) *Green v. James*, 6 M. & W. 656.

(3) *Bayley v. Homan*, 3 Bing. N. C. 915.

(4) *Muntz v. Goring*, 4 ibid. 451.

(5) *Lofts v. Hudson*, 2 M. & R. 481.

(6) *Dyer v. Ashton*, 2 D. & R. 19. S. C. not S. P. 1 B. & C. 3.

has not repaired within a reasonable time (1); and where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, in this case the ordinary and natural decay of it is no breach of the covenant, but the covenantor is bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. (2)

With a view to determine the relative sufficiency of the repair, the jury can inquire, whether the house were new or old at the time of the demise. (3)

A covenant by a lessee, to put premises into "habitable repair," binds him to put them into such a state, that they may be occupied, not only with safety, but with reasonable comfort, for the purposes for which they are taken. (4)

In an action on a covenant to keep premises in repair, contained in a lease for three lives, with a covenant for perpetual renewal on the part of the landlord, two of which lives had fallen, it was held, that the proper criterion for estimating the damages was, what would be necessary to put the premises in repair, and not merely what was the diminution of the plaintiff's security for rent. (5)

Where a jury had given damages (under 20*l.*) in an action by landlord against tenant for an injury to the former, arising from the tenant quitting premises occupied by him as tenant from year to year without having done such repairs as he was bound to do, the court refused to disturb the verdict, although it appeared that the larger portion of the repairs required, ought to have been done by the landlord himself. (6)

If a tenant who is bound to repair leave, and, at the end of the tenancy, the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. (7)

Where a tenant under a lease containing a covenant to repair, underlets the premises to one who enters into a similar covenant with him, and the original lessor brings an action on the covenant and recovers against the first lessee, the damages and costs recovered in that action, and also the costs of defending it, may be recovered as special damages in an action against the under-tenant for the breach of his covenant to repair. (8)

Where a plaintiff had declared as the survivor of two coheiresses, and laid the breach after the death of the other coheiress: — It was held, that she might recover damages for not keeping in repair, for a period previous to such death. (9)

In *Short v. Kalloway* (10) the plaintiff declared in covenant, reciting that P. had leased a house to the defendant, and the defendant had by the lease covenanted to repair; that the defendant had assigned to the plaintiff, with a covenant, and that the defendant had repaired according to the terms of the lease. The breach for non repair alleged, by way of aggravation, that the plaintiff had assigned to C., with a covenant that the covenants in the

To REPAIR.

down by a tempest.

House to be left in as good plight as upon entry of tenant.

Jury can inquire whether the house was old or new at the time of the demise.

Criterion for estimating damages.

Survivor of two coheiresses can recover damages for a period previous to the death of her coheiress.

Where the court will refuse to disturb a verdict for excess of damages, or to order a verdict to be entered for increased damages.

(1) Touchst. by Atherley, 173.

(2) Ibid. 168. Fitz. Abr. Covenant, 4.

(3) *Stanley v. Towgood*, 3 Bing. N. C. 4.

(4) *Belcher v. M'Intosh*, 2 M. & Rob. 186.

(5) *Nixon v. Denham*, 1 Jebb & Symes (Irish), 416.

(6) *Woods v. Pope*, 1 Scott, 536. 1 Bing. N. C. 467. 6 C. & P. 783.

(7) Ibid.

(8) *Neale v. Wyllie*, 3 B. & C. 533.

(9) *Nixon v. Denham*, 1 Jebb & Symes (Irish), 416.

(10) 11 A. & E. 28.

TO REPAIR.

lease had been performed; that C. had sued the plaintiff for the non performance of the covenants in the lease, whereby the plaintiff had to pay C. 120*l.* to settle the action, besides the expenses, 119*l.*, of defending it: to which it was pleaded, payment of 5*l.* into court, and no damages *ultra*. The replication was, damages *ultra*. The verdict was for 45*l.* damages beyond the 5*l.* On motion by the defendant for a new trial on the ground that the plaintiff was not liable to C., except for his own acts, and therefore could not charge the defendant with the 120*l.* or 119*l.*, the court refused a rule, the verdict being general, and not shewing that the jury had allowed damages in respect of C.'s action, and it being the defendant's duty to point out at the trial the limitation contended for. The court also refused to increase the damages by 119*l.*, which was proved to have been expended in defending the action against C., since the damages recovered by C. exceeded the sum given in the present action, and must therefore in part have been attributable to the plaintiff's own acts; so that the costs of defence did not appear to be the necessary consequence of defendant's breach of covenant.

**COVENANT TO
USE AND DE-
LIVER UP LAND
IN AN HUS-
BANDLIKE
MANNER, AND
NOT TO PLOUGH
MEADOW.**

16. COVENANT TO USE AND DELIVER UP LAND IN AN HUSBANDLIKE MANNER, AND NOT TO PLOUGH MEADOW.

The liability of the lessee respecting the mode of cultivation is usually defined by an express covenant: it is therefore requisite to look to the particular terms of the lease to ascertain the extent of the liability, without regard to the general obligations imposed by law in the absence of express covenants.

Covenants for
cultivation run
with the land.

All covenants by the lessee for cultivation run with the land. (1)

An action on the case will lie against the tenant for not using the land in an husbandlike manner, though there be no covenant to that effect; because the bare relation of landlord and tenant is a sufficient consideration to enable the plaintiff to maintain the action. (2)

Contravening
the prevalent
course of hus-
bandry in the
neighbour-
hood.

A covenant by the tenant to occupy the premises in a good and husbandlike manner, according to the custom of the country where the premises lie, will be broken by contravening the prevalent course of husbandry in the neighbourhood. (3)

Though the contract be simply to occupy an estate in a good and husbandlike manner, this will *prima facie* throw a liability upon the tenant to cultivate the land according to the practice of the neighbourhood. (4); and though a farm be held under a written agreement, the custom of the neighbourhood may well be insisted upon, provided such custom be not excluded by the terms of the agreement. (5)

In covenant on a lease, whereby the defendant covenanted to use the land in a husbandlike manner, and to deliver it up in like condition, in summing up to the jury Justice Buller laid it down, "That it was matter of law to determine, what was using the land in a husbandlike manner; and gave it

(1) Com. L. & T. 180., cit. Touchst. by Atherley, 161.

(2) *Powley v. Walker*, 5 T. R. 373.

(3) *Legh v. Hewitt*, 4 East, 154.

(4) *Ibid.*

(5) *Wigglesworth v. Dallison*, Doug. 201. *Senior v. Armistage*, Holt's N. P. C. 197., et vide *Wibb v. Plummer*, 2 B. & A. 746.

as his opinion, that under such a covenant, the tenant ought to use on the land all the manure made there, except that when his time is out, he might carry away such corn and straw as he had used there, and was not obliged to bring back the manure arising from it." (1)

In *Shipwith v. Green* (2) it was decided, that the covenant not to plough meadow, should only extend to what was really meadow at the time of the demise; and if land be described in the lease under the title of meadow, which in fact is then arable, the tenant will not be estopped by the words of the lease to prove it not to have been a meadow.

COVENANT TO
USE AND DE-
LIVER UP LAND
IN AN HUS-
BANDLIKE
MANNER, &c.

Not to plough
meadow.

17. RESTRICTING THE EXERCISE OF PARTICULAR TRADES.

I. Generally.

"The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom* would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen, that individual interest, and general convenience, render engagements not to carry on trade, or to act in a profession in a particular place, proper." (3)

"The rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made on sufficient consideration, and the public gain some advantage, it will be good. Suppose a man engaged in trade is desirous, when old age approaches, of selling the goodwill of his business — why may he not bind himself to enter into the service of another, and to trade no more on his own account? So long as he is able, he is bound to render his services; and it cannot be said to be a contract in absolute restraint of trade, when he contracts to serve another for his life in the same trade." (4)

The judgment of Chief Justice Tindal in *Horner v. Graves* (5) seemingly affords the best illustration of what is considered to be an illegal restraint of trade. It appeared, that the plaintiff and defendant were surgeon-dentists, that the defendant, in consideration of receiving instructions and a salary for five years from the plaintiff (the first year being 120*l.*), covenanted to abstain from practising as a surgeon-dentist at or within 100 miles of the city of York under a penalty of 1000*l.*, and that the plaintiff might dismiss the defendant from his service by giving to the defendant three calendar months' previous notice in writing; and the plaintiff availing himself of this clause, had discharged the defendant after three months' service; — upon these facts the Lord Chief Justice observed, "The law upon this subject has been laid down with so much precision and authority by Chief Justice

RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.

GENERALLY.
Judgment of
Mr. Justice
Best in *Homer*
v. Ashford.

Judgment of
Lord Abinger
in *Wallis v.*
Day.

Judgment of
Chief Justice
Tindal in *Hor-*
ner v. Graves.

(1) *Watson v. Welsh*, Taunton Lent Ass. 1785, MSS., cit. 1 Esp. N. P. 303.

(2) Str. 610.

(3) *Per Best J. in Homer v. Ashford*, 3 Bing. 326.

(4) *Per Lord Abinger in Wallis v. Day*, 2 M. & W. 281.

(5) 7 Bing. 735.

RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.

Parker in giving the judgment of the court of King's Bench in the case of *Mitchel v. Reynolds* (1), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now the rule laid down by the court in that case is, 'That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract, that is, so as it is a reasonable restraint only, are good.'

"The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the defendant from carrying on his trade or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the defendant's carrying on that trade in which the plaintiff had agreed to receive the defendant as his assistant."

"The sum of 30*l.* appears a very slender and inadequate consideration for such a sacrifice."

"But the greater question is, whether this is a reasonable restraint of trade; and we do not see how a better test could be applied to the question, whether reasonable or not, than by considering, whether the restraint is such only, as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy."

"In the case above referred to Chief Justice Parker says, 'A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;' which are rather instances and examples, than limits of the application of the rule, which, can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond, conditioned that he would not exercise the trade of a baker within that parish during that term; and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade."

"No certain precise boundary can be laid down within which, the restraint would be reasonable, and beyond which excessive. In *Davis v. Mason* (2), where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious, that the profession of

(1) 1 P. Wms. 181.

(2) 5 T. R. 118.

an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such, that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man, that a circle round York, traced with the distance of 100 miles, incloses a much larger space than can be necessary for the plaintiff's protection."

"We therefore think, that the contract is one, which contains a restraint of the defendant to carry on his trade, far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action."

II. *Valid Covenants.*

Covenants restraining the exercise of particular trades, as they affect the mode of occupation or enjoyment (1), will run with the land; and consequently, an assignee will be liable to an action for damages, or to forfeiture on the condition of re-entry, if he use the property demised in contravention of such an agreement.

So where three persons carrying on the trade or business of box and trunk-makers, and travelling by themselves and their servants into various parts of England to vend those articles, entered into an agreement, that each should have a certain district; that neither of them should interfere with the district of the other, or suffer any of his goods to be sold on the ground to be travelled by the other parties during their joint lives, and not to aid or assist any person in opposing any of the parties; and in case at any time during their joint lives, any person should set up and oppose any of them, to meet together and enter into such mutual agreement as might be beneficial to their mutual interests, it being their declared intention to aid and assist each other in their business to the utmost of their power; it was held, that as this agreement contemplated only a partial and not a general restraint of trade, and as it was founded on a valid and sufficient consideration, it was good; therefore, counts setting forth the same, and averring by way of breaches, that the defendant travelled in the district of the plaintiff and sold boxes therein, were held good on general demurrer. (2)

If there be a legal and valuable consideration for a contract in restraint of trade, its adequacy will not be assayed by the court. Thus, in *Hitchcock v. Coker* (3) Chief Justice Tindal said, "it was urged, in the course of the argument, that there is an inadequacy of consideration, in this case, with respect to the defendant, and that, upon that ground, the judgment must be arrested. Undoubtedly in most, if not all, the decided cases, the judges, in delivering their opinion, that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made

RESTRICTING
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VALID COVE-
NANTS.

Covenants re-
straining the
exercise of par-
ticular trades
run with the
land.

Box and trunk
makers di-
viding England
into districts,
and respec-
tively engaging
to keep to their
particular dis-
tricts.

If there be a
legal and va-
luable consider-
ation for a con-
tract in re-
straint of trade,
its adequacy
will not be as-
sayed by the
court.

(1) *Congleton (Mayor of) v. Pattison*, 10 East, 136.

(2) *Wickens v. Evans*, 3 Y. & J. 318.

(3) 6 A. & E. 438. (in error).

**RESTRICTING
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TRADES.**

on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade: if by that expression it is intended, only, that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if, by adequacy of consideration, more is intended, and that the court must weigh, whether the consideration is equal in value to that, which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would, thereby, be imposed upon the court, in every particular case, which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain, and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shewn upon the record a legal ground of action; and having obtained a verdict in his favour, that he is entitled to judgment."

**Agreements in
partial restraint
of trade.**

An agreement is illegal and void if it be generally in restraint of trade; but an agreement for a *partial* restraint of trade is valid, provided there be a sufficient consideration, and it be an honest and upright contract.

**Covenant by C.
to employ A.
and B. exclu-
sively to make
cordage for his
friends, and not
to employ any
other, &c. is
not illegal and
void, as being
in restraint of
trade without
adequate con-
sideration.**

In *Gale v. Reed* (1) it appeared, that by indenture between A., B., and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C. during his life 2s. on every cwt. of cordage which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust; and C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of A. and B.; and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him, by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever: — It was held, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c., A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed

(1) 8 East, 80.

together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to work for any of his friends who were refused to be trusted by A. and B.; by which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade.

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THE EXERCISE
OF PARTICULAR
TRADES.

A contract restricting a party from carrying on a trade on his own account for an indefinite period is not, on that account, void:— Thus, where the plaintiff by deed sold to the defendants his trade and business as a carrier between London and Wisbech, and covenanted that he would not thenceforth during his life exercise the trade of a carrier, but that he would serve the defendants as assistant in the trade of carriers; in consideration of which, the defendants covenanted to pay him a certain weekly sum during his life; it was held, in an action against the defendant on the covenant, that the plaintiff's covenant to serve during life was good in law, and that the covenant in restraint of trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade; but only from carrying it on in any other way than as assistant to the defendants. (1)

Restricting a
party from
pursuing his
trade on his
own account,
except as an
assistant.

In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises; and it is particularly worthy of consideration, whether such trade as that complained of, was carried on there at the time of the demise: and it seems, that a trade carried on there at the time of the demise, would not be within the covenant. (2)

Carrying on
offensive trades.

In *Doe d. Gaskell v. Spry* (3) there was a covenant, that the lessee was not to permit or suffer any person or persons to inhabit or dwell in, use, or occupy the demised premises or any part thereof, or use or exercise therein or thereupon the trades or business of a brewer, baker, vintner, victualler, butcher, poulterer, fishmonger, fruiterer, &c. without the consent in writing of the lessor. The defendant took the house, and fitted it up as a chandler's shop, in which various articles of provision, &c. were sold: he was also in the habit of selling meat in a raw state to all his customers. There was no exposure of it at the shop window; but it was in the interior shop, visible, however, to those who passed by the house if they chose to look in; but he did not kill any animals there. Upon these facts Lord Ellenborough said, "It is not necessary that a man should carry on every branch of a trade on these premises in order to come within the proviso of the lease. It will be quite sufficient if he partially carries it on there; and here he does exercise a material part of it, for he exposes the meat for sale, which has, either by him or his assistants, been slaughtered elsewhere. In the case of *Doe d. Bish v. Keeling* (4), where there was a similar proviso against carrying on the business of a schoolmaster, it was never made a question to what extent, or in what manner, that business was carried on. The real object

Judgment of
Lord Ellen-
borough in
Doe d. Gaskell
v. Spry.

The object of

(1) *Wallis v. Day*, 2 M. & W. 273.

(3) 1 B. & A. 617.

(2) *Gutteridge v. Munyard*, 7 C. & P. 129.
1 M. & Rob. 334.

(4) 1 M. & S. 95.

**RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.**

inserting covenants restrictive of the uses of particular trades.

Selling a secret in trade.

Relinquishment by an attorney of his business.

in all these cases is, to prevent the lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of those trades, which, in the judgment of the lessor, are likely to prevent tenants from afterwards taking the premises, and which, by so doing, might depreciate their value at a future period."

Effect will be given to covenants restraining trade within particular limits (1); such as that partners shall not carry on for their private benefit the particular commercial concern in which they are jointly engaged (2); or that proprietors of a theatre shall not write dramatic pieces for their theatres. (3) So, likewise, an apothecary may bind himself not to set up business within twenty miles of A. (4)

And a trader may sell a secret in his trade, and restrain himself generally from its use. (5)

An agreement by an attorney, first to relinquish his business, and recommend his clients to two other attorneys for a valuable consideration; secondly, not to practise in such business within certain limits; and thirdly, to permit the purchasers to make use of his name in their firm for a certain time, without any interference on his part, was held valid. (6)

INVALID COVENANTS.

Covenants restrictive of trade.

Agreements with publicans.

Where an

III. Invalid Covenants.

All covenants are, as previously observed, void, which have for their object a general restraint of trade, whether made with or without consideration, and whether it be of the party's own trade or not. (7)

It seems, a covenant by a lessee of a brewery, that he will not "during the continuance of the demise carry on the business of a brewer or merchant, or agent for the sale of ale, &c. in Sheffield or elsewhere, or in any other manner howsoever be concerned in the said business," is void, as being a general restraint of trade. (8)

Contracts by which brewers bind publicans to deal with them are not to be favoured in law, as they tend to prejudice the health of the subject. (9)

An agreement in a lease, that in case the lessee ceased to purchase beer of the lessor, his rent should be advanced, was held to be injurious to the public interest and welfare, and not to be favoured by the courts. (10) And where such an agreement was in the alternative, either that the publican should take all his beer of the brewer, or pay an advanced rent, it was held, that it could not be enforced, unless it were proved, that good beer was supplied. (11)

In *Capes v. Hutton* (12), the articles under which A. had served his clerk-

- (1) *Clerk v. Crow*, 2 Barn. 463.
- (2) *Morris v. Coleman*, 18 Ves. 437.
- (3) *Ibid.*
- (4) *Hayward v. Young*, 2 Chitt. 407.
- (5) *Bryson v. Whitehead*, 1 S. & S. 74.
- (6) *Bunn v. Guy*, 4 East, 190., sed vide *Hughes v. Statham*, 4 B. & C. 187.
- (7) *Prugnell v. Gosse*, Aleyn, 67. *Mitchell v. Reynolds*, 1 P. Wms. 181. 186. *Chesman v. Nainby*, Str. 739. 2 Ld. Raym. 1456.

Gale v. Reed, 8 East, 78. As to brewers' leases, vide *Doe d. Calvert v. Reid*, 10 B. & C. 849.

- (8) *Hinde v. Gray*, 1 M. & G. 195.
- (9) *Thornton v. Sherratt*, 8 Taunt. 529.
- (10) *Cooper v. Twibill*, 3 Camp. 286. n.
- (11) *Holcombe v. Hewson*, 2 *ibid.* 391., vide etiam *Hinde v. Gray*, 1 M. & G. 195.
- (12) 2 Russ. 357.

ship to an attorney contained a proviso, that A. should not practise within a certain distance; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty, to insure his fulfilment of the proviso. A., who was an infant at the time of the execution of the articles, served under them for three years after he attained full age, but was never called on to execute any bond, and with a knowledge of the purport of the articles completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district was refused with costs.

RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.

articled clerk
not restricted
from practising
within a limited
distance, al-
though in con-
travention of
his articles of
clerkship.

An agreement in partial restraint of trade can only be supported by an adequate consideration. Thus, an agreement, by which a brass-founder was to work exclusively for certain factors for his and their lives, they not undertaking to find him full employment, but on the contrary reserving liberty to employ others to execute their orders in his trade if they should think fit, and to put an end to the agreement at three months' notice, is bad, though London and six miles round were left open to the party to take orders from. (1)

A consideration
must exist for
an agreement
in partial re-
straint of trade.

IV. *Breach.*

BREACH.

A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by his selling raw meat by retail, although no beasts were there slaughtered. (2)

What is a
breach.

Trade of a
butcher.

"Any business
whatsoever."

Where a lessee of a house and garden for a term of years covenanted with the lessor, "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the license of the lessor, &c.;" and afterwards, without the license of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held, that the assignment was a breach of the covenant, and the lessor entitled to re-enter, under a proviso for re-entry for non performance of covenants. (3)

A lessee of a house covenanted, that he would use his best and utmost endeavours to continue it open as a public licensed victualling house, and to increase the trade and custom of it; and that he would not remove the trade or license to any other public-house. In an action brought upon this covenant, the breach was, that the defendant did not use his utmost and best endeavours to continue the house open as a public licensed victualling house, &c. but, on the contrary, allowed it to be discontinued and the license to be removed: to which it was pleaded, that the defendant did use his best and utmost endeavours to continue the house open, and to increase the trade, according to the true intent and meaning of the covenant. It appeared, that the house was occupied as a licensed house by different successive tenants from the year 1815, when the lease was granted, to the

To continue
the trade of a
public-house.

(1) *Young v. Timmins*, 1 Tyrw. 226. 1
C. & J. 331. *vide antè*, 1111.

(2) *Doe d. Gaskell v. Spry*, 1 B. & A. 617.
antè, 1115.

(3) *Doe d. Bish v. Keeling*, 1 M. & S. 95.

**RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.****What is not a
breach.****Not to run
coaches on cer-
tain roads.****Not to carry on
offensive trades.****Where exe-
cutors not
bound.**

year 1830, in which year, in consequence of complaints of irregularity in the conduct of it by the then tenant, the license was taken away by the magistrates, and from that time till the year 1836, when the lease expired, the house had not been licensed:—It was held, that it was incumbent on the defendant to shew, that he did some act after the refusal of the magistrates to renew the license, such as applying for a re-hearing of the case by them, or by some other act endeavouring to obtain the continuance of the license, and to get the house open again. (1)

A coachmaster having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, or prejudicial to the business which he had sold, an injunction was granted, restraining him from running a coach from Pangbourne through Reading to London. (2)

In a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, &c. should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business that might be, or grow or lead to be, offensive, or any annoyance or disturbance, to any of the other tenants of the lessor, &c." The lessee granted an under-lease of the premises (subject to the like covenant) to A., who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant:—It was held, that such an act did not amount to a breach of covenant. (3)

On a covenant that (in consideration of a weekly payment to A. and his executors for a term certain) A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it. (4)

WAVER.**W. Waver.****Landlord wit-
nessing a breach
for six years.****Lessor permit-
ting lessee to
expend money
in improve-
ments on a
breach.****Silent acqui-
escence to carry
on one probi-
bited trade,
does not justify
the exercise of
another.**

If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, wave the forfeiture. Some positive act of waver, as receipt of rent, is necessary.

But if he permit the tenant to expend money in the improvements, it seems that it will be evidence to be left to a jury, of his consent to the alteration of the premises. (5)

If the covenant be, not to carry on certain trades without the lessor's previous consent in writing, his mere silent acquiescence in the exercise of one of the forbidden trades does not raise an inference in the lessee's favour, that, commencing with that trade, he may afterwards carry on any other without the requisite license. (6)

(1) *Linder v. Pryor*, 8 C. & P. 518.(2) *Williams v. Williams*, 2 Swanst. 253.(3) *Jones v. Thorne*, 3 D. & R. 152. 1 B. & C. 715., vide *Gorton v. Smart*, 1 S. & S. 68.(4) *Cooke v. Colcraft*, 2 W. Black. 856. 3 Wils. 380.(5) *Doe d. Sheppard v. Allen*, 3 Taunt. 78.(6) *Macher v. The Foundling Hospital*, 1 Ves. & B. 188.

VI. *Declaration and Pleadings.*

A declaration stated, that the defendant, for the considerations mentioned in the deed declared on (which the plaintiff brought into court), covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke:—It was held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to. (1)

In *Archer v. Marsh* (2) by a deed, reciting that M. had entered into treaty with A. for the disposal of the business of a carrier from London to certain places in Norfolk and Suffolk, and from these places to London, which M. carried on and intended relinquishing to A.; and that it was thereupon stipulated, that M., his heirs, executors, and administrators, should not at any time thereafter exercise the trade of a common carrier from &c. to &c. (as above), and that A. should pay M. a certain sum for the goodwill; further reciting the actual resignation of the business by M., and payment of the sum stipulated; M., in consideration of that payment, covenanted with A., his executors, administrators, and assigns, that he, M., his heirs, administrators, and executors, should not take in or convey any goods or articles whatever from London to any of the places above mentioned, or from them to London. On this deed A.'s executors brought covenant and alleged as a breach, that M. had taken in and conveyed divers goods and articles from London to the places above mentioned, and from those places to London, contrary to the tenor of the deed, and of his covenant therein: and it was held (on objection taken to the declaration on demurrer to the plea), 1. That the breach was assigned with sufficient particularity, though it did not allege that M. conveyed the goods as common carrier. 2. That where a party has agreed to forego a business for a consideration, the court cannot enter into the reasonableness of the restraint as compared with the consideration; and therefore, that, although the restriction here was unlimited as to time, the covenant could not be pronounced void as operating in undue restraint of trade.

In covenant to allow a business to be carried on in a certain shop, a breach that defendant improperly shut up the shop is sufficient, without alleging, that the shop was shut up at unreasonable or improper times. (3)

The plaintiff, as tenant of a farm, covenanted with the defendant as landlord to fetch and bring all such timber, stone, and other materials as should, at any time during the continuance of the term, be wanted about the erecting of a threshing mill; and the latter covenanted to build and erect the same. The defendant pleaded, first, that he began to provide the necessary materials for erecting the mill, and that, whilst he was so doing, the plaintiff desired him not to build the same, but refrain from so doing until he should be requested by the plaintiff; and, secondly, a plea of license:—It was held, that both these pleas were bad on special demurrer, on the ground, that they amounted to neither a release, nor accord and satisfaction; the covenant of the defendant being an absolute and

RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.

DECLARATION
AND PLEAD-
INGS.

Where breach
of a deed for
restricting the
exercise of the
trade of a car-
rier within cer-
tain prescribed
limits, stated
with sufficient
particularity.

Improperly
shutting up a
shop.

Pleas amount-
ing to neither
a release, nor
accord and
satisfaction.

(1) *Homer v. Ashford*, 3 Bing. 322.
(2) 6 A. & E. 959.

(3) *Hodges v. Gray*, 4 Dowl. P. C. 733.

RESTRICTING
THE EXERCISE
OF PARTICULAR
TRADES.

executory covenant under seal, and the defendant having pleaded only a parol request alleged to have been made to him by the plaintiff, to discharge and release him from it before any breach, and it did not appear that such covenant was suspended, released, or discharged by any deed under seal. (1)

18. FOR RENEWAL.

FOR RENEWAL.

Disinclination of the court to construe a covenant to be one of perpetual renewal. The reasonableness of a covenant in a lease of lands renewable for ever, is a question for a court of law.

Construction of covenants for renewal, governed by the intention and not by the acts of the parties.

Lessor's renewal will not give a construction to an equivocal covenant for a perpetual renewal.

A covenant for renewal is a covenant running with the land. (2)

The courts are averse from construing a covenant to be for a perpetual renewal, unless it be perfectly clear, that such was the meaning of the covenant. (3)

The reasonableness of a covenant by a lessee, in a lease of lands renewable for ever, that he and his heirs shall always live upon the lands, or pay an additional rent, with the usual remedies by distress and entry, is properly triable at law; and a court of equity ought not to interpose or give relief against it. (4)

A contract for perpetual renewal will be specifically executed if clearly appearing, but is not to be inferred from a general provision for similar covenants. The construction of such a covenant is the same in equity as at law, and is not to be affected by the acts of the parties. (5) Thus, where a lessor, in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.*, demised certain ground, with the buildings, &c. for twenty-one years, with a proviso for distress if the rent were in arrear for fourteen days, and the lessor covenanted at the end of eighteen years of the term, or before, on the request of the lessee, to grant a new lease of the premises "for the like term of twenty-one years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture were contained;" it was held, that this covenant was satisfied by the tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal; and also, that an averment of the correspondence of the covenant for renewal with various other leases before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture; for, supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet *non constat* from this averment, that all the former leases contained the same covenant for renewal. (6)

In *Cooke v. Booth* (7) the court of Queen's Bench held, that the circumstance of the lessor's having frequently renewed a lease, gave a construction to an equivocal covenant for a perpetual renewal, and bound him continually to renew. But this decision has been universally condemned and exploded. (8)

(1) *Cordwint v. Hunt*, 2 Moore, 660.

(2) *Isteed v. Stoneley*, 1 And. 82. Doe d. *Bamford v. Hayley*, 12 East, 469.

(3) *Taylor v. Stibbert*, 2 Ves. jun. 443.

Baynham v. Guy's Hospital, 3 Ves. 298.

Moore v. Foley, 6 ibid. 237. *Iggulden v.*

May, 9 ibid. 334. *Maxwell v. Ward*, 11 Price, 13.

(4) *Ponsonby v. Adams*, 6 Bro. P. C. 431.

(5) *Iggulden v. May*, 9 Ves. 325. 7 East, 237. 3 Smith, 269. 2 N. R. 449.

(6) Ibid.

(7) Cowp. 819.

(8) *Baynham v. Guy's Hospital*, 3 Ves. 295. *Moore v. Foley*, 6 ibid. 232.

In *Statham v. Liverpool Dock Company* (1) a lease was made to A. for a term of years, at a yearly rent, and under and subject to the payment at stipulated periods, during the term, of certain sums of money in the nature of fines, with a covenant on the part of the lessor, at the end of the term, on due and punctual payment being made of the rent, and gross sums or fines at the times appointed for payment thereof, to grant a further or renewed lease. A. assigned to B. a part of the premises for the same term and interest as A. himself took under the lease, subject to the payment of a proportional part of the rent and gross sums or fines (the amount of the proportion was not specified). C., afterwards, purchased of the lessor the reversion of the premises, expectant on the lease to A., and, subsequently to acquiring the reversion, purchased A.'s interest in all the premises demised to A. by the lease, and not assigned by him to B. After this purchase by C., one of the gross sums or fines became due, but was not paid, and no proportion of it was demanded by C. from, or was paid by B.: — It was held, that the double character filled by A. relieved B. from the strict performance of the covenant, and that the non payment by B. of a proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant, as to deprive B. of his claim to a renewed lease of the property assigned to him, and a demurrer for want of equity was overruled.

FOR RENEWAL.

Where a strict performance of a covenant will not be enforced.

If a lessee have been guilty of *laches* in claiming his renewal, he will not be enabled to make an additional claim. A. and B. covenanted in a lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the said premises, unto the lessee, for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c.; and so in like manner, at the end and expiration of every twenty years, during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted, &c.:" under this covenant, the lessee cannot claim a further term of twenty years at the expiration of the last term of twenty years in the lease, if he has omitted to claim a further term at the end of the first and second twenty years in the lease. (2)

Effect of lessee being guilty of *laches* in claiming his renewal.

A covenant for renewal in a lease is not inconsistent with a covenant to let and manage to the best advantage with reference to the subject, a trust for creditors; for trusts of this kind are generally short. (3)

Covenant for renewal not inconsistent with a covenant to let, &c. as a trust for creditors.

Formerly the concurrence of all the under-lessees to a surrender of the existing interests was required, in order to obtain a renewal of the principal lease; yet if there was no covenant in the under-lease to that effect, the court possessed no power to compel the under-tenant to surrender (4); to remedy which, it was enacted by stat. 4 Geo. 2. c. 28. s. 6., "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid,

Necessity of surrendering existing interests.

Stat. 4 Geo. 2. c. 28. s. 6.

(1) 3 Y. & J. 565.

(2) *Rubery v. Jervoise*, 1 T. R. 229.

(3) *Kirkham v. Chadwick*, 13 Ves. 547.

(4) *Colchester v. Arnett*, 2 Vern. 383.

FOR RENEWAL.

Covenants for renewal by hospitals and other charitable foundations.

to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease."

Hospitals and other charitable bodies, restrained by their constitution from granting leases for a longer period than twenty-one years, can no more, by the circuitous mode of covenanting for renewal, invest a lessee with an interest exceeding the prescribed limits, than originally grant a lease for the excessive term. (1) Thus, where the founder of a hospital directed that no leases should be made for any longer term than twenty-one years, and the hospital made a lease for twenty-one years, with a covenant by renewal to make it up sixty years, the covenant being deemed equally prejudicial to the hospital, as a lease for sixty years, was decreed not to be binding in equity. (2)

Words not constituting a covenant for perpetual renewal.

The following words in a lease, "It is agreed between the parties, that upon the renewing or inserting of any life or lives, there shall be paid by the said lessee, his heirs or assigns, unto the said lessor, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* sterling," do not constitute a covenant for perpetual renewal. (3)

And where on the trial of an ejectment, the question was, whether a covenant for perpetual renewal was contained in a lost deed, the proof of which rested upon recitals in various documents, and upon matters of presumption, and inference arising from those documents, and it appeared from this evidence, that the deed contained a clause in the above terms:—It was held, that the judge should have told the jury, that such a clause did not amount to a covenant for perpetual renewal. (4)

On the construction of a covenant for renewal "under the like rent, covenants, and conditions," it was held, that it was not for perpetual renewal. (5)

A covenant in a lease to renew under the same covenants, is exclusive of the covenant for renewal. (6)

Promise to renew by letter.

A promise, by letter, to renew a lease in consideration of money already laid out by the tenant, is *nudum pactum*, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards. (7)

BREACH AND PERFORMANCE.

Party incapacitating himself.

Any act of a party by which he absolutely incapacitates himself to perform his covenant, is equivalent to an actual breach: thus, where a lessor covenanted, that if the lessee for twenty-one years would surrender his lease at any time during the term, he would grant him a new lease, and the lessor afterwards levied a fine, and granted a lease of the same premises to the conuzee for eighty years, this was held to be a breach; and, in an action of debt on a bond for the performance of the covenant, the lessee was released from the necessity of shewing, that he offered to surrender, the maxim being, "*lex neminem cogit ad vana seu inutilia peragenda*." (8)

Purchasing of lessor new lives

But if a lease for ninety-nine years, determinable on three lives, be conveyed in trust for A. for life; and A. covenant to use his utmost endeavours

(1) *Watson v. Hemsworth Hospital* (Master of), 14 Ves. 324., vide etiam *Watson v. Hemsworth Hospital*, 2 Vern. 596.

(2) *Lydiatt v. Foach*, 2 Vern. 410. *Taylor v. Dulwich Hospital*, 1 P. Wms. 655. 2 Eq. Ca. Abr. 198. pl. 2. *Somerville v. Chapman*, 1 Bro. C. C. 61.

(3) *Bell d. Smyth v. Nangle*, 1 Jebb & Symes (Irish), 199.

(4) Ibid.

(5) *Moore v. Foley*, 6 Ves. 232.

(6) *Tritton v. Foote*, 2 Cox, 174. 2 Bro. C. C. 636.

(7) *Robertson v. St. John*, 2 Bro. C. C. 140.

(8) *Main's case*, 5 Co. 20. (b.) Jenk. Cent. 256. *Ford v. Tiley*, 6 B. & C. 325. Platt on Covenants, 245.

as often as any of the persons on whose lives the premises are held shall die, to renew the same, by purchasing of the lord of the fee a new life in the room of such as shall fail ; it is no breach of the covenant, if, upon one of the lives failing, he procure a renewal upon his own life (1), because it is not unreasonable he should put in his own life, in order to avoid the burden of again renewing on the death of any other person he should nominate, particularly as the parties, in whose power it was to provide against such an act, had omitted to insert a restrictive covenant to that effect.

FOR RENEWAL.
in the room of
such as shall
die.

19. NOT TO ALIEN OR ASSIGN WITHOUT LICENSE.

A covenant not to assign cannot run with the land, because the question of its running with the land supposes an assignment ; and the very assignment by act of law, or with the license of the lessor, extinguishes the covenant. (2)

A covenant against alienation will always receive a very strict and narrow construction from the courts. (3) According to the case, a covenant with the lessee, his executors, administrators, or assigns, not to assign, was holden void, because it was repugnant upon the face of it. (4) But the authority of this case is not now recognised, because there may be assigns *at law*, as well as by act of the party ; and an assignment at law stands upon a different ground. (5)

A covenant "not to alien, assign, or underlet the premises or any part of them, without leave of the lessor in writing for that purpose first had and obtained," is a fair and usual covenant. (6)

The following cases will illustrate what is not a breach of the covenant under consideration :—

Where it was covenanted "that the lessee should not assign, transfer, or set over, the said premises or any part thereof," and the lessee made a lease for part of the time, it was adjudged, that such under-lease was no assigning, transferring, &c. and so was no breach of the covenant. (7)

So where the lessee made a lease of his whole term, but reserved the rent to himself, it was held to be no assignment, but an under-lease, though the lessee parted with his whole term. (8)

Where the covenant was, "that the lessee should not assign over his term without the lessor's consent in writing," and the lessee devised the term without any such consent obtained :—this was held not to be such an assignment as was a breach of covenant, because a devise is not a lease. (9)

The mere act of advertising the demised premises for sale, cannot be construed into a breach of covenant not to assign. (10)

Covenant not to underlet any part of the premises is not broken by

NOT TO ALIEN
OR ASSIGN
WITHOUT LI-
CENSE.

Covenant not
to assign can-
not run with
the land.

Covenant
against alien-
ation will al-
ways be strictly
construed.

Covenant not
to assign, &c.
is a fair and
usual covenant.

What is con-
sidered an un-
der-lease and
not an assign-
ment.

Devise of a
term not con-
sidered as an
assignment.

Advertising
demised pre-
mises for sale.
Taking lodgers
is not an
underletting.

(1) *Scudamore v. Stratton*, 1 B. & P. 455.

(2) *Balby v. Wells*, 3 Wils. 25. Doe d.

Cheere v. Smith, 5 Taunt. 795.

(3) *Crusoe d. Blencowe v. Bugby*, 2 W. Black. 767. *Church v. Brown*, 15 Ves. 258.

(4) 4 Bac. Abr. Grants (I.), 82.

(5) *Weatheral v. Geering*, 12 Ves. 504.

(6) *Morgan v. Slaughter*, 1 Esp. N. P. C. 8.

(7) *Crusoe d. Blencowe v. Bugby*, 3 Wils. 234.

(8) *Poultney v. Holmes*, Str. 405.

(9) *Fox v. Swann*, Sty. 483.

(10) *Gourlay v. Somerset (Duke of)*, 1 Ves. & B. 73.

**NOT TO ALIEN
OR ASSIGN
WITHOUT LI-
CENSE.**

An assignment
by act of law is
not a breach
of a covenant
not to assign.

Lease taken in
execution.

Effect of lessor
granting a li-
cense to assign.

If an assign-
ment be once
made, the in-
terest may be
assigned to any
person.

Acceptance of
rent is a waiver
of a forfeiture.

**WHAT IS A
BREACH.**

Assignment
after partial
entry of lessor.
Under-leasing.

Effect of mar-
riage.

admitting a lodger for above a twelvemonth into the exclusive possession of a room. (1)

An assignment either by the lessee or his executor, not voluntary, but by mere act of law, is not a breach of the covenant not to assign (2); as if the lessee become a bankrupt, the transfer of his property to his assignees under his fiat is not a breach of the covenant. (3)

A lease with a covenant "not to let, set, assign, transfer, or make over the premises," may be taken in execution, and sold by the sheriff, and assigned to the purchaser notwithstanding that covenant, though the judgment on which the execution issued, was under a warrant of attorney given by the lessee. (4)

But to warrant such an assignment, it must be a *bond fide* judgment for a subsisting debt, and by proceeding *in invitum*; for if the tenant give such warrant of attorney for the express purpose of its being so taken in execution and assigned, &c. to defeat the covenant, it will not prevail; but the lessor may enter and recover for breach of covenant. (5)

If the lessee be bound not to alien or assign without license, if that license be obtained, and an assignment take place, the assignee is not bound by the covenant, but may alien, without a subsequent license, for by the license, the condition is gone and dispensed with. (6)

And where an assignment has been once made, the assignee may assign his interest to any person with a view to get rid of the lease, although such person neither take possession or receive the lease. (7)

So, if a forfeiture has incurred by assignment, if the lessor accept rent afterwards, it is a waiver of the forfeiture; but in such case it must appear, that at the time he accepted the rent he knew of the forfeiture incurred, as otherwise he will not be bound. (8)

Where the covenant was not to assign the whole or any part of the lands demised, without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned:—this was held to be a breach of the covenant, notwithstanding the lessor's entry. (9)

Where a proviso in the lease was, that "if the lessee, his executors or administrators, did or should assign or otherwise part with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term thereby granted, to any person or persons whomsoever, without the license and consent in writing of the lessor, first had and obtained for that purpose, the lessor might re-enter," &c. and the lessee entered into an agreement with J. S. to grant him a lease of the premises for the residue of the term, reserving a few days under which possession was given:—Lord Ellenborough C. J. held, that the words of the proviso included an under-lease, and that, consequently, an under-lease was a breach of the proviso. (10)

If a lease be made to husband and wife, upon condition, that if it come to any other hand than their own and their issues, the lessor shall re-enter; and the husband die, and the wife take another husband, the lessor will

(1) Doe d. *Pitt v. Laming*, 4 Camp. 77.

(2) *Weatherall v. Geering*, 12 Ves. 512.

(3) 1 Esp. N. P. 300. cit. 3 Wils. 236.

(4) Doe d. *Mitchinson v. Carter*, 8 T. R. 431.
57.

(5) Ibid.

(6) *Dumport's case*, 4 Co. 119. (b.)

(7) *Taylor v. Shum*, 1 B. & P. 21.

(8) Roe d. *Gregson v. Harrison*, 2 T. R.

(9) *Collins v. Sillye*, Sty. 265.

(10) Doe d. *Holland v. Worsley*, 1 Camp. 20.

have a right to re-enter (1); but if a lease for years be made to a feme sole with a condition against alienation, and she take husband, this is no breach of the condition. (2)

NOT TO ALIEN
OR ASSIGN
WITHOUT LI-
CENSE.

Where the covenant in a lease was, that the lessee, his executors, administrators, or assigns, should not set, let, or assign over the whole premises demised, or any part of them, without leave in writing first had and obtained, under penalty of forfeiting the term, and the lessee's administratrix did underlet for part of the time: — this was held to be a forfeiture, and that a parol license from the lessor to let part of the premises did not discharge the lessee from the restriction of such a proviso. (3)

Executors or
administrators.

If the lessee covenant that he, his *executors or administrators*, shall not assign without license, except by his or their last will and testament; and the lessee make his will and die: — it seems, that the executors will be bound by the covenant, and cannot sell the premises for the payment of debts without the license of the lessor. (4)

20. REFERENCE TO ARBITRATION.

An agreement to refer all matters in difference to arbitration will not oust the courts of law or equity of their jurisdiction. (5)

REFERENCE TO
ARBITRATION.

If it be agreed that the arbitrators shall not only determine upon evidence, but be at liberty to use all such other ways and means to enable them to decide as they should think fit, the court has declined to interfere before the parties have tried the jurisdiction provided by the articles. (6)

It is not the sequent of a covenant to refer to arbitration, that the party thereby agrees to forbear to sue (7); but parties may agree to forbear, and if they do, they cannot proceed contrary to the agreement, and the covenant may be pleaded in bar to an action. (8)

21. TO SURRENDER COPYHOLDS.

TO SURRENDER
COPYHOLDS.

A purchaser by a covenant to surrender copyholds, obtains a right in equity merely without an equitable estate: by a surrender he obtains an equitable estate, and by admission he is invested with the legal seisin. (9)

Effect of a sur-
render.

A covenant to surrender will not amount to a surrender (10), any more than a covenant to grant a lease not warranted by the custom, will operate as an immediate lease so as to create a forfeiture. (11)

Covenant to
surrender will
not amount to
a surrender.

A surrender to two copyholders in pursuance of a covenant to surrender generally is good. (12) And where A. covenants to surrender copyholds,

What is and is
not a breach.

(1) *Anon.* F. Moore, 21. Com. Dig. Condition (Q.).

(2) Com. L. & T. 218.

(3) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(4) *Lloyd v. Crispe*, 5 Taunt. 249.

(5) *Ante*, tit. ARBITRATION AND AWARDS.

(6) *Platt on Covenants*, 149. *Waters v. Taylor*, 15 Ves. 10. *Carlen v. Drury*, 1 Ves. & B. 154. *Gourlay v. Somerset (Duke of)*, 19 Ves. 431.

(7) *Street v. Rigby*, 6 Ves. 817. 821.

(8) *Mitchell v. Harris*, 2 *ibid.* jun. 132.

(9) *Platt on Covenants*, 151.

(10) *Zinzon v. Talmash*, 2 Show. 130.

(11) *Fenny d. Eastham v. Child*, 2 M. & S. 255. *Hamlen v. Hamlen*, 1 Bulst. 189.

Lenthall v. Thomas, 2 Keb. 267. *Richards v. Sely or Seely*, 2 Mod. 79.

(12) *Beany v. Turner*, 1 Lev. 293.

**To SURRENDER
COPYHOLDS.**

the custom being, that he may surrender in court or by attorney, it is no breach to refuse to execute a letter of attorney for that purpose, as A. has his election. (1)

**Non payment
of fine for
covenantee's
admission.**

Where A. covenanted to do all acts, and deeds, at his own costs for assuring copyholds, the non payment of the fine for covenantee's admission, is no breach, for the title is complete by the admittance, and the fine is not due till after the admittance. (2)

22. To SURRENDER OR DETERMINE THE TERM.**To SURRENDER
OR DETERMINE
THE TERM.**

When the lease contained several covenants for payment of rent, &c. and there was a covenant, that the lessee might determine the term, at the end of the first three or five years, giving six months' notice; and that from and after the expiration of such notice, and the payment of all rent and arrears to be paid by the tenant and performance of covenants, the indenture should cease and be void; it was adjudged, that the payment of rent, and performance of covenants, was a condition precedent to the determination of the term, at the end of the first three years, and the mere giving notice without such performance, would not enable the lessee to determine the lease. (3)

23. WHAT A BREACH.**WHAT A
BREACH.**

Whether a party has broken any of his covenants or not, is a matter properly triable at law, as the damages (supposing a breach) cannot be settled without such trial. (4)

The following principles will exemplify, at *what time* a breach of covenant may be committed, and in what manner it may be committed.

**TIME AT WHICH
A BREACH OF
COVENANT MAY
BE COMMITTED.**

Covenants considered with respect to the time of performance are of three kinds: —

**Mutual and
independent
covenants.**

1. Such as are mutual and independent, where either party may recover damages from the other for the injury they may have received from a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. (5)

**Dependent
covenants.**

The second species of covenants considered with reference to the time of performance are, such as are conditions and dependent, in which the performance of one, depends on the prior performance of the other; and therefore, till the prior condition is performed, the other party is not liable to an action of covenant. (6)

In construing this covenant it should be remembered, that the dependence or independence of covenants is always to be collected from the evident sense and meaning of the parties; and however transposed the words may

(1) *Synnes v. Smith*, Sir W. Jones, 314. *Blacklowe*, 2 Saund. 155. *Cole v. Shelt*, 3 Lev. 41.
 (2) *Graham v. Sime*, 1 East, 631.
 (3) *Porter v. Shephard*, 6 T. R. 665. (6) 1 Esp. N. P. 306. *Blackwell v. Nash*, Str. 535. *Terry v. Duntze*, 2 Hen. Black.
 (4) *Stafford v. London*, 2 Bro. P. C. 134. 389. *Thorpe v. Thorpe*, 1 Salk. 171. *Porter*
 (5) *Trench v. Trewin*, 1 Ld. Raym. 124. *Boone v. Eyre*, 2 W. Black. 1312. *Campbell v. Jones*, 6 T. R. 570. *Hunloche v. Carter*, 1 Rol. Abr. Condition (D.) 432.

be, their precedence must depend on the order of time, in which the intent of the parties requires their performance. (1)

WHAT A
BREACH.

The third species of covenants, considered with regard to the time of performance, are such as are mutual conditions, and to be performed at the same time. In these, if one party be ready and offer to perform his part, and the other refuses or neglects to perform his, he who is ready and offers, has fulfilled his engagements, and may maintain an action of covenant for default of the other, though it is not certain that either is obliged to do the first act. (2)

Mutual cove-
nants.

But where the plaintiff relies on a tender and refusal, it should appear that he could have performed his part, when the tender was made.

Where plaintiff
relies on a
tender and
refusal.*

For where the issue was on the tender of stock, at a certain day, it was proved, that although the books were not open for transfer of stock that day in common form, yet that by leave of a director (which was not usually denied) a transfer might be made, but that the defendant never attended: — It was resolved, that the plaintiff had not performed his part, by not getting leave from a director, so as to entitle him to the action, for perhaps leave might not have been obtained, and so the defendant could not have performed his part. (3)

Therefore if one party disable himself from performing his part by any act of his own, the other party is not obliged to offer to perform his part, but may have his action immediately. (4)

The mode in which a breach of covenant may be committed, will receive illustration from the following principles: —

MODE IN WHICH
A BREACH OF
COVENANT MAY
BE COMMITTED.

If the covenant be a covenant in deed, this action will lie only for a misfeasance. As if a man grant a way, covenant lies for stopping it up, but not for letting it be out of repair.

For covenants in deed must be broken by some act "done." (5)

But in case of a covenant in law, action lies on it, though there has been no act to cause a breach. (6)

Breach of covenant must always refer to that, which is the subject-matter of the undertaking. (7)

Breach of covenant must always be committed on that, which is granted by and passes under the deed containing the covenant. (8)

To support this action the breach must have been committed during the existence of the estate on which the covenant is placed; for if the estate expire at the time the covenant is broken, this action it seems cannot be maintained. (9)

But if the estate continue after the breach committed, the action will lie even after the estate expires.

Thus, where the covenant was, that the lessee should enjoy the premises discharged of tithes, but that if the lessee was sued for them, and a reco-

(1) *Campbell v. Jones*, 6 T. R. 571. *Ritchie v. Atkinson*, 10 East, 295.

(2) *Beany v. Turner*, 1 Lev. 298. *Jones v. Barkley*, Doug. 659. 1 Esp. N. P. 308.

(3) *Clark v. Tyson*, Str. 504.

(4) *Scot v. Mayn*, Cro. Eliz. 450. *Main's case*, 5 Co. 20. (b.)

(5) 1 Saund. 321. *Rich (Lady) v. Rich (Lord)*, Cro. Eliz. 43. 4 Leon. 48, 49.

(6) *Holder v. Taylor*, Hob. 12.

(7) *Penn v. Glover*, Cro. Eliz. 421. *Dobson v. Crew*, ibid. 705. *Morgan v. Hunt*, 2 Vent. 213.

(8) *Russel (Lady) v. Gulwel*, Cro. Eliz.

657.

(9) *Brudnell v. Roberts*, 2 Wils. 143.

WHAT A
BREACH.

very had, that he should retain so much out of the rent: after the term expired, the lessee was sued for two years' tithes, owing while he was in possession, and had a recovery against him. He was allowed to recover to that amount in covenant against the lessor. (1)

WAVER OF
FORFEITURE.

24. WAVER OF FORFEITURE.

Waver of one
forfeiture no
waver of a sub-
sequent one.

A waver of one forfeiture is no waver of a subsequent one. Thus, a waver for one breach of covenant to repair is not a waver of a subsequent breach of such covenant; nor is a waver for one under-letting a waver for a subsequent one. (2)

Act by which
forfeiture is
waved, must
amount to an
affirmance of
the tenancy.

The act by which the forfeiture is waved must amount to an affirmance of the tenancy, or a recognition of its continuance. It is not enough, that the lessee knows of the breach without availing himself of his right of re-entry.

Where lease
made *ipso facto*
void by breach.

Where the lease is only voidable by the lessor's entry for breach of condition, the lessor after condition broken may wave the breach and his consequent right of entry, by some act recognising the continuation of the tenancy. But when the lease is made *ipso facto* void by the breach, then no subsequent recognition of the tenancy can again set it up. (3)

Affirmance of
voidable leases
by the accept-
ance of rent.

With respect to the affirmance of voidable leases by the *acceptance of rent*, a distinction seems to have been made, between the case of a lease rendered voidable by breach of condition *annexed to the rent itself*, — that is, rendered voidable by *non payment of the rent*, — and breach of a *collateral condition*, or condition relating to some *other* thing, as assigning without license, not making repairs, &c. In the former case, accepting, or distraining for, the very rent for the non payment of which the forfeiture is incurred, will, if it be accepted, or distrained for, before the re-entry is made, amount to a waver of the forfeiture, and consequently to an affirmance of the lease. (4) But in the latter case it would appear, that it is only acceptance of rent, which becomes due *after* the forfeiture, that will amount to an affirmance of a voidable lease. (5) To make the acceptance of rent by issue in tail or a remainder-man an affirmance of a voidable lease, it must be rent which accrued *after* his title to the possession accrued.

Waver of the
forfeiture, is not
a consequence
or conclusion
of law.

Waver of the forfeiture is *not a consequence or conclusion of law*, drawn from the fact of accepting rent with notice of the forfeiture; but acceptance of rent, with notice of forfeiture, is merely a circumstance to be submitted to the consideration of a jury (6), and for them to say, whether it affords sufficient evidence of *an intention* on the part of the lessor to wave the forfeiture; so that the question whether waver or no waver, depends, not simply on the fact of the lessor having received rent with notice of the forfeiture, but upon what was his *intention*; and the best way, it is conceived, of ascertaining such intention, is by looking at the *consequences* which would result to the lessor by holding acceptance of rent to amount to a waver of the forfeiture.

Where lessor

In all cases where the lessor has either sustained no injury by the act

(1) *Lanning v. Lovering*, Cro. Eliz. 916.

(2) *Doe v. Bliss*, 4 Taunt. 735.

(3) Co. Litt. 215. (a.) *Finch v. Throgmorton*, Cro. Eliz. 220. *Mulcarry v. Eyres*, Cro. Car. 511. *Anon.*, 3 Salk. 4. Com. L. & T. 289, 290.

(4) *Vide* 1st and 2d Res. in *Pennant's case*, 3 Co. 64. (b.).

(5) *Ibid.*

(6) *Doe d. Cheney v. Batten*, 1 Cowp. 243.

occasioning the forfeiture, or is placed in the same, or in as good a situation as he would have been in, had there been no forfeiture, as in cases of forfeiture for non payment of rent, or for assigning or under-letting without license, in cases of this kind no *injurious consequence* would result to the lessor from holding, that acceptance of rent, with notice of the forfeiture, was a waiver of such forfeiture, and therefore in such cases it may be fair enough to presume, that he intended to wave it.

WAIVER OF FORFEITURE.

has sustained no injury by the act occasioning the forfeiture.

But where the consequences of holding that acceptance of rent amounted to a waiver of the forfeiture, shew that the lessor could *not* intend to wave it, *there* a jury ought not to find, by their verdict, that he did intend it.

Where lessor has sustained an injury.

If for instance the waiver of the forfeiture would *materially injure or prejudice the lessor*, such a circumstance would tend strongly to shew, that he could never have intended to wave it. Thus, in cases of forfeiture for not building, repairing, or otherwise laying out money in improvements; in cases like these, there seems no reason to contend, that acceptance of rent, with notice of the forfeiture, could not be considered as a waiver of such forfeiture, because the *prejudice or injury* which the lessor might be doing himself by waving it, would tend much more strongly to shew, that he did not intend to wave it, than the acceptance of what he considered to be justly due to him could possibly shew that he did. (1)

Where a lease contained a proviso for re-entry in case the rent should be twenty-one days in arrear, and there should be no sufficient distress upon the premises, Lord Ellenborough held, that the landlord having distrained before the expiration of the twenty-one days, but continued in possession of the distress upon the premises until after the expiration of the twenty-one days, had not thereby waved his right of re-entry (2); because, although "a right which had accrued at the time of the distress might have been waved by it, yet the party is not estopped by it, as to any right which accrued subsequently."

Where landlord does not wave his right to re-enter by levying a distress.

25. RIGHTS AND LIABILITIES OF COVENANTOR AND COVENANTEE GENERALLY; AND HEREIN OF JOINT AND SEVERAL COVENANTS.

The right of action follows the interest in all cases; consequently, the party who has the legal interest in the covenant must always sue, although the beneficial interest may be in another. (3)

RIGHTS AND LIABILITIES OF COVENANTOR AND COVENANTEE GENERALLY, &c.

Upon the execution of the deed containing the covenant, the covenantor and covenantee acquire a right to the observance of the agreement; and, in case of a breach, can respectively sue for compensation in damages.

A covenantor cannot avoid or qualify his express covenant, without the consent of the covenantee, or under the provisions of a statute, as in cases of bankruptcy or insolvency.

The covenantor cannot, *per se*, defeat his express covenant.

It appears to be essential that the party claiming the benefit of the covenant, should be named therein as the covenantee. (4)

Assent of covenantor how established.

(1) *Fryett v. Jeffreys*, 1 Esp. N. P. C. 393. Touchst. by Atherley, 284. n.

(2) *Doe d. Taylor v. Johnson*, 1 Stark. 411.

(3) *Barford v. Stuckey*, 2 B. & B. 333. *Storer v. Gordon*, 3 M. & S. 308. 1 Saund. 154. n.

(4) 1 Chitt. Pl. 119., cit. 1 Salk. 197. Comb. 219., et ref. 1 Ld. Raym. 28. 1 Salk. 214. 14 Ves. 187. 16 ibid. 454. Platt on Covenants, 5.

JOINT AND SEVERAL COVENANTS.

Mode of ascertaining whether a covenant is joint or several.

Effect of voluntary destruction of the seals of a deed.

Several covenants defined.

Joint covenants defined.

Form of words.

"For themselves and every of them."

Joint and several covenants defined.

Construction of covenant "in manner following, that is to say."

Implied covenants.

Questions frequently arise respecting the legal rights of joint and several covenantors in suing and being sued.

To ascertain whether a covenant entered into with several persons is joint or several, the question is, whether it is for the performance of one and the same act; so that a breach to one is necessarily a breach to all.

But by a voluntary destruction of one of the seals of a deed, where the covenants therein are joint, both the covenantors are discharged from the covenants; but where they are several, the breaking of one of the seals will invalidate the instrument so far only as concerns him whose seal is torn away. (1)

Where more persons than one are covenantors, and each undertakes only to the extent of his *own* acts and defaults, without entailing on himself the necessity of making reparation in case of a breach by the other or others, this is termed a several covenant. (2) Thus, in covenant by the master of a vessel with the several part-owners, and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names:—It was held a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. (3)

By joint covenants each party becomes answerable for himself, and is in effect a surety also, for the due performance of the covenant by the other. (4)

No particular words are necessary to constitute a covenant of either kind. If two covenant generally for *themselves* (5), without any words of severance, or that they or one of them shall do such a thing, a joint charge is created. (6)

The words "for themselves and every of them" amount to a covenant joint and several, for every of them being tantamount to for each of them (7); so do the words *obligamus nos et utrumque nostrum* (8), or *conveniunt pro se et pro quolibet eorum*. (9)

Joint and several covenants are a combination of the two former, that is, they afford the covenantee the election of suing on either. (10)

The first covenant in a lease, whereby the lessees covenant jointly and separately "in manner following, that is to say," &c. must, according to the general principles of construction, extend to all the subsequent covenants on the part of the lessees throughout the deed, unless there be something in the nature of the subject to restrain them to the former part of the lease. (11)

Covenants implied by construction of law, as on the word *demiserunt*, will be co-extensive with the interest granted; joint, if a joint estate; if a several interest, several. (12)

Where the covenants are joint and several by two lessees of a joint inte-

(1) *Mathewson v. Lydiate*, Cro. Eliz. 408. 470. 546.

(2) *Platt on Covenants*, 115.

(3) *Servante v. James*, 10 B. & C. 410.

(4) *Lilley v. Hodges or Hedges*, 8 Mod. 166. Str. 553.

(5) *May v. Woodward*, Freem. 248.

(6) *Robinson v. Walker*, 7 Mod. 154.

(7) *May v. Woodward*, Freem. 248.

(8) *Robinson v. Walker*, 7 Mod. 153.

(9) *Ibid.* *Bolton v. Lee*, 2 Lev. 56.

(10) *Enys v. Donnithorne*, 2 Burr. 1196.

(11) *Northumberland (Duke of) v. Errington*, 5 T. R. 522.

(12) *Coleman v. Sherwyn*, 1 Show. 79.

rest, it does not follow, because the interest must in its nature survive, that the covenants must be construed to run with the land; on the contrary, each is also liable on the separate covenant, which in case of his death will devolve and be binding upon his executor. (1)

In cases where the covenantees have, or are to have, several interests or estates, there, when the covenant is made to and with the covenantees, and *cum quolibet eorum, aut altero eorum*; in this case these words make the covenant several: as, if one by indenture demise black acre to A., and white acre to B., and green acre to C., and covenant with them and either of them, or covenant with them and every of them, that he is the lawful owner of all these acres; in this case, the covenant is several; but if he demise to them the three acres together, and covenant in this manner, the covenant is joint and not several. And if A. and B. do covenant jointly and severally: in this case, the covenant may be joint or several, and the covenantors may be sued either the one way, or the other, at the election of the covenantee. (2)

Words though never so joint shall be taken severally, when they have a distinct subject-matter to work upon. (3) Where two lessees covenanted jointly and severally at the beginning of the lease, it was held, that the words "jointly and severally" extended to all the subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor. (4)

If a covenant be entered into with two or more covenantees, though the covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue separately for a breach of the covenant. (5)

Where joint covenantees take a joint interest, one of such covenantees cannot sue alone on the covenant, upon a simple averment, that the other covenantees had not sealed or delivered the deed of covenant; for *non constat*, but they may still execute the deed; and joint covenantees who may sue, must sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to shew. (6)

As covenantors may subject themselves jointly and severally to the burden of a covenant, so two or more covenantees may jointly and severally have the benefit of a covenant. As where a person covenants with two or more persons and each of them, here, if the covenantees take several interests or estates in the thing to which the covenant relates, the covenant is clearly several, and each of the covenantees alone may sue upon it: but it is held, that where the interests of the covenantees are joint, the circumstance of the covenant being held with "each of them" does not make it a separate covenant. (7)

Where there is no express contract with all, and their legal interest is several, the covenantees must sue separately; yet where the contract is entered into with the covenantees jointly, and the estate taken by them is

JOINT AND SEVERAL COVENANTS.

Where words make the covenant several.

Words though never so joint, will be taken severally where they have a distinct subject-matter to work upon.

Covenant joint in its terms, but covenantees with several interests.

Where covenantees take a joint interest.

Two or more covenantees may jointly and severally have the benefit of a covenant.

Where the interests of the covenantees is joint, the covenant being made with "each of them," does not make it a separate covenant.

(1) Platt on Covenants, 119. *Enys v. Donnithorne*, 2 Burr. 1190.

(2) Per Holt C. J. in 3 Ch. Rep. 126. cit. Touchst. by Atherley, 166. n.

(3) *Northumberland (Duke of) v. Errington*, 5 T. R. 522.

(4) Touchst. by Atherley, 551.

(5) Ibid. *Petris v. Bury*, 5 D. & R. 152.

(6) *Anderson v. Martindale*, 1 East, 497. *Slingsby's case*, 1 Co. 119. *Northumberland (Duke of) v. Errington*, 5 T. R. 522. *Southcote v. Hoare*, 3 Taunt. 89. As to joint and several covenants, vide 1 Wood. 537. Gilb. Covenant, 89. 2 Bac. Abr. Covenant (D.) 345. *Enys v. Donnithorne*, 2 Burr. 1190.

(7) *Tippett v. Hawkey*, 3 Mod. 263.

JOINT AND SEVERAL COVENANTS.

Persons to be joined as plaintiffs.

Where the interest is several.

Where a covenant is entered into by two or more jointly or separately, the covenantee may either bring a joint or separate action against the covenantors.

Executor or administrator.

Where the interest is joint, the action must be joint;

sed aliter, if the covenant be several.

several, they *may*, at their option, sue jointly or severally: jointly, in respect of the joint contract; severally, in respect of the interest. (1)

Where a covenant is entered into by two or more jointly and severally, the covenantee may either bring a joint action against all the covenantors, or a separate one against each of them. And in the case of joint and several covenants, the circumstance of one of the covenantors being under age, does not exempt the other from his liability on the covenant. (2)

And if there are three covenantees taking distinct interests, two of them may support an action without joining the third though living. (3)

The executor or administrator of each several covenantee stands in his testator's or intestate's situation. (4)

Where a joint interest is created, the covenantees cannot sever in action (5); nor can any words of severalty relieve them from the necessity of suing together, even although the covenant be with each of them, or with them jointly and severally. (6)

If A. covenant to do an act for the benefit of two or more, and A. break his covenant, one of them alone (7) cannot maintain covenant against him, for then might he be doubly or trebly charged for the same breach. (8) If an agreement be entered into between several fiddlers, that they will not play asunder, unless on my Lord Mayor's-day, &c. and they bind themselves in 20*l.* each to the other jointly and severally, and one only brings covenant and assigns the breach, that the defendant played *ad quantum tabernam*, &c. this is nought, for they ought all to have joined, the interest being joint; and it is repugnant and contradictory for four persons to bind themselves one to the other jointly and severally. (9) But where part owners of a ship agreed, "each and every of them with the others, and each and every of the others," that the ship should proceed on a certain voyage, under the exclusive control and management of one of them as the ship's husband, and that, after her return, "a full account should be made of the said ship and her concerns," and the neat profits be divided in proportion, after deducting all charges, this covenant is several; and for not making out the accounts and dividing the profits, an action lies against the ship's husband by each of the part owners. (10)

Where in consideration of 300*l.* paid by A. and B., a person covenanted with them, their heirs, &c. to pay *one annuity or clear yearly* sum of 30*l.*, in the following shares and proportions, viz. 15*l.* to A., his executors, &c. and 15*l.* to B., his executors, &c. to be respectively paid quarterly, &c.:— It was holden, that A. could not maintain an action for non payment of his share (11); because, if several were to be permitted to bring distinct

(1) 1 Saund. 154. *n.* Leigh, N. P. 663.

(2) *Haw v. Ogle*, 4 Taunt. 10.

(3) *James v. Emery (in error)*, 2 Moore, 195. 8 Taunt. 245. 5 Price, 529.

(4) *Withers v. Bircham*, 3 B. & C. 254. 5 D. & R. 106.

(5) *Eccleston v. Clipsham*, 1 Saund. 153. *Spencer v. Durant*, Comb. 115. *Johnson v. Wilson*, Willes, 248. *Saunders v. Johnson*, Skin. 401. *Wilkins v. Fry*, 1 Meriv. 262.

(6) *Ibid.*

(7) In an indenture between A. and B. of the one part, and C. of the other part,

among other covenants there is one thus: viz. "It is agreed between the parties that C. shall enter into a bond to B. to pay him 100*l.* at a day;" in an action for non performance A. and B. must join. *Rolls v. Felt*, Yelv. 177.

(8) *Slingsby's case*, 5 Co. 18. (b.) But where a covenant may be joint or several, vide 2 Rol. Abr. Obligation (H.), 149. *Saunders v. Johnson*, Skin. 401.

(9) *Spencer v. Durant*, Comb. 115.

(10) *Owston v. Ogle*, 13 East, 538.

(11) *Lane v. Drinkwater*, 1 C. M. & R. 599.

actions for one and the same cause, where the interest is joint, the court would be in doubt for which of them to give judgment. (1)

JOINT AND SEVERAL COVENANTS.

Should one only commence an action and omit to aver in his declaration that the others are dead (2), or that they dissented from the deed, the defendant may avail himself of it on demurrer, or on motion in arrest of judgment, or on error (3); for *Petrie v. Barry* (4) has established, that all joint covenantees who may sue, must be parties to an action, as their assent is to be presumed: and it is not enough to aver, that the other covenantees did not seal; they might sue notwithstanding; and unless the declaration shews that they have no right to be considered as covenantees, it is insufficient. Unlike, too, the several covenant, the executor derives no interest from a deceased joint covenantee, the surviving party being the only person entitled to institute legal proceedings. (5)

Where the covenant is entered into by two or more severally only, it is clear that an action joining them as defendants cannot be maintained; for at law, as well as in equity, the courts will not take cognisance of distinct and separate claims, or liabilities of different persons in one suit, though standing in the same relative situation. (6)

PERSONS TO BE JOINED AS DEFENDANTS.

Where the covenant is several.

In an action against joint covenantors they must all be made defendants, and an omission to join them in suit, can be taken advantage of by plea in abatement only, verified by affidavit. (7)

Where the covenant is joint.

And on the death of one, the joint covenantor incurs all the legal liability by survivorship, and exonerates the executor of his deceased companion. (8)

The covenantee may recover in execution against one, the whole sum covenanted to be paid, and has nothing to do with the contribution between the covenantors. (9)

But if a covenant be joint in its terms, and the deed be executed by one of the covenantors only, an action may be maintained against that one; for, although the words import a joint covenant, yet the deed is in fact the single instrument of the party executing it. (10)

Deed joint in its terms, but only executed by one covenantor.

Covenants joint and several, confer on the covenantee the right of commencing proceedings at his election against both or either of the covenantors. (11)

Where the covenant is joint and several.

And although one of three joint and several covenantors for the payment of an annuity may by his bankruptcy and certificate be rendered irresponsible, yet the covenantee may proceed against the other two. (12)

And in a joint and several covenant, the covenantee has the option of suing either the executor of a deceased covenantor, or the survivor. (13)

(1) *Slingsby's case*, 5 Co. 19. (a.), cit. 1 East, 500.

(2) *Osborne v. Crosbern*, 1 Sid. 238. *Scott v. Godwin*, 1 B. & P. 67.

(3) 1 Chitt. Pl. 13.

(4) *Petrie v. Barry*, 3 B. & C. 353. *Scott v. Godwin*, 1 B. & P. 67.

(5) *Anderson v. Martindale*, 1 East, 497. *Southcote v. Hoare*, 3 Taunt. 87.

(6) *Birkley v. Presgrave*, 1 East, 226.

(7) *Eccleston v. Clipsham*, 1 Saund. 154. *a. Cabell v. Vaughan*, ibid. 291. *a.*

(8) *Towers v. Moor*, 2 Vern. 99. 5 Bac. Abr. Obligation (D. 4.), 810.

(9) *Clough v. Clough*, 5 Ves. 717. *Exp. Rowlandson*, 3 P. Wms. 405., et vide *Brett v. Cumberland*, Cro. Jac. 523. Platt on Covenants, 133.

(10) *Bidwell v. Lethbridge*, 1 Barn. 235. 2 Rol. Abr. Facts (F.) 22.

(11) *Lilley v. Hodges or Hedges*, 8 Mod. 166. Str. 553. *Enys v. Donnithorne*, 2 Burr. 1196.

(12) *Baxter v. Nichols*, 4 Taunt. 90.

(13) *May v. Woodward*, Freem. 248. Platt on Covenants, 134.

ACTIONS BY AND
AGAINST EX-
ECUTORS, &c.

26. ACTIONS BY AND AGAINST EXECUTORS, &c.

ACTIONS BY
EXECUTORS,
&c.

Executors and administrators represent their testator or intestate in respect of his contracts personal, and in respect of contracts relating to the reality when a damage has been sustained in the lifetime of such testator intestate. (1) And an administrator *de bonis non* stands in the same position. (2)

Executors of an administrator have priority of action over an administrator *de bonis non*.

The executor of an administrator, if he have in that capacity granted a lease, has a right of action for non payment of rent in preference to an administrator *de bonis non* of the intestate, the latter administrator being in paramount the lease of the former administrator. (3)

Executors, though not named, may sue upon a covenant respecting a chattel.

Executors, though not named, may sue upon a covenant made with their testator in reference to a chattel. (4)

A covenant by the lessee with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situated, from all costs and charges, by reason of the lessee's taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to the parish, was held to be an express covenant with the lessor, which did not run with the land; and that an action on it was well brought by his executors. (5)

Breach in lifetime of testator.

Upon a covenant by a lessor not to fell timber or cut wood, the executor of the lessor can maintain an action for the breach in the lifetime of his testator. (6)

Breach committed after testator's death.

An executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death. (7)

But such a declaration should state the termor's interest and title in the premises; and where it was merely stated that A. B. demised premises to the testator of the plaintiff (viz. the termor, without stating that A. B. was seised in fee, or of any other estate), and that the plaintiff's testator demised them to C. D., and stated a breach of covenant after the plaintiff's testator's death:—It was held bad. (8)

When a lessee for years under demise for a term longer than the residue held by him, the under-lessee covenanting to pay the lessee, his executors and administrators, the yearly sum of 75*l.* by quarterly payments:—It was held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the executor of the lessee, to recover arrears of this rent accruing during the continuance of the lessee's term. (9)

If in consequence of a breach of covenant for seisin, the testator were prevented from selling, this would seem sufficient to vest the right of

(1) F. N. B. 145. (D.) 146. (D.)

(2) *Smith v. Simonds*, Comb. 64.

(3) *Platt on Covenants*, 520. cit. *Drew v. Bayly*, 2 Lev. 100.

(4) *Doe d. Rogers v. Rogers*, 2 N. & M. 550.

(5) *Walsh v. Fussell*, 3 M. & P. 455. 6 Bing. 163.

(6) *Raymond v. Fitch*, 2 C. M. & R. 588.

(7) *Mackay v. Mackreth*, 2 Chitt. 461.

(8) *Ibid.*

(9) *Baker v. Gostling*, 1 Bing. N. C. 19.

action in the executor. (1) The like, if the demised premises were out of repair during the life of the testator, the lessor. (2)

In the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, or in the absence of such interest, the executor does not stand in a situation to take advantage of the breach. (3)

In *Southcote v. Hoare* (4) it appeared, that by indenture tripartite between A. 1, B. 2, and C. 3, A., tenant for life, demised to C., and C. covenanted with B. (a receiver) and other the receiver or receivers for the time being, and to and with such other person, who for the time being should be entitled to the freehold, and to and with every of them. A. died: — It was held, that his executrix could not maintain covenant for a breach in her testator's lifetime, but that the action was joint, and survived to B.

Executors or administrators are liable, in respect of assets, for covenants broken in the testator's lifetime (5), and for the performance after his death of such covenants as relate to the personalty, as to pay a sum of money, &c. (6); and this, notwithstanding the party covenants for himself and his assigns, without naming executors, for an executor or administrator is an assignee in law. (7)

A testator, being seised in fee of certain lands, and also of a corn-mill, demised the former to a tenant for three lives, covenanting for a money-rent, and, in addition thereto, that the lessee should perform certain suits and services; and amongst others, that he, his heirs and assigns, should do suit to the lessor's mill by grinding therein, all such corn as grew upon the demised land: the testator afterwards devised the mill, and also the reversion of the land to the same person, who became seised upon the death of the deviser: during the demise of the land, the lessee died intestate, and his wife took out administration of his estate and effects. An action of covenant being brought, assigning for a breach, a neglect to grind corn at the mill during the lifetime of the lessee, and also since his death: — It was held, that the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land, whilst the ownership of the land and the mill remained in the same person, and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee. (8)

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non repair, to say, that the premises yield no profit. (9)

In *Pentland v. Gibson* (10) it appeared by the deed of partnership of the St. Patrick Assurance Company, that the members for themselves and their executors, respectively covenanted with C. P. (the secretary) to pay

ACTIONS BY AND AGAINST EXECUTORS, &c.

Where executors cannot sue on a breach.

ACTIONS AGAINST EXECUTORS, &c.

Liable for covenants broken in testator's lifetime; and performance of personal covenants after his death.

Cannot plead to an action for non payment of rent and taxes that the premises yield no profit.

(1) *Kingdon v. Nottle*, 1 M. & S. 362.

(2) *Morly v. Polhill*, 2 Vent. 56.

(3) *Kingdon v. Nottle*, 1 M. & S. 355. *Chamberlain v. Williamson*, 2 ibid. 408. Co. Litt. 262. (a.)

(4) 3 Taunt. 87.

(5) *Hyde v. Skinner*, 2 P. Wms. 197. *Hyde v. Windsor (Deus of)*, Cro. Eliz. 553.

F. N. B. 145. (H.)

(6) Touchst. by Atherley, 78. 482. *Brice*

v. Carre, 1 Lev. 47. *Fountain v. Guales*, Comb. 59. S. C. nom. *Fountain v. Guavers*, Skin. 146.

(7) *Anon.* F. Moore, 44. pl. 136. 1 Bulst. 23.

(8) *Vyryan v. Arthur*, 2 D. & R. 670. 1 B. & C. 410.

(9) *Tremeere v. Morison*, 1 Bing. N. C. 89.

(10) 1 Alcock & Napier (Irish), 310.

**ACTIONS BY AND
AGAINST EX-
ECUTORS, &c.**

certain deposits upon their respective shares. To an action of covenant brought by C. P. upon this deed, against the executrix of a deceased member of the company, for the amount of deposits, demanded after the death of that member, the defendant pleaded, that before the commencement of the suit C. P. ceased to be secretary, and R. H. was duly appointed in his stead, and that R. H. was secretary at the time of the action brought; that by the 5 Geo. 4. c. 160. the company "shall and may sue" in the name of the secretary; and that, therefore, R. H. should have brought the action: — It was holden on general demurrer, that this plea was insufficient, and that the action was properly brought in the name of C. P., the covenantee in the deed.

By the forty-second clause of the deed (which was set out on oyer), it appeared, that the shares of a deceased member were to vest in his personal representative, provided such personal representative should execute a certain deed within twelve calendar months after the member's decease, otherwise all benefit of and from the shares to such representative to be at an end. That, however, was subject to this proviso, that the personal representative should be called upon by notice given by the directors to execute such deed, and in the event of a refusal after such notice, the shares of such deceased member should be sold, and the proceeds to be held for and on account of such defaulter free of interest: — It was held, that the execution of the personal representative was a condition subsequent and not precedent to the vesting of the shares in him or her, and that in the meantime, before the regular notice upon the part of the directors, calling upon the personal representative to execute such a deed, and the refusal consequent thereupon, the assets of the deceased member were bound in the hands of his personal representative, for the payment of the deposits duly demanded.

Lessee for
years covenant-
ing to build a
house.

To repair de-
mised premises.

Executor as
long as he has
assets, must
perform cove-
nants in a
lease.

Not liable on a
void lease.

If a lessee for years covenant for himself, that he will within the first three years build a new house, but dies after the expiration of the term without performing his covenant, his executors will be charegable. (1) Or, if he covenant to repair the demised premises within six years, and die within the next six years, the executors are bound to make the reparation, for it may be made by them within the six years as well as by the testator. (2) So long as the executor has assets, he must perform the covenants contained in a lease granted to his testator; nor will an assignment (3), even with an acceptance of the rent by the lessor of the assignee, relieve the executor from the charge. (4).

If a tenant in tail male demise for a term of ninety-nine years, and his lessee assign over to another, but, before such assignment, the tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. (5)

(1) *Anon.* Dyer, 14. (a.) pl. 69. *Iremonger v. Newsum*, Latch. 261.

(2) 6 Vin. Abr. 383, 384. 10 Hen. 7. 18. pl. 4. Bro. Abr. Covenant, pl. 50. 4 Leon. 171.

(3) *Pitcher v. Tovey*, 1 Salk. 81. 4 Mod. 71. 2 Vent. 234. Carth. 177. 3 Lev.

295. Holt's N. P. C. 73. 12 Mod. 23. Freem. 326. *Wilkins v. Fry*, 1 Meriv. 265.

(4) *Brett v. Cumberland*, Cro. Jac. 522. 1 Rol. 359. *Bachelour v. Gage*, Cro. Car. 188. Sir W. Jones, 223.

(5) *Andrew v. Pearce*, 1 N. R. 158.

A., being possessed of a lease for years, covenanted in an indenture for making a family provision, that, if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to B.; A. afterwards purchased the reversion in fee, and died: — It was holden, that A. did not intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon the covenant. (1)

ACTIONS BY AND
AGAINST EX-
ECUTORS, &c.

A covenant by two joint lessees, if it be joint and several, will bind the executors of either who dies. (2)

Covenant by
two joint lessees
will bind ex-
ecutors.

Executors or administrators are not responsible on covenants which require personal performance by the covenantor, for breach committed by the covenantor during his life (3): thus, if a lessee for years covenant for himself, omitting other words, to repair the houses demised, it seems, he is bound to repair only during his life, and his executors or administrators are not bound. (4)

Covenants re-
quiring per-
sonal perform-
ance by the
covenantor.

For breaches of covenant by a testator his executor is chargeable *de bonis testatoris* only (5); but unless he enter on the property demised, he is not chargeable upon the covenant of his testator *de bonis propriis*, although it be broken in the time of the executor; for it is the testator's covenant which binds the executor in his representative capacity; and by that name, and in that capacity must he be sued. If therefore the executor before entering omits to repair the demised premises (6), or assigns over the lease without giving notice thereof, agreed to be given by the lessor (7), he is only liable *de bonis testatoris*. But after an entry by the executor on the premises, the lessor has the option of suing him for breaches in his own time, either as executor or as assignee (8); and if he be sued in the latter character, stating generally in the declaration, that the estate of the lessor in the premises lawfully came to the defendant, without naming him executor, the judgment will be *de bonis propriis*. (9) After his assignment over, he is not liable *de bonis propriis*. (10)

Where charge-
able *de bonis*
testatoris.

Where not
chargeable
upon the cove-
nant of his tes-
tator *de bonis*
propriis.

On an implied covenant an action may, it seems, be maintained against the executor or administrator of a lessor, if the lessee be lawfully evicted during the lifetime of the lessor (11); but unless the covenant be broken before the lessor's death, his executor is not responsible (12); for, on this kind of covenant, the liability of the executor ceases with the determination of the estate in respect of which the law created the covenant.

Action may be
maintained on
an implied co-
venant.

(1) *Williamson v. Butterfield*, 2 B. & P. 63.

(2) *Eys v. Donnithorne*, 2 Burr. 1190.

(3) *Hyde v. Windsor* (Dean of), Cro. Eliz. 553. *Hyde v. Skinner*, 2 P. Wms. 196.

(4) Touchst. by Atherley, 178., vide etiam *Ingers v. Hyde* (Executors of), Dyer, 114. (a.)

(5) *Jevens v. Harridge*, 1 Saund. 1. n.

(6) *Anon.* Dyer, 324. (a.) *Collins v. Throughgood*, Hob. 188. *Bull v. Wheeler*, Cro. Jac. 647. S. C. nom. *Bull v. Winter*, Palm. 314. *Bristol* (Dean and Chapter of) v. Guise, 1 Saund. 111. *Castilion v. Smith* (Executors of), Hob. 283.

(7) *Bridgman v. Lightfoot*, Cro. Jac. 671.

(8) *Buckley v. Pirk*, 1 Salk. 317. 10 Mod. 12. *Lyddall v. Dunlapp*, 1 Wils. 4.

(9) *Tilney v. Morris*, Carth. 519. 1 Salk.

309. 1 Ld. Raym. 553. *Keeling v. Morris*, 12 Mod. 371. *Wilson v. Wigg*, 10 East, 313., vide etiam *Rich (Lord) v. Frank*, 1 Bulst. 22. Cro. Jac. 238. *Ipswich* (Bailiffs, &c. of) v. *Martin*, ibid. 411. 1 Rol. 404. *Sackville v. Evans*, Freem. 171.

(10) *Boulton v. Cannon*, Freem. 336. 393. *Jenkins v. Hermitage*, ibid. 377. 3 Keb. 367.

(11) *Swan v. Stansham*, Dyer, 257. (a.) S. C. nom. *Swann v. Scarles and Stranson*, F. Moore, 74.

(12) *Procter v. Johnson*, 2 Brownl. 214. *Newton v. Osborn*, Sty. 387. *Porter v. Sweetnam*, ibid. 407.

ACTIONS BY AND
AGAINST EX-
ECUTORS, &c.

Debt arising
by covenant is
a demand by
specialty.

A debt arising by a covenant is a demand by specialty, and is of an equal nature with other specialty debts (1): therefore, a covenant by a settler in a marriage settlement, that the premises are free from incumbrances, will rank equally with debts on bond. (2)

If an executor have not sufficient assets to pay a reserved rent, he should tender the entire amount of assets he may have, and then plead he had no other assets of the deceased to administer. (3)

ACTIONS BY
AND AGAINST
HEIRS.ACTIONS BY
HEIRS.

Effect of heir
not being in-
cluded by name
in the covenant.

27. ACTIONS BY AND AGAINST HEIRS.

The heir represents his ancestor as to any contracts relating to the freehold and inheritance, as an executor represents his testator in respect of the personalty; the rule being, that real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by such heir or assignee alone; but personal covenants must be sued on by the executor. (4)

When the covenant relates to the inheritance, and is such as runs with the land, though it be with the lessor his executors and administrators, without naming the heir, yet the heir shall have an action of covenant for a breach (5)

The same right belongs to the heir when he takes from his ancestor, tenant *pur autre vie*, living the *cestuique vie*, and such heir alone can avail himself of the covenants running with the land. But where a party is tenant for his own life only, no right of action can devolve on his heir, as the dropping of the life on which the estate is held, necessarily effects a determination of the lease. (6)

Breach in cove-
nantee's life-
time.

When the covenant relates to the inheritance, and runs with the land, if there has been a breach of it in the covenantee's lifetime, the heir, as the damage accrues to him, has a preferable right to the executors to sue on the covenant. (7)

Want of re-
pairs.

If the premises be out of repair in the time of the ancestor, and continue so in the time of the heir, it is a damage to the heir, and the jury can give such damages as will put the premises in repair, respect being had not to the length of time they have continued in decay, but to what it will cost at the *time of action brought* to put them in repair. (8)

Plaintiff de-
claring, as heir
at law, upon a
lease granted
by his ancestor.

Where a plaintiff declares as heir at law upon a lease granted by his ancestor, he must shew how he is heir at law; a general averment that the demised premises descended to him as cousin and heir at law, is not sufficient. (9)

ACTIONS
AGAINST HEIRS.

It has been previously stated, that in respect to the realty, the heir repre-

(1) *Plumer v. Marchant*, 3 Burr. 1380.
Bath (Earl of) v. Bradford (Earl of), 2 Ves.
sen. 587. 589.

(2) *Parker v. Harvey*, 11 Vin. Abr. 292.
3 Bac. Abr. 21.

(3) *Reid v. Tenterden (Lord)*, 4 Tyrw.
111.

(4) *Kingdon v. Nottle*, 1 M. & S. 365. 4
ibid. 53. *Sail v. Kitchingham*, 10 Mod.
158.

(5) *Lougher v. Williams*, 2 Lev. 92.
Sacheverell v. Froggatt, 2 Saund. 367.

(6) *Brudnell v. Roberts*, 2 Wils. 143.

(7) *Jones v. King*, 1 Marsh. 107. 4 M.
& S. 188., et vide *Kingdon v. Nottle*, ibid.
53.

(8) *Vivian v. Champion*, 1 Salk. 141.

(9) *Lidgbird v. Judd*, 7 D. & R. 517.

sents the covenantor; consequently, where the covenantor has covenanted by deed or bond for his heirs, the heir is liable. (1)

In order to render the heir responsible, he should be named in the deed, and should have assets by descent from the covenantor to answer the claim; for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory until he has assets by descent. (2)

An action will not, in general, lie against an heir upon an implied covenant, because he cannot be named therein. (3)

If a person be clothed with such a character as will make him liable to the covenant, which is proved by shewing that the estate is vested in him, it is unimportant whether he be in possession as assignee or heir at law (4); therefore a statement in a declaration that the estate vested in defendant by *assignment*, instead of stating that it had come to him by descent, will not be a fatal variance.

By stat. 11 Geo. 4. and 1 Will. 4. c. 47. ss. 3. & 8., every creditor by bond, covenant, or other specialty, may maintain an action of debt or covenant against the heir, who is bound to confess to the amount of lands or tenements descended; and the heir is also answerable for the debts of his testator, to the amount of the property descended, although he may have sold such previously to any action being brought.

It is not necessary to allege in the declaration, that the heir has lands by descent. If the heir has not any lands by descent, it seems he may insist on it by way of defence to the action.

**ACTIONS BY
AND AGAINST
HEIRS.**

The heir should be expressly liable under the covenant and have assets *per* descent.

Implied covenant.

Stat. 11 Geo. 4.
and 1 Will. 4.
c. 47. ss. 3. & 8.

Not necessary to allege, that heir has lands by descent.

28. ACTIONS BY AND AGAINST DEVISEES.

A devisee acquires the same rights over property which has been left to him by his testator, as the heir would have acquired if the lands had descended. (5)

Covenant lies by devisee of lands in fee, upon a covenant made by defendant to the testator, to whom defendant conveyed the lands in fee, that defendant was lawfully seised, &c. and had good right to convey, &c.; for such covenant runs with the land, and though broken in the lifetime of the testator, it is a continuing breach in the time of the devisee; and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. (6)

The devisee of an equity of redemption (the legal fee being in a mortgage) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor. (7)

By stat. 11 Geo. 4. and 1 Will. 4. c. 47. ss. 4. & 8., "If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to

**ACTIONS BY
AND AGAINST
DEVISEES.**

Devisee of equity of redemption.

Stat. 11 Geo. 4.
and 1 Will. 4.
c. 47. ss. 4. & 8.

(1) *Dyke v. Sweeting*, Willes, 585.

(2) 2 Bl. Com. 243.

(3) *Newton v. Osborn*, Sty. 387.

(4) *Derisley v. Custance*, 4 T. R. 75.

(5) *Kingdon v. Nottle*, 4 M. & S. 53. East, 487.

Vyryan v. Arthur, 1 B. & C. 410. *Roe d. Bamford v. Hayley*, 12 East, 464.

(6) *Kingdon v. Nottle*, 4 M. & S. 53.

(7) *Carlisle (Mayor of) v. Blamire*, 8

**ACTIONS BY
AND AGAINST
DEVISEES.**

whom by this act relief is so given, shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely." "That all and every the devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought."

Stat. 3 & 4 W.
& M. c. 14.

In *Farley v. Briant* (1) it was held, that an action of debt by a covenantee against the devisee of a covenantor, will not lie under stat. 3 & 4 W. & M. c. 14., where the covenantor is only a surety, and the breach of covenant did not take place in his lifetime.

Right to da-
mages.

Where there was a devise to trustees and their heirs during the life of A., in trust for A., and, after his decease, to B. in fee; and the trustees recovered, in A.'s lifetime, damages for a breach of covenant in a lease granted by the testatrix, and still subsisting: — It was held, that, upon A.'s death, the damages belonged to her estate. (2)

**COVENANT BY
THE ASSIGNEE.**

Covenants in
law which run
with the land
extend to the
assignee.

29. COVENANT BY THE ASSIGNEE.

Covenants in law, which run with the land, extend to the assignee, who can maintain covenant on them: as upon the words "demise and grant" the assignee can support covenant if ejected; for as the lessee or assignee has the annual profits in return for rent, he is for the loss of these entitled to a compensation from the lessor. (3)

Assignees who come in by act of law shall have the benefit of these covenants, and maintain this action.

Tenants by
statute mer-
chant, statute
staple, or elegit.

As a tenant by statute merchant, statute staple, or elegit, or he who purchases a lease for years, sold under an execution, is an *assignee*; so is a tenant by the curtesy to the husband of feme lessee for years, who survives; all of whom may maintain this action as assignees. (4)

Under the common law, express covenants were not binding upon, nor could they be taken advantage of by any others than parties or privies; to remedy which, it was enacted by stat. 32 Hen. 8. c. 34., that the assignee of a reversion should have the same remedies against the lessee, or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir, or their successor, had at common law; and on the other hand, such assignee should be liable by the statute to an action for a breach of covenant running with the land, as the lessor, &c. was at common law.

Party coming
in by act of the
party, or by
bargain and
sale of the re-
version, is an
assignee.

Whoever comes in by act of the party, as by bargain and sale of the reversion, is an assignee within stat. 32 Hen. 8. c. 34.; but it is otherwise where one comes in by act of law, as the lord by escheat, or where one is in of another estate. (5)

(1) 5 N. & M. 42.

(2) *Noble v. Cass*, 2 Sim. 343.

(3) *Noke's case*, 4 Co. 80. (b.) *Spencer's case*, 5 *ibid.* 17.

(4) 5 Co. 17. (a.)

(5) *Ibid.* 215.

30. RIGHTS AND LIABILITIES UNDER STAT. 32 HEN. 8. C. 34

But every one who comes in by the act and limitation of the party, though in the *post*, is a sufficient grantee within the statute 32 Hen 8. c. 34. (1); and it seems to have been the better opinion (2), that the bargainee of a reversion by bargain and sale, indented and enrolled, was an assignee within the statute, though he had but an use by the act of the party, and the possession by stat. 27 Hen. 8. c. 10.

RIGHTS AND
LIABILITIES
UNDER STAT. 32
HEN. 8. C. 34.

The effect of stat. 32 Hen. 8. c. 34. was to transfer the privity of contract from reversioner to reversioner, and to enable persons not strictly privies thereto to bring actions upon the covenant (3), and give them the same remedy against the lessees as the heirs at law of individuals, or the successors, in the case of corporations had before the statute. (4)

Effect of stat.
32 Hen. 8. c. 34.

It may be laid down as a general principle, that "if the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee can sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue." (5)

The statute extends to the grantee of the reversion of a subject, as well as of the king (6), and to grants made by the successors of the king, albeit the king be only named in the act (7):—to covenants entered into by or with lessees for years, or for life, but not to covenants entered into on a conveyance in fee, or gift in tail. (8)

Statute extends
to the grantee
of the reversion
of the subject
as well as of
the king.

The grantee cannot take advantage of a condition before he has given notice to the lessee, but he may of a covenant. (9)

Where grantee
may take ad-
vantage of a
condition.

The assignee of part of the estate in reversion, or of a grant for years of part of the reversion in fee, may take advantage of the condition. (10)

Assignee of
part of the
estate in re-
version, may
take advantage
of the condi-
tion.

But the assignee of part of the reversion cannot take advantage of the condition; as if there be lessees of three acres, and the reversion of two of them is granted, the grantee cannot have advantage of the condition, for it is entire, and cannot be apportioned. (11)

Assignee of
part of the re-
version cannot
take advantage
of the condi-
tion.

The assignee of the lessor can maintain covenant against the lessee, after the lessee has assigned and rent has been accepted from the assignee, for such is within stat. 32 Hen. 8. c. 34. (12)

Assignee of
lessor can
maintain cove-
nant against
lessee after
lessee has as-
signed.

So also the assignee of the reversion, who has accepted rent from the assignee of the lessee, shall nevertheless have covenant against the executor of the lessee, for a breach of covenant done after the assignment, for

(1) Co. Litt. 215. (b.) *Appowel v. Mon-
nour*, F. Moore, 98.

(7) Co. Litt. 215. (a.)

(2) *Lee v. Arnold*, 4 Leon. 29.

(8) Ibid. *Lewes v. Ridge*, Cro. Eliz.
863. *Matures v. Westwood*, ibid. 599. 617.

(3) *Thursby v. Plant*, 1 Saund. 237.
Barker v. Damer, 3 Mod. 336. *Bord v.*
Cudmore, Cro. Car. 183. *Isherwood v. Old-*
know, 3 M. & S. 395. *Wey v. Yally*, 6 Mod.
194.

S. C. nom. *Mathuris v. Westroray*, F. Moore,
527., vide *Davy v. Matthew*, Cro. Eliz.
649.

(9) Co. Litt. 215. *Hingen v. Payn*, Cro.
Jac. 476.

(4) *Webb v. Russell*, 3 T. R. 402.

(10) Co. Litt. 215. (a.)

(5) *Per Best J. in Vyvyan v. Arthur*, 1
B. & C. 417. 2 D. & R. 670.

(11) Ibid.

(6) *Hill v. Grange*, 2 Dyer, 130. (b.)
Plowd. 167. Co. Litt. 215. (a.)

(12) *Ashurst v. Mingay and Farrer*, 2
Show. 133.

**RIGHTS AND
LIABILITIES
UNDER STAT. 32
HEN. 8. c. 34.**

Assignee of re-
version after
acceptance of
rent.

Surrenderree of
copyhold.

Assignment of
apprentice by
custom of Lon-
don.

Stat. 32 Hen.
8. c. 34. does
not extend to
gifts in tail.

To entitle
lessee to main-
tain covenant
against as-
signee, he must
be assignee of
the whole term.

Whether entry
is requisite to
constitute a
party an as-
signee.

Where the as-
signee is bound
by being
named.

it is a covenant in fact and runs with the land, and the lessee by his own act cannot discharge himself. (1)

The surrenderree of a copyhold reversion can bring debt or covenant against the lessee within the equity of stat. 32 Hen. 8. c. 34., for it is a remedial law, and no prejudice can come to the lord. (2)

Though by the custom of London an apprentice may be assigned, yet the assignee cannot have covenant on the indenture of apprenticeship; for there cannot be an assignee by custom, and he is no party to the contract. (3)

The words of the statute against lessees do not extend to gifts in tail. (4)

To entitle the lessor to maintain covenant against a party as assignee, he must be assignee of the whole term. For where the original lessee made an under-lease for a time, somewhat less than the term of his lease, and the lessor brought covenant against the under-lessee, it was adjudged not to lie, he not being assignee; and the plaintiff having declared against him in that capacity was nonsuited. (5) So where lessee for three lives grants all his estate, right, title, and interest in the land for ninety-nine years, if the lives named in the original lease so long live, the grantee has not all the interest of the lessee, and so is not liable on covenant as assignee. (6)

An actual entry upon the demised premises by an assignee is not requisite, in order to charge him with the performance of covenants running with the land: by accepting an interest under the conveyance, he incurs all the responsibility connected with the estate as extensively, as if he had taken possession in fact. Thus, covenant for non payment of rent lies against an assignee of a lease, to whom an assignment is made by way of mortgage security, although he has never entered, or taken actual possession. (7)

Where the covenant relates to a thing not in being at the time of the demise; as if it be to build a wall on the land demised, this not being *esse* when the covenant was made, it will extend to the assignee if named, but not otherwise. (8)

The assignee of a lease is not liable to the original lessor, for a breach of a covenant not running with the land, unless he be expressly named in the lease as a covenantor (9): thus, in covenant by lessor against assignee of lessee, on a covenant by the lessee, for himself, his executors, and administrators, to pay to the lessor the amount of fruit-trees, &c. to be planted by the lessee, according to an appraisement to be made by two persons, one to be chosen by each of the parties; the breach alleged was, that the defendant refused to name a person to make the appraisement: upon which it was held, that this covenant did not run with the land, and that the assignee was not bound. (10) And a covenant by lessor to pay for all trees planted by lessee, does not run with the land. (11)

(1) *Brett (Str James) v. Cumberland*, Cro. Jac. 521.

(2) *Glover v. Cope*, 1 Salk. 185.

(3) *Barker v. Beardwell*, 1 Show. 4.

(4) Co. Litt. 215. (a.)

(5) *Holford v. Hatch*, Doug. 182.

(6) *Derby (Earl of) v. Taylor*, 1 East, 502.

(7) *Williams v. Bosanquet*, 1 B. & B. 238.

3 Moore, 500., vide etiam *Cook v. Harris*, 1 Ld. Raym. 367. *Bellasis v. Burbrick*, 1 Salk. 209. 1 Ld. Raym. 170., sed vide *Eaton v. Jaques*, Doug. 455.

(8) *Spencer's case*, 5 Co. 16.

(9) *Grey v. Cuthbertson*, 2 Chitt. 482.

(10) Ibid.

(11) Ibid.

It is doubtful, whether a covenant by the lessee of a public-house, that he and his assigns will buy all their beer of the plaintiff, is binding on the assignee. (1)

If the covenant mention the assignee, as if the lessee covenant for him and his assigns, there the assignee shall be bound, by any covenant, for any thing to be done on the thing demised, as to build a wall on the land demised:—but to do any thing which is merely collateral to the thing demised, as to build a house on some other part of the lessee's land, there the assignee will not be bound, though named. (2) Therefore, where on a demise of a piece of land by the plaintiff for the purpose of erecting a mill and making a watercourse, the lessee covenanted for himself, his executors, administrators, and assigns, “not to hire persons to work in the mill who were settled in other parishes, without receiving a parish certificate of the settlement of such persons,” and the lessee assigned to the defendant, who having employed persons not so certificated, the plaintiffs brought covenant, the court held the defendant not liable, the covenant not being one which ran with the land, but collateral merely, and therefore not binding on the assignee. (3)

If the lessee covenant for himself and his assigns, to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it will not bind the assignee, because it is merely collateral. (4) Or, if a man lease sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time, to deliver the like cattle or goods as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant will not bind the assignee, for it is but a personal contract.

Chief Justice Wilmot in *Bally v. Wells* (5) thus explains why the assignees are exempted from liability:—“The reasons why the assignees, though named, are not bound in the last two cases are not the same. In the first case (*i. e.* of a covenant to build a house on other land, or to pay a collateral sum to the lessor), it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not *quodam modo*, but *nulla modo*, annexed or appurtenant to the thing leased. In the case of the mere personalty (*i. e.* if the lease be of sheep or other personal goods), the covenant doth concern and touch the thing demised, for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns in respect of the reversion; it is merely collateral in one case, in the other it is not collateral; but they are total strangers to one another, without any line or thread to unite and tie them together, and to constitute that privity which must subsist between debtor and creditor to support an action.”

A covenant for payment of a rent charge in fee, being a personal cove-

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Where assignee
will not be
bound though
named.

To do any
thing merely
collateral to the
thing demised
will not bind
assignee.

Reasons as-
signed by Chief
Justice Wilmot,
why assignees
are exempted
from certain
liabilities.

Payment of a
rent charge a

(1) *Hartley v. Pehall*, Peake's N. P. C. 178., vide *Holcombe v. Hewson*, 2 Camp. 391.
Jones v. Edney, 3 *ibid.* 285.

(2) *Spencer's case*, 5 Co. 16.

(3) *Congleton (Mayor of, &c) v. Pattison*, 10 East, 130.

(4) *Ibid.* *Mayo v. Buckhurst*, Cro. Jac. 438.

(5) Wilmot's notes, 344., cit. 5 B. & A. 7, 8.

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personal cove-
nant.

To grind corn,
grain, &c. is a
collateral co-
venant.

Where the co-
venant relates
to and is to
operate on a
thing in being.

Where assignee
bound without
being named.

Where cove-
nants are for
the benefit of
the estate de-
mised.

Covenants
which extend
to the support
of the thing
demised.

nant, and collateral to the land of the grantor, will not affect an assignee or lessee of the land at law. (1)

A mortgagee died seised of the residue of a mortgage term, subject to a proviso, that in case the mortgagor should pay him, his executors, administrators, or assigns, a certain sum on a given day, the term should determine: the mortgagee bequeathed this sum to the plaintiff by will, whom he appointed one of his executors:—It was held, that he could not maintain an action of covenant in his own name as assignee, although his co-executor had assented to the bequest, as the covenant with the mortgagee was collateral, and did not run with the land, and because it was broken in his lifetime. (2)

A covenant to grind at the plaintiff's mill all the corn, grain, or malt, the lessees shall have occasion to use or spend, is likewise merely a collateral covenant, and is not connected with any thing relative to the premises leased, and cannot in consequence be binding on the assignee; for within such a covenant, corn for the horses, &c. of the defendants must be ground, and to whatever distance the defendants might remove to live, they must bring it to the plaintiff's mill. Had the covenant been, to grind all the corn they should spend ground, it might relate to the premises, and, running with the land, bind the assignees. (3)

When the covenant relates to, and is to operate on a thing in being, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed to the thing demised, and will go with the land, and bind the assignees to the performance, though not named. As if the covenant be to repair a house then demised, this shall bind the assignee, though not named. (4)

Wherever a covenant is for the benefit of the estate demised, this will extend to the assignee though not named, upon the principle *qui sentit commodum, sentire debet et onus*. Thus, where the lessee covenanted for himself, his executors, and administrators, "to leave fifteen acres every year untilled," and afterwards assigned his estate to the defendant, and the breach assigned was, "that the defendant had not left the fifteen acres untilled, but on such a day had ploughed part," &c.; exception being taken that the assignee not being named was not liable, it was adjudged, that the covenant being for the benefit of the estate, he was liable. (5)

A covenant which extends to the support of the thing demised, will bind the assignee though not named. Thus, a covenant to repair the house, &c. demised, for such is for the support of the things demised, or, according to *Spencer's case* (6), extends to it, as being *in esse* at the time of the demise, and therefore shall bind the assignee. (7) So where the covenant was, "that the lessee, his executors, and administrators (not saying assigns) shall reside in the demised premises with their family and servants during the

(1) *Brewster v. Kitchin, Kitchell, or Kidgell*, 1 Ld. Raym. 317. 322. Comb. 424. *Hendon*, 12 Mod. 327. Holt, 175. 669. 5 Mod. 368. Carth. 438. (4) *Spencer's case*, 5 Co. 16. 1 Esp. 1 Salk. 198. 2 ibid. 615. 3 ibid. 340. 12 N. P. 312. Mod. 160. 171. (5) *Cockson v. Cock*, Cro. Jac. 125.

(2) *Canham v. Eust*, 8 Taunt. 227. 2 Moore, 164.

(3) *Uxbridge (Lord) v. Staveland*, 1 Ves. sen. 56., vide etiam *Vyryan v. Arthur*, 1 B.

(6) 5 Co. 16.

(7) *Dean and Chapter of Windsor's case*, ibid. 24.

time demised," the action was against the defendant as assignee; a demurrer, that the assignee was not named, and so the action not maintainable, was overruled, for the covenant was one that ran with the land, and so bound the assignee, though not named. (1)

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Covenants to cultivate demised premises, as, to lime and dung the land during the term (2), or to spend all the muck thereon (3), or to leave fifteen acres every year for pasture *absque cultura*, being for the benefit of the estate according to the nature of the soil, &c. (4) will charge the assignee unnamed.

Covenants relating to the cultivation and repairing of premises.

A lessee of tithes covenanted for himself and his assigns, that he would not let any of the farmers in the parish have any part of the tithes; this covenant runs with the tithes, and was held to bind the assignee, against whom an action was brought for breach of covenant. (5)

If a man grant to a lessee for years, "that he shall have so many estovers as will serve to repair his house, or as he shall burn in his house," or the like, during the term, it is appurtenant to the land, and will go with it as a thing appurtenant into whose hands soever the house may come (6), and to discharge the lessor of all charges ordinary and extraordinary. (7)

So likewise an action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract; and in case of eviction the rent may be apportioned, as in debt or replevin. But it is otherwise in covenant against the original lessee, who is liable on his personal contract. (8)

With regard to how far the lessee or assignee is chargeable in covenant there is a considerable difference.

LIABILITY OF
ASSIGNEE.

1. The lessee has, from his covenant, both a privity of contract and of estate, and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant, notwithstanding the assignment. (9)

Lessee has from his covenant both a privity of contract and of estate.

2. The assignee comes in only by privity of estate, and he therefore is liable only while in possession. (10)

Assignee comes in only by privity of estate.

As to the first, therefore, the lessee is liable for a breach committed by the assignee after the assignment.

In *Bernard v. Godscall* (11) it was resolved, that if the lessee assign, though the lessor accepts rent from the assignee, yet for the breach of any express covenant, though committed by the assignee after assignment, this action will lie against the first lessee, on the ground of the privity of contract still continuing.

The assignee's obligation to perform the covenants running with the land, arises and endures solely on the score of privity of estate (12); and hence,

Assignee's obligation to per-

(1) *Tatem v. Chaplin*, 2 Hen. Black. 133.

(2) *Sail v. Kitchingham*, 10 Mod. 158.

(3) *Bally v. Wells*, 3 Wils. 32. Wilmot, 341.

(4) *Cockson v. Cock*, Cro. Jac. 125.

(5) *Bally v. Wells*, 3 Wils. 25.

(6) *Spencer's case*, 5 Co. 17. (a. b.) *Dean and Chapter of Windsor's case*, ibid. 24. (b.) F. N. B. 181. (N.)

(7) *Dean and Chapter of Windsor's case*, 5 Co. 24. (b.)

(8) *Stevenson v. Lambard*, 2 East, 575. *Parher v. Webb*, 3 Salk. 5.

(9) 1 Esp. N. P. 314., cit. Doug. 736.

(10) Ibid., cit. ibid. 441.

(11) Cro. Jac. 309. *Norton v. Achland*, Cro. Car. 418.

(12) *Lekux v. Nash*, Str. 1221. *Stevenson v. Lambard*, 2 East, 575. *Wilkins v. Fry*, 1 Meriv. 265. *Onslow v. Corrie*, 2 Madd. 340. *London (City of) v. Richmond*, 2 Vern. 431. *Copeland v. Stephens*, 1 B. & A. 607. *Paul v. Nurse*, 8 B. & C. 486.

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form the cove-
nants running
with the land.

Effect of an
assignee's as-
signing his in-
terest.

as the tenant continues chargeable on his contract, the lessee may sue the assignee who has the estate, and the lessee who made the covenant, or his executors, at one and the same time: but execution shall issue only against one of them. (1) Consequently the lessor may sue at his election, either the lessee or his executors, or the assignee. (2)

By an assignment over, an assignee may free himself from all future burthens connected with the estate, without even the necessity of furnishing the lessor with notice of his intention to dispose of the property (3); and the court denied the authority of *Kighly v. Bulkly*. (4) Therefore, after a transfer by him, he cannot be subject to an action for a breach of covenant to repair (5), nor for rent accruing due after that time (6), although his assignee may never have entered or taken possession (7); and an assignee of a term declared against as such, is not liable for rent accruing after he has assigned over, although it be stated, that the lessor was a party executing the assignment of the first assignee, and thereby agreed, that the term which before was determinable at the option of either party, should be absolute (8): nor will an action lie on the covenants in the lease, against an assignee at the suit of an assignor, for the latter has no residuary interest. (9)

In covenant against the assignee of the lessee for the non payment of rent; it was pleaded, that before the rent became due, the defendants assigned all their estate and interest in the demised premises to A. and B.; to which it was replied, that in and by the indenture, the lessee, for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given:—It was held, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not estop the assignee from setting up the assignment; and secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. (10)

Assignee of
a part of the
estate.

But the subdivision of an estate will not exempt the assignee of a portion from the burthen of the covenants running with the land: if he be assignee of part only, he is liable to an action of covenant for not repairing that part. (11)

Incorporeal he-
reditaments
may be the sub-

Incorporeal hereditaments may be the subject of a covenant going with the land and binding the assignee. (12)

(1) *Brett v. Cumberland*, Cro. Jac. 523., vide *Whitway v. Pinsent*, Sty. 300.

(2) *Boulton v. Canon*, Freem. 336. *Barnard v. Godecall*, Cro. Jac. 309. *Bacheloure v. Gage*, Sir W. Jones, 223. Cro. Car. 188. *Burnett v. Lynch*, 5 B. & C. 608. 8 D. & R. 368.

(3) *Tongue v. Pitcher*, 3 Lev. 295. S. C. nom. *Tovey v. Pitcher*, 2 Vent. 234. Carth. 177. *Pitcher v. Tovey* (in error), reversing the judgment of C. P., Holt, 73. 1 Salk. 81. 4 Mod. 71. 12 ibid. 23. 1 Show. 316.

(4) 1 Sid. 338. 2 Keb. 260. S. C. nom. *Knight v. Buckley*, Sir T. Raym. 162. S. C. nom. *Keightly v. Buckly*, 1 Lev. 215., vide etiam *March v. Brace*, 2 Bulst. 151.

(5) *Keeling v. Morrice*, 12 Mod. 371.

(6) *Pitcher v. Tovey*, 4 ibid. 71. 12 ibid. 23. 1 Show. 316.

(7) *Odell v. Wake*, 3 Comb. 394. *Taylor v. Shum*, 1 B. & P. 21.

(8) *Chancellor v. Poole*, Dong. 764.

(9) *Hicks v. Down*, alias *Smith v. Baker*, 1 Ld. Raym. 99. *Wheeler v. Baker*, 3 Salk. 10.

(10) *Paul v. Nurse*, 8 B. & C. 486.

(11) *Congham v. King*, Cro. Car. 221. S. C. nom. *Conan v. Kemise*, Sir W. Jones, 245. *Ards v. Watkin*, Cro. Eliz. 637. 651. *Merceron v. Dowson*, 5 B. & C. 479.

(12) *Bally v. Wells*, 3 Wils. 25., cit. 10 East, 136.

A., being seised of the lands of B. and C., demised C. to one person for three lives, and afterwards assigned B. to another. In the lease of C., the tenant covenanted to lay out twenty barrels of lime on every acre that should be broken up, and the landlord covenanted that the tenant might yearly cut, in such part of B., as he (the landlord) should appoint, a sufficient quantity of turf for burning the lime, and for fuel for himself and two cottages on the land:—Held, 1. That this amounted to a covenant on the part of the landlord, to appoint a place to cut the turf. 2. That the covenant having been set out *in hæc verba*, the court would construe the covenant as a covenant to appoint, and a breach assigned for not appointing was held right. 3. That covenant did not lie, by the tenant of C. against the assignee of B., there being no privity of contract or of estate. (1)

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ject of a cove-
nant binding
the assignee.

It seems that an assignee is not liable after assignment for breaches before assignment, because the relation which exists between covenantor and assignee is derived from the privity of estate which subsists between them during the occupancy of the latter; and, by getting rid of the estate, the assignee determines the privity as far as regards himself, and transfers it to the new assignee. If, therefore, that on which alone the liability is founded, namely the privity, be destroyed, how can its dependent liability survive in charge against the assignee. The defeasance of the principal must surely operate as the defeasance of the accessory; not only to the principle on which the action of covenant against the assignee is founded does the proposition seem to be opposed, but the authorities will admit of a different doctrine. (2)

Whether as-
signee liable
after assign-
ment, for
breaches before
assignment.

If the dealing between the assignor and his assignee be colourable and fictitious only, it is a ground of objection at law, and the lessor may, by replying fraud to the plea of assignment, overturn the transaction in that court as well as he may in equity. (3) But evidence of fraud cannot be received as a general replication of *non assignavit*; the fraud must be specially pleaded. (4) In *Taylor v. Shum* (5) Chief Justice Eyre doubted, whether there could ever be such a thing as a fraudulent assignment, and whether an issue on such a point could ever be well taken. But it was agreed, that the only case in which the replication *per fraudem* could be good, was where the assignor continued in possession of the premises, of which he made a profit, and made the assignment to prevent responsibility.

Fraudulent as-
signment.

With respect to what shall be deemed a valid assignment, there is no fraud in assigning to a feme covert; and unless the husband refuse his assent, such assignment will exonerate the assignor (6): nor is it fraudulent to dispose of the estate to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure (7); or to a person actually a prisoner in the Fleet, although the consideration money be lent by the assignor to the assignee, to be repaid by him (8), or even although the assignee receive from the assignor a premium, as an inducement to accept

What a valid
or fraudulent
assignment.

(1) *Dawson v. Baldwin*, 1 Hayes & Jones (Irish), 24.

(2) *Vide* Platt on Covenants, 496. *et seq.*

(3) *Knight v. Peachy*, Sir T. Raym. 303.

(4) *Leheux v. Nash*, Str. 1221.

(5) 1 B. & P. 21.

(6) *Barnfather v. Jordan*, Doug. 452. Co. Litt. 3. (a.) 356. (b.)

(7) *Pitcher v. Tovey*, 1 Salk. 81. *Taylor v. Shum*, 1 B. & P. 23. *Onslow v. Corrie*, 2 Madd. 345.

(8) *Leheux v. Nash*, Str. 1221.

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the transfer; but an execution to a nonentity, or a person not in existence, will be unavailable. (1)

COVENANT BY
HUSBAND AND
WIFE.

Stat. 32 Hen. 8.
c. 28.

Where cove-
nant to baron
and feme, hus-
band may sue
per se.

Wife tenant in
common with a
stranger.

31. COVENANT BY HUSBAND AND WIFE.

By stat. 32 Hen. 8. c. 28. it is enacted, that in leases for life or for years, of the wife's land, the wife shall be a party to the lease, and the reservation be to her and her heirs; and therefore in covenant on such leases, the wife should join.

But where the covenant is to baron and feme, the husband alone may bring the action. (2)

Where the lease was of land, of which the wife was tenant in common with another, and the husband and wife brought the action, it was held, that the wife might or might not join in the action. (3)

TENANTS IN
COMMON.

Should join in
an action of co-
venant, even
though one is
merely trustee
for the other.

Lessee negli-
gent of repairs.

32. TENANTS IN COMMON.

In actions personal, tenants in common must join, they should consequently join in an action of covenant; even though one is merely trustee for the other. (4) Tenants in common of a reversion on a lease for years, must join in covenant for not repairing; because it is in the personalty merely. (5)

Tenants in common may sue a lessee of a house in covenant for negligence of repairs, although after the demise, but before the breach alleged, he became a co-tenant of the plaintiffs in the same house. (6)

In covenant by one of five tenants in common, on a lease for rent payable on the four most usual days of payment in the year, it was alleged as a breach, that, on the 24th of June, 1824, a large sum of money, to wit, the sum of 21*l.* 15*s.*, one-fifth part of the rent, for three quarters of a year then elapsed, became due, and was in arrear from the defendant to the plaintiff:—It was held, on special demurrer, that this was good. (7)

DECLARATION.

VENUE.

WHEN LOCAL.

33. DECLARATION.

If the action of covenant be founded on privity of *estate*, the venue is *local*; if it be founded upon privity of *contract*, the venue is *transitory*.

The action is local in lessor *v.* assignee of lessee (8); assignee of lessee *v.* lessor (9); assignee of reversion *v.* assignee of lessee (10); assignee of lessee *v.* assignee of reversion.

(1) *Taylor v. Shum*, 1 B. & P. 22.

(2) *Beaver v. Lane*, 2 Mod. 217.

(3) *Alsberry v. Walby*, Str. 229.

(4) *Scott v. Godwin*, 1 B. & P. 67.

(5) *Kitchen v. Buckley*, 1 Lev. 109.

(6) *Yates v. Cole*, 2 B. & B. 660. S. C.
nom. *Gates v. Cole*, 5 Moore, 554.

(7) *Henniker v. Turner*, 6 D. & R. 72.
4 B. & C. 157.

(8) *Stevenson v. Lambard*, 2 East, 575.

(9) *Berwick (Mayor of) v. Shanks*, 3
Bing. 459.

(10) *Barker v. Damer*, Carth. 182. 1
Salk. 80.

By stat. 3 & 4 Will. 4. c. 42. s. 22., in any action in any of the superior courts, the venue in which is by law local, the court on the application of either party can order the issue to be tried, or writ of inquiry to be executed in any other county or place than that, in which the venue is laid.

If the locality do not appear on the declaration, and no issue be raised upon it, the defendant is not entitled to a nonsuit by reason of the venue being laid in a wrong county. (1) And if the action be local, and it be tried in a wrong county, such defect will be aided after verdict by stat. 16 & 17 Car. 2. c. 8.

The locality of an action of covenant for non payment of rent, will not be influenced by the rent being made payable in a county different from that in which the lands lie. (2)

The action of covenant is transitory in cases of lessor *v.* lessee; lessee *v.* lessor, assignee of reversion *v.* lessee (3); lessee *v.* assignee of reversion. (4)

By stat. 11 Anne, c. 2. s. 6. (I.), the action of covenant against the assignee of the lessee is in Ireland transitory. (5)

Where there are several facts material to the plaintiff's action arising in different counties, an action of covenant may be brought in either. (6)

The following cases will afford an illustration as to the right of parties in general to maintain covenant: —

Where a deed began, "It is agreed," &c. and the parties' names were not mentioned in the body of the deed, but at the end was "In witness whereof we have hereunto set our hands and seals," and both parties signed and sealed it: — It was held, that it was a sufficient naming in the deed, and that an action of covenant lay on it. (7)

A covenant in a bishop's lease, that if the lessee should grind grain growing on the premises demised to him, at any mill, save the mill belonging to the bishop of Raphoe for the time being, then the lessee should pay to such bishop and his successors 5s. for each barrel of grain so ground, as if the same had been due for rent, is not personal to the bishop who was the original lessor, but the right to sue thereon passes to his successor. (8)

Where by the partnership deed of the Saint Patrick Assurance Company of Ireland, the defendant covenanted with C. P., then the secretary, and as a trustee on behalf of the company, to pay certain calls: — It was held, that an action on such covenant could be maintained in the name of C. P., although he had ceased to be the secretary of the company, notwithstanding the 5 Geo. 4. c. clx. (9), which enacts, that all actions in the name of the company shall and may be lawfully carried on in the name of the secretary for the time being. (10)

By articles under seal A. agreed to sell, and B. to purchase, certain premises; B. therein covenanted to pay on or before a fixed day, as the consi-

DECLARATION.

Stat. 3 & 4
Will. 4. c. 42.
s. 22.

Where the locality does not appear in the declaration.

Non payment of rent.

WHEN TRANSITORY.

Stat. 11 Anne,
c. 2. s. 6. (I.)

When action may be brought in either county.

PARTIES.

BY WHOM COVENANT CAN BE MAINTAINED.

Right to sue under bishop's leases.

Secretary of the St. Patrick Assurance Company.

Stat. 5 Geo. 4. c. clx.

Where tender of conveyance

(1) *Boyes v. Hewetson*, 2 Bing. N.C. 575.

(2) *Barker v. Damer*, 1 Salk. 80.

(3) Stat. 32 Hen. 8. c. 34. *Thursby v. Plant*, 1 Saund. 237.

(4) Stat. 32 Hen. 8. c. 34.

(5) *Grogan v. Magan*, 1 Alcock & Napier (Irish), 366.

(6) *London (Mayor of) v. Cole*, 7 T. R. 583.

(7) *Nurse v. Frampton*, 1 Salk. 214.

(8) *Raphoe (Bishop of) v. Hawkesworth*, 1 Hudson & Brooke (Irish), 606.

(9) Loc. & Per. cap. clx.

(10) *Pentland v. Hervieu*, 2 Hudson & Brooke (Irish), 444.

DECLARATION.

previous to
commencement
not required.

Judgment of
Mr. Justice
Patteson in
Mattock v.
Kinglake.

Assignee under
stat. 1 Geo. 4.
c. 119. s. 7.

**BY WHOM CO-
VENANT CANNOT
BE MAINTAINED.**

Where the ac-
tion is founded
on an indenture,
the person
bringing the
action must be
a party to the
deed.

Chairman of a
board of di-
rectors.

deration of such sale and purchase, a certain sum with interest to the time of the completion of the purchase, A. allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; and B. agreed to pay for the conveyance and the stamp:—It was held, that the conveyance was not a condition precedent to, or concurrent with the payment, and that A. might therefore sue for the purchase money and interest, without previously tendering a conveyance; Mr. Justice Patteson observing, “*Pordage v. Cole* (1) is directly in point. We must overrule it if we decide in favour of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment, that it was to be necessarily precedent to, or concurrent with, it. The words ‘completion of the purchase,’ which furnish the only plausible argument in the defendant’s favour, only mean payment of the rest of the purchase money on the day specified, the defendant was to pay all the principal sum that remained due, with interest up to that time; but he might have prevented the further running of interest, by payment at any time before that day, if he pleased.” (2)

The provisional assignee of the Insolvent Court, under stat. 1 Geo. 4. c. 119. s. 7., assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it as tenant of the premises which the insolvent held as lessee for years after the death of such last mentioned assignee:—It was held, that his executor was liable to the lessor for breaches of covenants in the lease subsequent to the testator’s death, it not appearing, that the Insolvent Court had appointed fresh assignees. (3)

If an action be founded on an indenture, the person bringing the action must be a party to the deed, or he cannot maintain the action. (4)

Thus, in *Green v. Horne* (5) the plaintiff declared, that A. being arrested at his suit, the defendant, in consideration that he would order the bailiff to let A. go at large, covenanted with the plaintiff to bring in the body of A. and deliver him to the bailiffs on such a day; and on oyer the deed appeared in *hæc verba*:—“I (the defendant) do promise and engage myself to bring in the body of A. to the custody of B. (the bailiff) such a day.” On demurrer it was held, that the plaintiff should not have this action, he being no party to the deed; for though covenant may be brought on a deed-poll, in which no person certain is mentioned, but generally, “To all whom it may concern,” yet a person must be named in a deed indented, or he cannot have an action on it.

Where in covenant against A. and B., on a covenant supposed to be implied as incident to a demise by lease; on production of the lease it appeared, that, in point of law, A. only demised, and that B., who had an equitable interest merely, confirmed:—It was held, that the action was not maintainable against A. and B. (6)

Covenant cannot be maintained against the chairman of the board of directors of a joint stock company, upon a deed under the seal of a former chairman of the company, though sealed by him for or on behalf of the company; because a chairman of a board of directors need not be a mem-

(1) 1 Saund. 319.

(2) *Mattock v. Kinglake*, 10 A. & E. 50.

(3) *Abercrombie v. Hickman*, 8 ibid. 683.

(4) 1 Rol. Abr. Covenant, 520—522.

(5) 1 Salk. 197.

(6) *Smith v. Pocklington*, 1 C. & J. 445. 1 Tyrw. 309.

ber of the company, for the company might get a party to be a director who was not a partner. (1) DECLARATION.

The Basingstoke Canal Company were empowered by act of parliament to raise money on the security of the canal and dues, the creditors to have no priority over each other. By the form of deed given in the act of parliament authorising the undertaking, the canal and dues were assigned to the lenders as a security for the principal money lent, the interest on which was "to be paid half yearly:" — It was held, that an action of covenant for payment of interest did not lie against the company on such deed; because, as observed by Mr. Justice Vaughan, "The third section, by enacting that all the creditors shall have an equal claim to the property and dues of the company, imports that the company was not to be subject to actions of this kind." (2) Where a canal company cannot be made defendants.

In *Cardwell v. Lucas* (3) the declaration, which was in covenant, stated that one J. H. was seised in fee, and being so seised, by a certain indenture, with the consent and approval of the said J. H. then given, made between the said J. H. of the one part, and the defendant of the other part (*profert* sealed with the seal of the defendant), it was witnessed, that, for the considerations therein mentioned, he the said J. H. did demise to the defendant, his executors and administrators, certain premises therein mentioned, to hold to him, his executors, &c. for the term of eleven years. By virtue of which said indenture, and by permission of the said J. H., the defendant afterwards entered into the premises, and was possessed thereof. That J. H. afterwards made his will, by which he demised the estate to his widow E. for life, remainder to the plaintiff for life. It then averred the death of J. H., and afterwards of E. his wife, whereupon the said plaintiff became and was seised of the reversion of and in the premises in his demesne, as of freehold for the term of his natural life, under and by virtue of the will. The defendant pleaded in effect, that, although the deed was his deed, yet that it was not signed by J. H., nor by any agent of the said J. H., thereunto lawfully authorised by writing; nor was any lease for the said term of eleven years put into writing and signed by J. H., or any agent, &c.: — It was held on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture; Lord Abinger observing, "This action being brought by the plaintiff, as assignee of the reversion, it is quite clear that it cannot be maintained unless he be assignee of the reversion to which the covenants in the instrument declared upon are annexed. If the intended lessor had signed and executed the lease, the covenants would have been annexed to the reversion expectant on the determination of a term for eleven years, which reversion would have been duly assigned to the plaintiff; but as the intended lessor did not sign nor execute the lease, one of these two consequences necessarily follows: either the covenants in the lease are void, on the ground that they were entered into in contemplation of a lease for eleven years, and that the foundation of them was the existence of such a lease, which foundation has failed according to a doctrine laid down in *Yelv. 18.* (4), or, if the lease for On lease not executed by covenantee.

Judgment of
Lord Abinger
in *Cardwell v.
Lucas.*

(1) *Hall v. Bainbridge*, 1 M. & G. 42.
8 Dowl. P. C. 588.

(3) 2 M. & W. 111.

(2) *Pontet v. Basingstoke Canal Comp.*
3 Bing. N. C. 433.

(4) *Soprani v. Skurro*, Com. Dig. Cove-
nant (F.). *Rose v. Poulton*, 2 B. & Ad. 831.

DECLARATION.

eleven years must be considered as not essential to the validity of the covenants, because the defendant executed the indenture and took possession without having that lease, and so the covenants were not void; still they were annexed to the reversion expectant upon a mere lease at will, for such was the only interest that passed to the defendant by the parol demise of Mr. Hodson, implied by his assent to the lease. On the latter supposition, the tenancy was determined by the death of the lessor; in either view of the case, therefore, the plaintiff cannot recover. If a tenancy from year to year can be taken upon these pleadings to have existed at any time, it arose subsequently from the occupation by the defendant for more than a year, and the covenants are certainly not annexed to a reversion expectant on the expiration of *that* tenancy. For these reasons this action cannot be maintained, and our judgment must be for the defendant."

Wherever a covenant is for the benefit of any party, he must take notice of it at his own peril.

Wherever a covenant is for the benefit of any person, he must take notice and advantage of it at his own peril.

Thus, where there was a covenant by the defendant (lessee) "to permit the plaintiff (lessor) to sow clover among the defendant's barley;" and the plaintiff assigned as a breach, that the defendant had sowed the barley without giving him notice. The defendant pleaded, that he had not prevented the plaintiff. On demurrer, the plea was held sufficient, for the defendant was only bound by his covenant to permit, and the notice should have been taken by the plaintiff for whose benefit the covenant was. (1)

CAUSE OF ACTION.

That the contract was under seal.

Time of execution.

The declaration in this action must state that the contract was under seal (2), and should usually make a *profert* thereof, or shew some excuse for the omission. (3)

Deeds are supposed to be executed on the day that they bear date. (4)

One may declare in covenant that the deed was indented, made, and concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, and concluded. (5)

And it seems not to be a misdescription of a lease to state it as commencing on a particular day, when the *habendum* is from that day. (6)

Allegation of dependent and independent covenants.

If the plaintiff's covenant constitute a condition precedent, he must have previously performed it, or he cannot maintain his action; and its fulfilment must be averred, or an excuse for its non performance must be shewn; and if performance, or that which is equivalent to performance, be not alleged and proved, the defendant can plead non performance of the condition precedent in bar; and if the averment of performance be omitted or inaccurately stated, the defendant can on demurrer take advantage of it.

Covenants to be performed *eo instanti*.

If the covenants be to be performed *eo instanti*, neither can maintain an action without shewing a performance of, or an offer to perform, or at least a readiness to perform his part, though it be not certain which of the parties is obliged to perform the first act.

(1) *Hughes v. Richman*, Cowp. 125.

(2) *Moore v. Jones*, 2 Ld. Raym. 1536. Com. Dig. Pleader, 2. (V. 2.)

(3) *Read v. Brookman*, 3 T. R. 151.

(4) *Stone v. Bale*, 3 Lev. 348., vide etiam *Goddard's case*, 2 Co. 4. (b.)

(5) *Hall v. Cazenove*, 4 East, 477. 1

Smith, 272., et vide *Mayelstone v. Palmerston* (Viscount), M. & M. 6. 2 C. & P. 474.

(6) *Welsh v. Fisher*, 2 Moore, 378.

If the covenants be mutual and independent, no averment of performance is requisite, as it would be no excuse to allege a breach by the plaintiff.

DECLARATION.

It is not necessary to state the consideration of the defendant's covenant, unless the performance of it constituted a condition precedent, when such performance must be averred; or unless a consideration be by law necessary; and even in that case an averment that the defendant, "for the consideration mentioned in the deed," thereby covenanted, &c. will be sufficient on general demurrer, the defendant not craving oyer of, and setting out, a deed shewing no consideration, &c. (1)

Not requisite to state the consideration of defendant's covenant.

If the deed on which the plaintiff declares contain a proviso, operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant mean to rely on it, it is incumbent on him to shew it. (2)

Deed containing a proviso, operating as a defeasance of the covenants.

Only so much of the deed and covenant should be set forth, as is essential to the cause of action (3); and each may be stated according to the legal effect, though it is more usual to declare in the words of the deed. Thus, in covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other. On the production of the lease in evidence, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other: — It was held, that this was no variance, although premises demised were the property of the wife before marriage. (4)

Covenant need only be stated according to the legal effect.

In an action of covenant for quiet enjoyment, the plaintiff may state generally, that A. B., lawfully claiming title under the defendant, entered by virtue of such title on the premises, without setting forth the particulars of A. B.'s title. (5)

Covenant for quiet enjoyment.

Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. (6) Therefore, if on oyer of a bond, the obligees are described as commissioners acting under an act of parliament for the regulation of the duties on assessed taxes, and in the bond the duties are stated to be the duties of assessed taxes, this is no variance. (7) So in covenant, where the declaration stated, that the defendant covenanted to pay a certain sum of money at a certain time upon oyer, and the covenant appeared to be to pay the money at that time, and also at a particular place; to which the defendant demurred, and assigned the variance as a cause of demurrer: — It was held, that there was no material variance. (8)

Omitting a word, when the context supplies it, or inserting a wrong word, where the context corrects the mistake.

(1) *Homer v. Ashford*, 3 Bing. 322.

(2) *Elliott v. Blake*, 1 Lev. 88. Sir T. Raym. 65. *Bultivant v. Holman*, Cro. Jac. 537.

(3) *Dundass v. Weymouth (Lord)*, Cowp. 665. *Price v. Fletcher*, ibid. 727.

(4) *Arnold v. Revault*, 4 Moore, 66. 1 B. & B. 443., vide etiam *Wilson v. Bramhall*, 1 Y. & J. 2. The proper mode of declaring in covenant on a lease is, to set out that by indenture certain premises therein mentioned were demised, without stating them particularly, subject amongst other things to a proviso, setting out the substance of the covenant and the

breach. *Dundass v. Weymouth (Lord)*, Cowp. 665. In covenant for rent, a breach that the defendant had not paid, without saying "or his assigns," was held good, because the court would not presume an assignment. *London (Mayor of) v. Trench (Sir Fisher)*, Bull. N. P. 164.

(5) *Hodgson v. E. I. Comp.* 8 T. R. 278.

(6) *Loveland v. Knight*, 1 M. & R. 597. 3 C. & P. 106.

(7) Ibid.

(8) *Paine v. Emery*, 4 Dowl. P. C. 191. 1 Gale, 266.

DECLARATION.

Where omission of one of the parties to an annuity or rent charge no variance.

Effect of perception of rents, &c. by a receiver, in a suit instituted before time of assignment to covenantee.

Rule to set forth in pleading a title by conveyance, as the foundation of an action of covenant.

Judgment of Chief Justice Bushe in *Cleyburne v. Piercy*.

In *M'Gennis v. England* (1) the declaration stated, that the defendant and one W. E. since deceased, by deed granted an annuity or rent charge to the plaintiff; and that the defendant and W. E. did thereby covenant to pay the same: breach, the non payment; plea, *non est factum*. By the deed given in evidence it appeared, that the defendant joined with W. E. in the grant of an annuity, or assignment, or rent charge, the interest of which at the time of the grant was solely vested in W. E.: but which was held to be no variance.

In an action upon covenants for title contained in a deed of assignment, it appeared upon the declaration and the deed of assignment set out on oyer, that the assignment was made to the plaintiff in 1816, by a person to whom the lands in question, with other lands, had been by deed in 1800 vested in a trustee to raise by sale, mortgage, or demise of any part of the lands, a certain sum. This trust deed was recited in the assignment. The breach of covenant assigned was, the perception of the rents and profits of these lands by a receiver appointed by the court of Chancery, in a suit instituted before the time of the assignment, for the purpose of carrying the trusts of the deed of 1800 into execution, and a sale in such suit, whereby the plaintiff was put out of possession. It was contended, on general demurrer to the declaration, that the deed of 1800 being recited in the deed of assignment, neither such deed of 1800, nor the loss of possession occasioned by carrying it into effect, could be considered as a breach of the covenants for title, but should be taken as an exception from the general words of the covenant in the deed of assignment:—Held, that the demurrer could not be sustained.

In *Cleyburne v. Piercy* (2) it was stated in the declaration in the words of the assignment, that the granting parties to the assignment granted, bargained, sold, and assigned, &c.: upon the deed set out on oyer it appeared, that the deed operated as an assignment of one and the confirmation of the others. Upon special demurrer on this ground it was held, that the declaration was sufficient; Chief Justice Bushe observing, “The rule is, that in setting forth in pleading a title by conveyance, it is necessary to set forth the conveyance according to its legal operation. But this rule has never been extended to cases where the conveyance is stated, not for the purpose of setting forth the title, but as the foundation of an action of covenant. The reason of this distinction is obvious. When title is essential to the action, as in replevin, and a party accordingly takes upon himself to set out his title, it is incumbent on him to shew the court what his title is, and he is not to call upon the court to make out title for him.” (3) “But in an action of covenant it is immaterial to the action under what conveyance the plaintiff holds. The conveyance is set forth to shew the covenant, and not for the purpose of making titles to the lands. Accordingly, it will be found that all cases in which the rule of pleading a conveyance according to its legal operation has been applied, are cases in which the conveyance was set forth for the purpose of shewing title. This distinction is taken by Mr. Justice Holroyd in *Moore v. Plymouth (Lord)* (4): he says, ‘In deducing title, I have un-

(1) 2 Hudson & Brooke (Irish), 577.

(2) Smith & Batty (Irish), 412.

(3) Pollexfen's judgment in *Baker v. Lade*, 3 Lev. 291.

(4) 3 B. & A. 70.

derstood it to be an established rule, that conveyances are to be pleaded as they operate: that rule however does not apply to an action on a deed of covenant: in such an action it is stated, that by a certain deed, it was witnessed that the party covenanted; the title in that case is not deduced.' "(1)

A declaration alleging, that by indenture *purporting* to be made between plaintiff and defendant, it was *witnessed* that defendant covenanted: — It was held to be, after plea, sufficiently certain. (2)

Where an indenture of lease contained a proviso, that if a certain event should happen after the execution of the lease, the rent reserved should be reduced: — It was held, that in an action of covenant for non payment of rent, the covenant might be declared upon as an absolute covenant. (3)

In an action of covenant against a surety in an annuity bond, who had become bound to pay in twenty-eight days from the time specified for payment by the grantor, in case of failure by the latter, the declaration by mistake stated, that the payment had become due from the surety on the day on which it had become due only from the principal: — It was held, that as the bond and covenant were upon the whole set forth with sufficient certainty to prevent any reasonable mistake as to the ground of action, the inconsistent allegation might be rejected as surplusage. (4)

In covenant, the plaintiff in his declaration (after *profert*) averred, that the defendants, for the considerations in the deed contained, covenanted that they would not do certain acts. The defendants pleaded, that, as the performance of the covenants in the indenture mentioned would, for a term, prevent them from carrying on their trade, they were in restraint of trade and illegal: — It was held, that as the defendants had not cravedoyer of the deed, nor demurred to the declaration on account of any supposed insufficiency of consideration in the deed, as set out therein, the court (the covenants being reasonable) would presume, that the deed disclosed a sufficient legal consideration. (5)

Where in one count it was alleged, that the bishop of Raphoe was seised as of fee, in right of his bishopric, of the mill of R., and in a subsequent count the plaintiff declared, as successor: on a covenant with his predecessor, that if the lessee should grind grain growing on the premises demised to him, at any mill, save the mill belonging to the bishop for the time being, he should pay to the lessor and his successors 5s. for each barrel of grain so ground, as if the same had been due for rent: — It was held, that it sufficiently appeared in this count, by reference to the former count, that the bishop for the time being was seised of the mill of R. in right of his bishopric, and that the covenant was not personal to the lessor, and that it was not necessary in a declaration on a lease made by an ecclesiastical person, to shew that it was a lease made conformably to the enabling statutes 10 & 11 Car. 1. (Ir.) c. 8. and 35 Geo. 3. (Ir.) c. 28. (6)

DECLARATION.

Inferential statement of covenants.

Where covenant with a proviso may be declared upon as absolute.

Where inconsistent allegation may be rejected as surplusage.

Where the court will presume, that the deed disclosed a sufficient legal consideration.

Sufficient allegation that a bishop was seised in fee in right of his bishopric.

(1) In support of the demurrer the following cases were cited: — *George v. Butcher*, 2 Vent. 140. *Earl of Clanrickarde's case*, Hob. 275. 2 Saund. 178. n. Co. Litt. 45. (a.) *Ross v. Parker*, 1 B. & C. 358. *Chester v. Willan*, 2 Saund. 96. Co. Litt. 308. (a.) Com. Dig. Plead. (C.), 30, 31. *Sacheverell v. Froggatt*, 2 Saund. 366. n. *Moore v. Plymouth (Lord)*, 3 B. & A. 66. *Quigley v. Furlong*, 2 Fox & Smith (Irish), 224.

(2) *Baynon v. Bailey*, 8 Bing. 256 1 M. & Sc. 339.

(3) *Grogan v. Magan*, 1 Alcock & Napier (Irish), 366., ante, 1064—1066.

(4) *Hearn v. Cole*, 1 Dow, 459. 463.

(5) *Homer v. Ashford*, 11 Moore, 91. 3 Bing. 322.

(6) *Raphoe (Bishop of) v. Hawkesworth*, 1 Hudson & Brooke (Irish), 606.

DECLARATION.

Where grantors have not the legal rights which the deed, as set out in the declaration, purports to grant.

Where a declaration in covenant by the reversioner against A., the assignee of a lease for years, (granting license to B. to continue a certain channel open through the bank of a navigable river, upon certain conditions,) stated, that the grantors had the entire right and absolute possession of the channel, and full power to grant the use of it to B., and it appeared from the indenture, that they were described merely as the persons who had the greatest proportion or share in the profits of the navigation, and that they, by virtue of all or any powers and authorities vesting in or enabling them, granted the license to B., his executors, administrators, and assigns: — It was held, that this was a variance, as the grantors had not the privilege which the deed as set out in the declaration purported to grant. (1)

Policy of assurance to be void, if assured went beyond the limits of Europe.

Where a declaration stated, that by indenture, the defendant covenanted, that he would at any time or times thereafter appear at any office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c. in order to enable the plaintiff to insure his life, and should not afterwards do or permit to be done any act whereby such assurance should be avoided or prejudiced; and then alleged the defendant's appearance at the Rock Life Assurance Company, and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be void, notwithstanding which the defendant went beyond the limits of Europe: — It was held, on special demurrer, that the declaration was bad for want of an averment, that the defendant had notice that the policy was effected: — and it seems, that if such notice had been given, the defendant would have been bound to notice the conditions of the policy. (2)

BREACH.

Breach may be assigned in the negative of the covenant generally, or according to the legal effect.

The breach may be assigned in the negative of the covenant generally, or according to the legal effect. (3)

In covenant, "that the grantor has good right and lawful authority to grant," the breach may be as general as the covenant, following the words thereof in the negative, as it lies more properly in the knowledge of the lessor, what estate he had in the land which he demised, than in the lessee, who was a stranger to it. (4)

Plaintiff should not qualify the negative words of his breach by adding affirmatively other matters of breach.

The plaintiff should not qualify the negative words of his breach by adding affirmatively other matters of breach. In covenant to allow a business to be carried on in a certain shop, a breach that defendant improperly shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times. (5)

Disjunctive covenant.

If the covenant be in the disjunctive, the breach ought to state, that the defendant did not do one act or the other. But where the covenant was to "pay or cause to be paid a sum of money," it was held sufficient in assigning the breach, to state, that the defendant did not pay, omitting the words "or cause to be paid," for he who causes to pay, pays. (6)

Non payment of rent.

Where the reserved rent was made payable quarterly on the 1st February,

(1) *Portmore (Earl) v. Bunn*, 3 D. & R. 145. 1 B. & C. 694.

(2) *Vyse v. Wakefield*, 8 A. & E. 377. 6 M. & W. 442.

(3) *Com. Dig. Pleader*, 6. 2 Saund. 181. (a.) *Falmouth (Earl of) v. Thomas*, 1 C. & M. 89.

(4) 2 Saund. 181. (a.) *Bradshaw's case*, 9 Co. 60. (b.)

(5) *Hodges v. Gray*, 4 Dowl. P. C. 733.

(6) *Aleberry v. Walby*, Str. 231. 1 Saund. 234. (c.)

1st May, &c. The breach of the covenant declared upon was, that between a certain day named and the 1st of April, 1827, grain which grew on the premises was ground at other mills, whereby the defendant afterwards, to wit, on the day last aforesaid, became liable to pay the sum of 5s. per barrel, &c. which still remained due:—It was held, that an action having been brought after the 1st of May (the next rent day), the breach of the covenant was sufficiently averred. (1)

DECLARATION.

In *Saward v. Anstey* (2) the defendant purchased an estate charged with an annuity to M. S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it. In a declaration on this covenant, the breach alleged was, the non payment of the annuity; without adding that the vendor had been thereby damnified, which was held sufficient on demurrer.

Non payment of annuity.

In covenant by a master against his servant (3), on a covenant not to buy or sell without the master's leave, within two years; the breach assigned was, that defendant had, *diversis diebus et vicibus*, between such a day and such day, sold to H., and to several other persons unknown, goods to the value of 100l.: upon this allegation issue was taken, and after verdict for the plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to times and persons: to which Chief Justice Holt said, that in covenant it was sufficient if a general breach were assigned, and that the breach in question was certain enough; "for it is so described, that if another action be brought, the defendant may plead a former recovery for the same cause, and aver this to be the same selling."

Covenant by master against his servant for buying and selling without his leave.

If the breach be so general, that the subject-matter of the complaint is not shewn, it will not be sufficient: thus, in *Warn v. Bickford* (4), an assignment of a breach of covenant in general words, although in the words of the covenant, was held ill upon a demurrer to the defendant's plea, because the assignment did not shew any particular act of the plaintiff, nor in what particular respect he had refused to act, which amounted to a breach of his covenant. And such bad assignment is not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix, sued) to a declaration in covenant for unliquidated damages.

Breach will be too general, if the subject-matter of the complaint be not shewn.

A. and B. are lessees of a coal mine, A. being also lessee in trust for himself and B. of land adjoining, necessary for the working of the mine, covenanted with C. that he would do nothing whereby an annuity, charged (with power of entry upon the mine, &c. and sale, in case the annuity should be in arrear) upon the profits, which, after payment of the rent, taxes, &c. then charged thereon might be made under the leases of the mine and land, by the sale of the coal or otherwise, could be impeached. In an action on this covenant, C. assigned as breaches, 1st, that A. surrendered the land, and took a new lease to himself and B. jointly, in trust for other persons, whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it; 2d, that A. and B. accepted a new lease of the land, at an increased rent, and in other respects upon less advantageous terms,

Declaration insufficient for not shewing in what manner acts complained of operated to impeach an annuity.

(1) *Raphoe (Bishop of) v. Hawkesworth*, *Gale v. Reed*, 8 East, 84. *Barton v. Webb*, 8 1 Hudson & Brooke (Irish), 606. T. R. 459.

(2) 2 Bing. 519. 10 Moore, 55.

(4) 7 Price, 550., et vide 9 ibid. 43.

(3) *Farrow v. Chevalier*, 1 Salk. 139. cit.

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for the fraudulent purpose of obtaining from the lessor a demise of mines under the land, upon terms advantageous to A. and B., whereby the annuity became and was impeached; 3d, that A. and B. assigned (amongst other things) such neighbouring mine and the land to D., whereby the annuity became and was impeached:—It was held, that the declaration was insufficient, for not shewing in what manner the acts complained of operated to impeach the annuity. (1)

Eviction of assignee.

In an action for a breach of covenant on the defendant's demise, for not having a good title to demise for the whole of the term demised, whereby the plaintiff's assignee of the lease was evicted, and the plaintiff put to costs; in an action against him by such assignee, for such eviction, the plaintiff must shew who evicted the assignee; and merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, is not sufficient. (2)

Covenant to do or forbear a specific act.

If the covenant be to perform or forbear a specific act, an assignment of the breach in the words of the covenant will be sufficient. (3)

Informal assignment of breach of covenant, will be cured after judgment by default.

However informally a breach of covenant may be assigned in a declaration, yet, after judgment by default, the court will pronounce such judgment as will meet the justice of the case, notwithstanding the informality. (4)

PROFERT.**Where deed is pleaded with profert, the opposite party can have oyer.**

In all cases where a deed, &c. is pleaded with *profert* (5), either by the plaintiff or defendant, the other party may have oyer of it (6), provided the *profert* have been necessary (7), and may then set it forth in his plea if he will. Unless there have been a *profert*, however, oyer cannot be prayed; and therefore, if a deed be pleaded without *profert*, the other party should demur specially for the want of it, particularly if it be essential to his plea, &c. that the deed should be set forth. (8)

Unless there have been a profert, oyer cannot be prayed.

Oyer is generally craved, where it is essentially necessary that the deed, &c. pleaded, should be set forth, before the party craving oyer can plead. So, if any part of a deed which ought to be stated, be omitted in a declaration, &c. or if the deed be erroneously stated, the other party should set forth the deed upon oyer and demur. (9)

Where oyer is generally craved.

When a *profert* or an excuse for the omission is unnecessary, an allegation making the *profert* will be considered as surplusage, and will not entitle the other party to oyer. (10) An excuse for the omission of *profert* is traversable, and should always be in strict accordance with the fact. (11)

Where profert of deed will be deemed unnecessary.

In an action of covenant on an indenture of lease by tenants in common, where the moiety of one of the plaintiffs is alleged in the declaration to have been conveyed to him by lease and release, but no *profert* is made of the deed of release:—It was held on special demurrer, that the deed was on this ground defective, the deeds of lease and release, although contained in the same instrument, being separate and distinct deeds, and the latter deriving its entire efficacy from the common law. (12)

Excuse for omission of profert traversable.**Where profert should be made of releases.**

(1) *Pitt v. Williams*, 4 N. & M. 412. 2 A. & E. 419.

(2) *Fraser v. Skay*, 2 Chitt. 646.

(3) *Vignior's case*, 8 Co. 162. *Marsh v. Bulteel*, 5 B. & A. 507.

(4) *Brookes v. Heberd*, 8 D. & R. 69.

(5) *Post*, 1162. tit. NON EST FACTUM.

(6) The term "oyer" does not import inspection of the deed; and where an inspection is required, it must be obtained either by summons or by application to the court.

(7) *Roberts v. Arthur*, 2 Salk. 497. It seems that the demand of oyer is a kind of plea. 3 *ibid.* 119.

(8) Archb. by Chitty, 1059.

(9) *Stibbs v. Clough*, Str. 227. 1 Saund. 317. n. 2 *ibid.* 366.

(10) *Morris's case*, 2 Salk. 497.

(11) 1 Saund. 9., *post*, 1162. tit. NON EST FACTUM.

(12) *Pentland v. Healy*, 1 Alcock & Napier (Irish), 164.

84. PLEADINGS.

In covenant there is strictly no *plea* which can be termed a general issue, PLEADINGS.
for *non est factum* only puts in issue the fact of sealing the deed; and *non infregit conventionem* and *nil debet* are insufficient pleas (1); and therefore most matters of defence must be pleaded specially. (2)

I. *Of the Plea of other Covenants in Bar.*

A covenant in one indenture cannot be pleaded in bar of a covenant in another indenture, except such be a defeasance of the former; for perhaps the injuries may not be equal.

Thus, a plaintiff declared, that the defendant by indenture covenanted to pay him 300*l.* per annum so long as his wife should live with and be supported by the plaintiff; and that one quarter's salary was then in arrear; the defendant pleaded, that afterwards there was another indenture made between the same parties, that whenever the defendant and his wife should come to cohabit together the allowance should cease: and pleaded further that they did cohabit; which on demurrer was ruled to be a bad plea, and that the defendant could have an action on his indenture, but could not plead it in bar to a covenant in the other. (3) A defeasance by another deed may, however, be so pleaded in bar: but the second deed must appear to be intended to operate as a defeasance, and contain proper words for that purpose, "as reciting the first deed, and declaring it to be thereby void." (4)

OF THE PLEA
OF OTHER CO-
VENANTS IN
BAR.

Covenant in one indenture cannot be pleaded in bar of another indenture, except such be a defeasance of the former.

Where defeasance by another deed may be pleaded in bar.

But one covenant in a deed may be pleaded in bar to a covenant in the same deed; for the sense of the parties is to be collected from the whole of the deed. Thus, on a covenant for rent, the defendant was allowed to plead another covenant in the same indenture, viz. "that he (as lessee) might retain so much of the rent for repairs and charges." (5)

II. *Nil habuit in Tenementis.*

The defendant cannot plead *nil habuit in tenementis*, for the indenture is an estoppel. (6)

So neither can the defendant plead a plea which amounts to "*nil habuit in tenementis*," though not so in terms.

Thus, in *Palmer v. Ekins* (7) the plaintiff declared as assignee of the reversion from one Palmer, who had by deed demised the premises in question

NIL HABUIT IN
TENEMENTIS.

Where plea cannot be pleaded which amounts to *nil habuit in tenementis*.

(1) Com. Dig. Pleader, 2. (V. 4.) *Hodgson v. E. I. Comp.*, 8 T. R. 283. *Walsingham v. Comb*, 1 Lev. 183.

(2) Com. Dig. Pleader, 2. (V. 4.)

(3) *Gawden v. Draper*, 2 Vent. 217.

(4) *Clayton v. Kynaston*, and *Lacy v. Kynaston*, 2 Salk. 573. 575.

(5) *Johnson v. Carre*, 1 Lev. 152.

(6) *Heath v. Vermeden*, 3 ibid. 146.

(7) Str. 817.

PLEADINGS.

to the defendant for twelve years then unexpired ; the defendant pleaded, "that, ten years before the making of the lease to him, Palmer had sold the reversion in fee to one Bragg," and traversed the seisin of Palmer as alleged by the plaintiff. To this plea there was a general demurrer : and the court resolved, 1st, That the defendant's plea was tantamount to *nil habuit in tenementis*, for it denied the seisin in fee in Palmer, who had demised to him by deed, and so was bad in law. 2d, That the plaintiff, who was assignee, should have the benefit of this estoppel, which runs with the land. 3d, That the estoppel need not be replied, but might be taken advantage of on demurrer ; and that the plea, in the present case, was bad on a general demurrer.

In *Gorman v. Hanlon* (1), the declaration stated, that on the 24th and 25th of March 1826, J. G., and one T. G., since deceased, by indentures of bargain, and sale, and release, demised the lands of Kellystown in the county of Carlow, for the life of the said J. G., yielding during the said term to the said J. and T., their heirs and assigns, the yearly rent of 139*l.* 12*s.* 6*d.* payable on the 25th of March, and 29th of September ; and the defendant thereby covenanted with the said J. and T., their heirs and assigns, to pay or cause to be paid to them, their heirs and assigns, the said rent on the days aforesaid. It was averred that afterwards, to wit on the 28th of March 1815, T. G. died ; and for a breach, that, on the 29th of September 1824, the rent for nine years of the term then elapsed became in arrear.

Pleas which do not amount to *nil habuit in tenementis* or to *non est factum*.

Pleas, 1st, *non est factum* ; 2nd, that before the making of the indentures in the declaration mentioned, to wit, on the 19th of May 1790, one R. D. was seised in his demesne as of fee in the said lands, and being so seised, he, afterwards, to wit, on that day, by bargain, and sale, and release, conveyed the lands to one M. G., to hold to her, her heirs and assigns, for the lives of herself, of the said J. G., and of one R. L., and she, being seised, afterwards, to wit, on the day last aforesaid, leaving the said T. G. her eldest son and heir at law ; whereby the same lands came to and were vested in him as her heir ; and he became seised for the lives of the said J. G. and R. L., and being so seised, he afterwards, to wit, on the 25th of March 1806, by the indentures in the declaration mentioned, released ; and the said J. G. by that indenture confirmed to the said defendants the said lands to hold for the life of the said J. G., without this, that the said T. and J. released the said lands in manner and form as in the declaration alleged. There was a third plea which stated the seisin of T. G. as stated in the second plea, and averred that he, by indenture, released to the defendant the rent reserved.

Issue was joined upon the first plea, and to the other two the defendant demurred. Among other causes of demurrer assigned were, that the second plea amounted to *nil habuit in tenementis*, and to a plea of *non est factum*. Joinder in demurrer : but the court overruled the demurrer, and gave judgment for the defendant.

Tenant cannot set up any objection to the title of his landlord.

A tenant cannot set up any objection to the title of his landlord under whom he holds. Thus, if both lessee and lessor sign a lease, the former is estopped to plead *nil habuit in tenementis* to an action of debt for rent by

the lessor. (1) In an action of covenant for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*. (2)

So likewise in *Hodson v. Sharpe* (3) it was held, that a lessee of lands in the Bedford Level could not object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by stat. 15 Car. 2. c. 17. for want of being registered; Lord Ellenborough observing, "*Doe v. Barber* (4) was an action against a stranger to the title of the lessor, and therefore the defendant was not estopped from disputing it; but in *Cooke v. Loxley* (5), which was an action for use and occupation by a rector against his tenant of the glebe lands, the defence attempted to be set up was, that the rector had been simoniacally presented, which would have avoided his title to the rectory: but the court agreed, that it was a universal rule, that a tenant should not be permitted to set up any objection to the title of his landlord under whom he held; that this was not a mere technical rule, but one founded in public convenience and policy. Here the lessee has all the benefit which he could derive under the lease; and now he sets up an objection to it, that it is not registered, which he shall not be permitted to do. The act no doubt meant, for the protection of titles, that leases and conveyances within this district should be registered; that every person interested in the inquiry might know in whom the title to any such land was; and therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate."

Judgment of Lord Ellenborough in *Hodson v. Sharpe*.

To an action by a lessor for a breach of covenant, on an indenture of lease in not repairing, &c. the lessee cannot plead in bar, that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*. But seemingly, the lessee is not estopped from shewing, that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. (6)

Where lessee cannot plead that lessor had only an equitable estate.

In order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration. Thus, in *Noke v. Awdler* (7) it was resolved, that although the court would not intend a lease to be good by estoppel only, yet where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease. (8)

To give a party the benefit of an estoppel, a good title must appear on the face of the declaration.

Where a lease by indenture takes effect in point of interest, which interest *may* be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from shewing the facts which determined the lease. As where

Where parties are not estopped from shewing the facts which determined the lease.

(1) *Wilkins v. Wingate*, 6 T. R. 62.

(2) *Parker v. Manning*, 7 *ibid.* 537.

(3) 10 East, 350.

(4) 2 T. R. 749.

(5) 5 *ibid.* 4.

(6) *Blake v. Foster*, 8 *ibid.* 487.

(7) Cro. Eliz. 379. 436.

(8) Vide etiam *Ludford v. Barber*, 1 T. R. 86. *Frontin v. Small*, 2 Ld. Raym. 1418. Str. 705. *Wilks v. Bach*, 2 East, 142.

PLEADINGS.

Where defendant may traverse the derivative title of the plaintiff.

In an action at the suit of the assignee of a termor, the defendant can traverse the interest of the plaintiff.

NON EST FACTUM.

Reg. Gen. H. T. 4 Will. 4. r. 2. s. 1.

Where a deed becomes part of the declaration.

Non compliance with the stamp laws.

Qualifications not noticed in the declaration.

If any covenant be altered or erased, the whole deed is discharged.

Instrument delivered as an *escrow*.

A., lessee for life of B., makes a lease for years by deed indented, and then purchases the reversion in fee; after which, B. dies: A. can avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. (1); because the tenant for life had a freehold, which is a greater estate, and the lease will not require any estoppel if the life endure. (2)

In covenant upon a lease for the breach of a covenant running with the land, if the plaintiff claim as heir, devisee, or assignee of the lessor, the defendant may traverse the *derivative title* of the plaintiff. (3)

Although the defendant is estopped from pleading or traversing *generally*, that the lessor was seised as stated in the declaration (4); yet in an action at the suit of the assignee of a termor, the defendant may deny, that the lessor was possessed of the residue of the term in the manner alleged in the declaration. (5)

III. *Non est factum*.

By Reg. Gen. H. T. 4 Will. 4., "In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

Where in covenant a defendant craves oyer of the deed, sets it out, and pleads *non est factum*, the deed so set out becomes part of the declaration; and the only question at the trial upon that issue is, whether the deed set out was executed by the defendant (6), or such other parties as may be stated in the declaration. (7)

By analogy to the cases decided on bills of exchange, the defendant may, under the plea of *non est factum*, object to the want of stamp, or alteration of the instrument since it was executed. (8)

In an action of covenant it is no objection under the plea of *non est factum*, that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration. (9)

If any covenant be altered or erased, the whole deed is discharged; for the deed is a complication of all the covenants, so that, by changing any, the deed remains no longer the same. (10)

Formerly evidence might have been given under the general issue, that the instrument was delivered as an *escrow* and not a deed. It would seem, observes Mr. Kennedy (11), that "such a defence ought never to be pleaded specially, because it admits that the instrument was executed in point of fact in the terms alleged, and only denies that it was intended to take effect

(1) 1 Inst. 27. (b.), vide etiam *Trepot's case*, 6 Co. 15. (a.) *Doe d. Barney v. Adams*, 2 C. & J. 232. *Hill v. Saunders*, 4 B. & C. 529. *Brudnell v. Roberts*, 2 Wils. 143.

(2) *Gibman v. Hore*, 1 Salk. 275.

(3) 1 Chitt. Pl. 487.

(4) Ibid.

(5) *Carvick v. Blagrave*, 1 B. & B. 531.

(6) *Snell v. Snell*, 7 D. & R. 294. 4 B. & C. 741.

(7) *Wilson v. Woolfryes*, 6 M. & S. 341.

(8) *Jervis' Rules*, 130. n.

(9) *Gordon v. Gordon*, 1 Stark. 294., vide etiam *Ross v. Parker*, 1 B. & C. 358. 2 D. & R. 662.

(10) 1 Esp. N. P. 328. cit. 2 Co. 28.

(11) *Rules of Pleading*, 143.

at the time of execution; the instrument was perfect *quoad* the sealing and signing, &c. though its operation was deferred; and therefore the fact of its being delivered as an *escrow*, is in the nature of a defeasance, and ought to be pleaded as a matter in confession and avoidance."

By stat. 9. Geo. 4. c. 15. and 3 & 4 Will. 4. c. 42. (1), judges at Nisi Prius can amend records on which the trial is had in matters not material to the merits of the case; they can likewise, instead of causing the record or document to be amended, direct the jury to find the facts according to the evidence, and therefore such finding is to be stated in such record; and notwithstanding the finding on the issue joined, the court in banco, if they think the variance immaterial to the merits of the case, and the misstatement such, as could not have prejudiced the opposite party in the conduct of the action or defence, can give judgment according to the very right and justice of the case.

Unless the deed has been set out on oyer, it will be fatal, if there be any material or essential variance between the deed set out and that produced: — but it is no variance, when the *profert* is "of the said indenture," to give in evidence a counterpart. (2)

The plaintiff should at the trial produce the deed, and if there be a subscribing witness to the deed, the execution should be, generally speaking, proved by such witness.

Payment of money into court on one of the breaches assigned in the declaration, dispenses (3) with proof of the execution of the deed, although one of the pleas, be the plea of *non est factum*.

If *profert* of the deed in question have been made, and *non est factum* pleaded, the plaintiff cannot give secondary evidence of its contents by proving its destruction (4); and an amendment of the record by omitting the *profert*, will not be permitted. (5) If however the deed be pleaded as a lost deed, and found before the trial, it may be given in evidence. (6)

Coverture of the defendant, at the time of execution, which might have been given in evidence under *non est factum*, must be pleaded.

PLEADINGS.

Stat. 9 Geo. 4. c. 15. and 3 & 4 Will. 4. c. 42.

Amendment of records.

Effect of variance between deed set out and that produced.

Production, and proof of execution of deed.

Effect of payment of money into court.

Profert.

Deed pleaded as having been lost, but found before the trial.

Coverture of defendant.

IV. *Non infregit Conventionem*.

There does not seem to be any case where, upon demurrer, *non infregit conventionem* has been holden a good plea; it cannot be pleaded where the plaintiff assigns a breach without setting forth the particulars of the title of a third person, adding, "and so the defendant did not keep his covenant," &c. (7)

Mr. Selwyn (8) considers, "If *non infregit conventionem* can be pleaded in any case, it must be in the single case, where the declaration states a single breach of the covenant in the affirmative, and concludes with an affirmative allegation, 'and so the defendant has broken his covenant.'" (9)

NON INFREGIT CONVENTIONEM.

(1) *Vide* APPENDIX.

(2) *Pearse v. Morrice*, 3 B. & Ad. 396.

(3) *Randall v. Lynch*, 2 Camp. 357.

(4) *Smith v. Woodward*, 4 East, 585.

(5) *Paine v. Bustin*, 1 Stark. 74.

(6) *Hawley v. Peacock*, 2 Camp. 557.

(7) *Hodgson v. E. I. Comp.* 8 T. R. 278.

(8) *Nisi Prius*, 529.

(9) *Ibid.*, vide etiam *Pitt v. Russel*, 3 Lev. 19. *Taylor v. Needham*, 2 Taunt. 278.

PLEADINGS.

Non infregit conventionem is not an issuable plea to a breach of covenant assigned in the negative. (1)

Where there are mutual covenants, one cannot be pleaded in bar of the other. (2)

PERFORMANCE.

V. Performance.

Affirmative and negative covenants.

If all the covenants in an indenture are in the affirmative, the defendant may plead performance generally; but if they are in the negative, he must plead to them specially (for a negative cannot be performed), and to the rest generally. (3)

And if he plead otherwise, on demurrer, the defendant will have judgment. (4)

Therefore, where plaintiff covenanted by charter-party, that he would sail from the Thames to such a place in Spain, and the words were, that he "*decederet, procederet, et non deviet*;" he pleaded performance generally; and it was held ill, for there was an express negative covenant, "that he should not deviate;" to which he should have pleaded specially; for though he sailed from the Thames to Spain, he might have deviated. (5)

And the case is the same in debt on a bond for performance of covenants. Performance is a bad plea; for some of the covenants might be negative. (6)

Disjunctive covenants.

So if any of the covenants are in the disjunctive, he must shew which he has performed. (7)

For the acts of a stranger.

When the covenant is for the act of a stranger, performance generally is a bad plea; it should shew how performed. (8)

Issue cannot be taken on a general averment of performance.

Performance must be pleaded in the terms of the covenant, otherwise it will be bad, even on general demurrer. (9)

But a general averment of performance, "according to the provisions of the said agreement," is sufficient on general demurrer, although the agreement contain conditions precedent; and a specific averment of performance would have been indispensable on special demurrer. (10)

In covenant, issue cannot be taken on a general averment of performance. (11)

Covenantor prevented from performing his covenant.

It may be observed, that if the covenantee perform any act by which the covenantor is incapacitated to observe his covenant, it will discharge the covenantor (12); or if the covenantee forcibly prevent covenantor from performing his covenant, he will be released from its performance. (13)

So likewise if the covenant be made for the payment of a sum of money due, or performance of any other act to be done *in presenti*, or which may

(1) *Bone v. Eyre*, 2 W. Black. 1312.
S. C. nom. *Boone v. Eyre*, 1 Hen. Black.
273. n.

(2) Ibid.

(3) Co. Litt. 303. (b.) 1 Esp. N. P. 326.

(4) *Cropwel v. Peachy*, Cro. Eliz. 691.

(5) *Laughwell v. Palmer*, 1 Sid. 87.

(6) *Ellis v. Box*, Aleyn, 72.

(7) Co. Litt. 303. (b.)

(8) *Fitzpatrick v. Robinson*, Show. 1.

(9) *Scudamore v. Stratton*, 1 B. & P. 455.

(10) *Varley v. Manton*, 9 Bing. 363.

(11) *Sayre v. Minns*, Cowp. 575.

(12) *Main's case*, 5 Co. 20. (b.) Cro.
Eliz. 450. 479. *Ford v. Tiley*, 6 B. &
C. 325. Co. Litt. 206. *Bridges v. Beding-*
field, 2 Mod. 28. *Studholme v. Mandell*, 1
Ld. Raym. 279. *London (City of) v. Greyme*,
Cro. Jac. 182.

(13) *Anon.* Keil. 34. (b.) *Barker v. Flet-*
wel, Godb. 69. *Carrel v. Read*, Cro. Eliz.
374. *Carith v. Read*, F. Moore, 402.

become payable, or necessary to be performed, during coverture, such covenant is extinguished or avoided by intermarriage; but where the covenant cannot from its nature confer a right of action while the coverture lasts, it is not extinguished or avoided, but during the marriage it is suspended only. (1)

Omission by covenantee to do some act necessary on his part to the execution of the covenant, will in some cases operate as an excuse of performance. (2)

A covenantor, however, may be discharged from performing a part of his covenant, without affecting his liability as to the rest: accordingly, if the owner of a ship covenants with A. that he will receive such loading as he shall appoint at W. by such a day, and then go with the first fair wind to X., and there unload and take in other wares, and A. afterwards discharges him of the taking in of the goods at W., but not of the receiving his loading at X., this discharge of the parcel of the covenant is not any discharge of the residue, for they are several and distinct. (3)

A covenantee's right to the performance of the covenant will not be defeated or prejudiced by the acts of a third party.

PLEADINGS.

Where a covenant is and is not extinguished by intermarriage. Omission by, covenantee.

Covenantor may be partly discharged from performing his covenant without affecting his liability as to the rest.

VI. Release.

A release being matter in confession and avoidance must be specially pleaded, and cannot be given in evidence under the general issue.

A covenant not broken is releasable only by special name.

If before a covenant is broken the covenantee releases the covenantor from all actions, suits, and quarrels, this does not discharge the covenant itself, because, at the time of the release, there was no debt, duty, or cause of action. (4)

But in that case a release of all covenants is a good discharge of the covenant before it is broken. (5)

Where a party takes a bond and also a deed of covenant to secure an annuity, although the bond is forfeited before a discharge under the Insolvent Debtors' Act (6), yet the covenantor may be sued on the covenant for payment becoming due after his discharge. (7)

Wherever a discharge is pleaded in the nature of a release, the defendant must plead it to be by deed, or it will be bad; for as the covenant is by deed, by deed only can it be discharged. (8)

It being a principle of law, that matters contracted for by deed, can only be dissolved by deed, the performance of a covenant cannot, therefore, be dispensed with by a subsequent parol agreement. (9)

RELEASE.

Covenant not broken can only be released by special name.

Matters contracted for by deed can only be dissolved by deed.

(1) *Cage v. Acton*, 1 *Ld. Raym.* 515. *Carth.* 511. *Lil. Ent.* 213. *Milbourn v. Ewart*, 5 *T. R.* 381. *Hayes d. Foord v. Foord*, cit. *ibid.* 386. *Heeding v. Davis*, *Skin.* 409. *S. C. nom. Gibbon v. Davies*, *Comb.* 242. *Lapart v. Hoblin*, 2 *Sid.* 58. cit. 1 *Ld. Raym.* 518. *Anon.* 1 *Vent.* 344.

(2) 1 *Roll. Abr. Condition (U.)*, 457. *Platt on Covenants*, 596.

(3) *Smith v. Barnes*, 1 *Roll. Abr. Condition (G.)*, 451.

(4) *Co. Litt.* 292. (b.) *Eeles v. Lambert*, *Aleyn*, 38.

(5) 1 *Esp. N. P.* 329.

(6) 16 *Geo. 3. c.* 38.

(7) *Cotterel v. Hooke*, *Doug.* 97. *Marks v. Upton*, 7 *T. R.* 305.

(8) *Blake's case*, 6 *Co.* 44. (a.) *Rogers v. Payne*, 2 *Wils.* 376.

(9) *Fortescue v. Brograve*, *Sty.* 8. *Blake's case*, 6 *Co.* 43. (b.) *Cook v. Jennings*, 7 *T. R.* 381. *Smith v. Wilson*, 8 *East*, 437. *White v. Parkin*, 12 *ibid.* 578. *Thompson v. Brown*, 1 *Moore*, 358. 7 *Taunt.* 656., overruling *Hotham v. E. I. Comp.* *Doug.* 272. *Sellers v. Bickford*, 1 *Moore*, 460. *Rogers v. Payne*, 2 *Wils.* 376.

PLEADINGS.

Covenantee cannot release a covenant after it is broken.

Where a covenant runs with the land, and the lease has been assigned, the covenantee cannot release a covenant after it is broken, and action has been brought by the assignee; for the right of action is then attached in his person. But if covenantee had released before a breach or action brought, it had barred the assignee even for a breach in his own time. (1)

SET-OFF.

Set-off must be specially pleaded.

Unliquidated damages cannot be pleaded by way of set-off.

VII. Set-off.

By the new rules, set-off must be specially pleaded; but previously to such regulations it was requisite to plead a set-off specially, in an action on a specialty. (2)

Unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off. (3) Neither in an action for unliquidated damages, as in covenant for not indemnifying the plaintiff against taxes, can a plea of set-off be maintained. (4)

ACCORD AND SATISFACTION.

Only pleaded in discharge of damages.

VIII. Accord and Satisfaction.

Accord and satisfaction is a good plea in covenant; for though this action is founded on a deed, and a deed can only be discharged by a deed, yet this is a good plea; for it is not pleaded in discharge of the covenant itself, but only in discharge of the damages; and the covenant still remains. (5)

So where the breach assigned on a covenant, the defendant pleaded an accord or agreement, "that the plaintiff should take 30s. in discharge of all damages," it was on demurrer ruled to be a good plea, for in every action where damages were demandable by way of amends, accord is a good plea in discharge. (6)

Delivery of something in the nature of a satisfaction.

The delivery of something in the nature of a satisfaction may be pleaded, which will operate as an extinguishment of plaintiff's demand. Thus, in covenant against three, the defendant pleaded, that he, in payment and satisfaction of the sum demanded, had given his promissory note to the plaintiff, on which the plaintiff had commenced an action, and obtained a judgment against him, which judgment remained in full force. This plea was on demurrer adjudged to be bad, because the defendant did not aver, that the plaintiff had accepted the note in satisfaction of his demand; and though a judgment had been obtained, it had not produced any fruit, so that the judgment remained but as a concurrent remedy, and in no way operated as an extinguishment of the original demand. (7)

Accord or satisfaction only a good plea, where there has been an actual breach.

But it is only a good plea where there has been an actual breach, for not till then are damages claimable.

In covenant by the heir in reversion against executor of tenant for life for a breach of covenant in the testator in not repairing the house demised, it was pleaded, that the testator, tenant for life, died on such a day, and

(1) *Middlemore v. Goodale*, Cro. Car. 503.

(2) Bull. N. P. 180. *Oldenshaw v.* 329.

Thompson, 5 M. & S. 164. 1 Stark. 311.

(3) *Howlet v. Strickland*, Cowp. 56. *Weigall v. Waters*, 6 T. R. 488.

(4) *Cooper v. Robinson*, 2 Chitt. 161.

(5) *Blake's case*, 6 Co. 43. 1 Esp. N. P.

(6) *Alden v. Blague*, Cro. Jac. 99. *Kaye*

v. Waghorn, 1 Taunt. 428.

(7) *Drake v. Mitchell*, 3 East, 251.

that afterwards it was agreed between the plaintiff and the defendant, that the defendant should quietly depart and leave possession to the plaintiff; and in consideration thereof, the plaintiff agreed to discharge him from the breach, and averred that, within five days from the day of agreement, he left the house:—On demurrer the plea was holden to be bad; for the time was not fixed by the terms of the agreement, when the executor should depart; and, although it was averred that he departed within five days, yet that would not aid the first uncertainty; for the agreement was the foundation of the whole, which ought to be certain, when it should be performed. (1)

In *Snow v. Franklin* the plaintiff declared, that in consideration he would permit S. P. to enjoy a farm at Clipsham for one year, the defendant covenanted to pay the rent of 72*l.* per annum, and also 200*l.* then in arrear, and the breach assigned was, the non payment of the rent. The defendant pleaded, that before any cause of action had arisen on the covenant, that it had been agreed between him and the plaintiff, that the plaintiff should take 30*l.* in discharge of all covenants; which the plaintiff had accepted:—On demurrer this plea was held to be a bad one; for at the time there was no covenant broken, and accord and satisfaction is no good plea, except in discharge of damages for a covenant actually broken, or damages sustained. (2)

Accord and satisfaction no good plea, except in discharge of damages for a covenant actually broken, or damages sustained.

In covenant for the non payment of rent, the defendant cannot plead “levied by distress;” for that is a confession that it was not paid at the day, to which time the breach refers; but *riens in arriere*, or payment at the day, will be a good plea. (3)

Where “levied by distress” cannot be pleaded.

The plaintiff and defendant being joint lessees of a lease, the plaintiff released his part to the defendant, who covenanted to repair, pay rent, and indemnify the plaintiff. On covenant brought and breach assigned as to all, the defendant pleaded bankruptcy; it was adjudged, that this being an express and collateral covenant, was not discharged under the bankruptcy and certificate, for it was not a debt due at the time of the bankruptcy, and so could not be proved under it. (4)

Express and collateral covenant cannot be discharged by bankruptcy.

IX. Eviction.

EVICTION.

Eviction is a good plea in covenant, but it must appear to be such, as disables the defendant from performing his covenant.

Must be pleaded to be such, as disables the defendant from performing his covenant.

For where the lessee covenanted to build a house upon the land within ten years, and he assigned the term, on action brought for non performance the defendant pleaded, that the lessor had entered and held possession for part of the ninth year. But it was said by the court, that the defendant should have shewn that the defendant entered by wrong, and held him out, so that he could not build; for perhaps the lessor's entry might have been lawful, as for non payment of rent, which in fact was the case. (5)

(1) *Sanford v. Cutcliffe*, Yelv. 124. *Russell v. Russell*, 3 Lev. 189. cit. Selw. N. P. 519.

(2) Lutw. 358.

(3) *Hare v. Savills*, 2 Brownl. 273. cit. 1 Esp. N. P. 330.

(4) *Mayor v. Steward*, 4 Burr. 2444., *anté*, tit. BANKRUPTCY.

(5) *Barker v. Fletwell*, Godb. 69.

PLEADINGS.

In an action of covenant for non payment of rent, on an indenture by husband and wife, and under seal of the wife (according to the provisions of the stat. 32 Hen. 8. c. 28. s. 3.), the declaration stated, that the husband and his wife, since deceased, demised the premises to the defendant for twenty-one years, and that he covenanted to pay rent to the husband and wife, and heirs of the wife; that the wife died; and that, after her decease, rent became due to the husband: to which it was pleaded, that the husband never had any thing in the premises, but in right of his wife, whose estate they were; and that she died before the rent became due, without issue; and that her heir had threatened to eject the defendant unless he would attorn and become tenant to him; and that he was accordingly obliged to do so:—It was held on general demurrer, that it was not necessary for the defendant to shew actual eviction by the heir; and that the plea was a discharge to the action on the grounds, that the lease was not voidable by the heir, but was a good and subsisting lease, and that he was only entitled to the rent, and could not have entered to evict or eject the defendant without being considered as a trespasser. (1)

Collateral acts cannot be pleaded.

So where the covenant was by the lessee to drain such water out of the land before such a day, and on covenant for non performance he pleaded, "that before the day the lessor entered and continued in possession until after the day," this was adjudged to be a bad plea; for it was a collateral act, and he should have set it out that he was prevented by the lessor. (2)

Where traverse of entry bad on special demurrer.

To covenant for rent against the lessee of tolls the defendant pleaded, that before the rent became due, the plaintiff entered upon the tolls, and then ejected, expelled, put out, and removed the defendant from possession thereof: to which it was replied, that the defendant did not enter, eject, expel, and put out, &c.:—It was held, that the traverse of the entry was bad on special demurrer. (3)

When entry will not excuse non performance.

If the covenant could be performed, an entry will not excuse the non performance.

As where on a demise of a messuage with the appurtenances, the defendants covenanted to repair, and breach assigned in not repairing; the defendant pleaded an entry by the plaintiff into the back yard of the messuage. The court held this to be no plea, for an entry into the back yard could not suspend the covenant to repair the messuage, of which he was still in possession, though by such entry the rent was suspended. (4)

INFANCY.

X. Infancy.

A covenant can be avoided by a party to it, if at the time of his execution of the deed he was an infant (5); it is a defence, however, which must be pleaded specially, and cannot be given in evidence under *non est factum*.

- (1) *Hill v. Saunders (in error)*, 7 D. & R. 165. *Stevenson v. Lombard*, 2 East, 575.
 17. 4 B. & C. 529. 9 Moore, 238. 2 *Roper v. Lloyd*, Sir T. Jones, 148., cit. *Hunt v. Cope*, Cowp. 242. *Dorrel v. Andrews*, Hob. 190.
 Bing. 112. 1 C. & P. 80.
 (2) *Carrel v. Read*, Cro. Eliz. 374.
 (3) *Palmer v. Goden*, 9 Dowl. P. C. 248. (5) *Gylbert v. Fletcher*, Cro. Car. 179.
 (4) *Snelling v. Stagg and Andrews*, M. T. *Lilly's case*, 7 Mod. 15. *Whittingham v. Hill*, Cro. Jac. 494.
 26 Car. 2. cit. 1 Esp. N. P. 328. Bull. N. P.

By the custom of London, an infant can bind himself by deed of apprenticeship. (1)

Parties who contract for and on behalf of infants, will be held to their express covenants. (2)

35. EVIDENCE.

The evidence in the action must entirely depend on the pleadings, there not being any general issue. EVIDENCE.

Where the plaintiff declares in covenant on any deed, he will not be allowed to go into evidence of any matter out of the deed to support his action, for the proof must correspond with the declaration. (3) Evidence will be strictly confined to the deed declared upon.

By an agreement under seal, three persons agreed to purchase a mine, and it was stipulated that the deposit was a conditional payment to be returned to the purchasers, should the property on the inspection by an agent to be sent out by the purchasers, prove to have been misrepresented in the description:—It was held, that the agent sent out must be a person distinct from the purchasers, and not one of themselves; and that no evidence was receivable to shew, that the vendor assented to one of the purchasers going out as agent, except the objection had been waved by some instrument under seal. (4)

If the plaintiff assign a breach generally, and subsequently narrow it to a particular matter, he will be confined to evidence of such particular matter: thus, where the breach assigned was, "that the defendant had not used the demised premises in an husbandlike manner, but, on the contrary, had committed great waste, spoil, and destruction," it was adjudged, that the evidence should be confined to the commission of waste, &c. and that the plaintiff should not be allowed to go into evidence of the not using the land in an husbandlike manner, if that did not amount to waste. (5) If plaintiff narrow his breach to a particular matter, he will be confined to such matter.

But where an expression used in a deed has a technical meaning, parol evidence is admissible to shew, that it had been used in that sense, and not in its ordinary meaning in common parlance; although such language may, in itself, be perfectly clear and unambiguous. (6) Where an expression used in a deed has a technical meaning.

If a plaintiff only set out a part of a deed, he cannot use the remainder without proving it in the usual way. (7) If only part of a deed be set out, remainder must be proved.

Parol evidence is not admissible to shew that a deed, which on the face of it is absolute, is merely conditional. (8) Parol evidence inadmissible to contradict a deed.

If a plaintiff produce an original lease for a long term, and prove possession for seventy years, the mesne assignments will be presumed. (9) Mesne assignments, where presumed.

If a person be found on the premises, appearing as the tenant, it is *prima facie* evidence of an underletting, sufficient to maintain a breach of covenant not to assign or underlet. (10) *Prima facie* evidence of underletting.

(1) *Code v. Holmes*, Palmer, 361. 2 Rol. 305. *Anon.* 1 Lev. 12. *Horn v. Chandler*, 1 Mod. 271.

(2) *Cuming v. Hill*, 3 B. & A. 59.

(3) *Littler v. Holland*, 3 T. R. 590. 1 Esp. N. P. 330.

(4) *English v. Blundell*, 8 C. & P. 332.

(5) *Harris v. Mantle*, 3 T. R. 307.

(6) *Clayton v. Greyson*, 4 N. & M. 602. *Smith v. Wilson*, 3 B. & Ad. 728.

(7) *Williams v. Sills*, 2 Camp. 519.

(8) *Anon.* Loft. 457., vide etiam *Harris v. Goodwyn*, 9 Dowl. P. C. 409., where a plea was held to be bad, as seeking to answer an agreement under seal by a parol promise.

(9) *Earl d. Goodwin v. Baxter*, 2 W. Black. 1228.

(10) *Doe d. Hindly v. Rickarby*, 5 Esp. N. P. C. 4.

<p>EVIDENCE.</p> <p>Description of land in a lease is <i>per se</i> evidence.</p> <p>Where lessor can prove the time of a demise.</p>	<p>If a lease describe the demised land as meadow land, no other evidence is necessary to prove, that it was meadow land at the commencement of the term. (1)</p>
	<p>Where the question relates to the time of a demise from A. B., and both parties admit his title, he may be a witness; for the verdict cannot be given in evidence in any action either by or against him. (2)</p>
	<p>In an action for breach of covenants to pay rent and repair, contained in a lease, the reversion in which was vested by the provisions of a will in plaintiffs upon trust (among others) to pay an annuity to the use of a married woman for life, and, after her death, to pay certain annuities to the use of her children: — It was held, that her husband was a competent witness, though other part of the trust property had been sold, because the rents were not sufficient for the purposes of the will. (3)</p>
<p>Incompetency of witness.</p> <p>Covenantor for title.</p>	<p>In <i>Steers v. Carwardine</i> (4) the plaintiff claimed, as occupier of a house, to be entitled to the use of water from a certain watering place; her sister, who was called as a witness in support of the right, stated on the <i>voir dire</i> that she had been a joint owner in fee with the plaintiff of the house in respect of which the right was claimed, and had conveyed her share to the plaintiff with the usual covenant for title: — It was held, that she was not a competent witness, and that indorsing her name on the record under stat. 3 & 4 Will. 4. c. 42. s. 27. would not render her competent.</p>
<p>STATUTE OF LIMITATIONS — PARTICULARS OF DEMAND — PAYMENT OF MONEY INTO COURT — STAYING PROCEEDINGS — WRIT OF INQUIRY — DAMAGES — COSTS — JUDGMENT — EXECUTION.</p> <p>STATUTE OF LIMITATIONS.</p>	<p>36. STATUTE OF LIMITATIONS — PARTICULARS OF DEMAND — PAYMENT OF MONEY INTO COURT — STAYING PROCEEDINGS — WRIT OF INQUIRY — DAMAGES — COSTS — JUDGMENT — EXECUTION.</p>
	<p>By stat. 3 & 4 Will. 4. c. 42. s. 3., “all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within ten years after the end of this present session 1833, or within twenty years after the cause of such action or suit.”</p>
	<p>In <i>Paget v. Foley</i> (5) it was holden that covenant for rent arrear might be brought within the term limited by stat. 3 & 4 Will. 4. c. 42. s. 3., and that it is not restricted to six years by stat. 3 & 4 Will. 4. c. 27. s. 42.; and it may be here observed, that such statute has a prospective and not a retrospective operation. (6)</p>
<p>PARTICULARS OF DEMAND.</p> <p>For not repairing, &c.</p> <p>In debt on bond.</p>	<p>In covenant for not repairing, &c. the defendant can claim particulars of the non repairs, &c. (7)</p> <p>In debt on bond conditioned for the performance of covenants, or to indemnify or the like, the defendant can call for a particular of the breaches for which he is sued. (8)</p>

(1) *Birch v. Stephenson*, 3 Taunt. 469.

(2) *Bell v. Harwood*, 3 T. R. 308.

(3) *Abercrombie v. Hickman*, 8 A. & E. 683.

(4) 8 C. & P. 570.

(5) 2 Bing. N. C. 679.

(6) *Paddon v. Bartlett*, 3 A. & E. 884.

(7) Archb. by Chitt. 1068. In an ac-

tion by vendee against vendor, where it was stated in the declaration, that the abstract of title delivered was “insufficient, defective, and objectionable,” the court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact. *Collett v. Thompson*, 3 B. & P. 246.

(8) 1 Tidd, 597.

In an action of covenant by the assignee of a lease, for non payment of rent and non repairs, the court will not compel the plaintiff to give particulars with sums and dates. (1)

If the breach assigned be for the non payment of money, the defendant can pay money into court as a matter of course (2); or, upon a bare covenant for the payment of money, the defendant can plead a tender. (3)

Where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant can plead payment into court of one entire sum in satisfaction of all the counts or breaches. (4)

If the breach assigned be not for the non payment of money, as in an action for dilapidations, the defendant must obtain an order or rule for that purpose under stat. 3 & 4 Will. 4. c. 42.

Where upon a declaration consisting of two counts the defendant paid into court enough to cover the demand on the first, and obtained a verdict on the second, but had omitted to plead the payment as required by the new rules, the court held that he was not entitled to costs. (5)

Where the breach assigned is the non payment of money, proceedings may be stayed, upon payment of the amount claimed and costs.

In an action of ejectment on a forfeiture by a breach of covenant to repair, the court has no power to stay proceedings upon terms, if the lessor of the plaintiff do not consent. (6)

Where the judgment is interlocutory, which it always is in covenant, the sole object of such action being damages, the abstract right of the plaintiff to damages is admitted, but its amount has to be ascertained, for the purpose of informing the conscience of the court.

In an action of covenant for the non payment of a liquidated sum (7), as for the non payment of rent (8), the question of damages is referred to a master to compute the principal due without a writ of inquiry.

But if the computation of damages be not a mere matter of calculation, as on a covenant to indemnify (9), the court will not refer it to one of the masters, but will require a writ of inquiry.

A writ of inquiry in an action of covenant for unliquidated damages, is within the directions to taxing officers of Hilary Term, 4 Will. 4., prescribing a reduced scale of taxation. (10)

In covenant for non payment of money, the measure of damages is the sum agreed to be paid to the plaintiff; or, if not ascertained by the contract, the sum proved to be due at the commencement of the action; and, if in accordance with the deed, interest thereon.

When the contract is not for the payment of money, but for the doing or forbearing of some other act, the damages depend on the nature of the

PARTICULARS OF DEMAND.

PAYMENT OF MONEY INTO COURT.

Non payment of money.

Plea of tender.

Several counts for several causes of action.

Breach assigned other than for the non payment of money.

Effect of omitting to plead payment as required by the new rules.

STAYING PROCEEDINGS.

WRIT OF INQUIRY.

DAMAGES.

Where the damages are certain.

Where computation of damages not a mere matter of calculation.

(1) *Sowler v. Hitchcock*, 5 Dowl. P. C. 724.

(2) *Gregg's case*, 2 Salk. 596. *Hallet v. E. L. Comp.* 2 Burr. 1120. *Walnouth v. Houghton*, Barnes, 282. 284. Stat. 19 Geo. 2. c. 37. s. 7. Archb. by Chitt. 1017.

(3) *Johnson v. Cluy*, 7 Taunt. 486. 1 Moore, 200.

(4) *Marshall v. Whiteside*, 1 M. & W. 188. 4 Dowl. P. C. 766. Tidd's N. P. 313., et vide *Lorymer v. Vizen*, 3 Bing. N. C. 222.

(5) *Adlard v. Booth*, 1 Bing. N. C. 693.

(6) *Doe d. Mayhew v. Asby*, 10 A. & E. 71.

(7) *Thelluson v. Fletcher*, Doug. 316. 1 Esp. N. P. C. 73. *Wingfield v. Cleverley*, 13 Price, 53.

(8) *Byrom v. Johnson*, 8 T. R. 410. *Campion v. Crawshay*, 6 Taunt. 356. Archb. C. Att. Pract. 338.

(9) *Denison v. Mair*, 14 East, 622.

(10) *Croft v. Miller*, 6 Dowl. P. C. 73.

DAMAGES.

contract, and whether it relates to the person, or to real or personal property.

In *Lethbridge v. Mytton* (1) the defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*, within a year:—It was held, that, on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, though no special damage was laid or proved; and an inquisition, on which nominal damages had been given, was set aside, and a new writ of inquiry awarded.

Where in an indenture of assignment, of the assignor's interest in two fields, and a limekiln thereon situate, it was covenanted, that the assignee should, on or before a certain day, prostrate and remove the said limekiln, and in case it should not be removed and prostrated, that the assignee should pay the assignor 100*l.* for each year after that day, during which the limekiln should remain on the assigned premises, or a rateable sum for any shorter time:—It was held, that the sum, so covenanted to be paid, was in the nature of liquidated and ascertained damages, and not a penalty. (2)

COSTS.

The plaintiff, if he have a verdict, is in all cases entitled to costs, unless the damages be under 40*s.*, and even in that case unless the judge certify under stat. 43 Eliz. c. 6. (3)

The costs of a writ of inquiry in covenant for unliquidated damages, are not to be taxed upon the reduced scale of rule. (4)

JUDGMENT.

Judgment by default is in covenant interlocutory—the sole object of the action being damages.

Where two or three joint covenantors suffer judgment by default on counts on several deeds, and the third defends and succeeds on some counts, the plaintiff cannot hold his judgment on those counts against the other two. (5)

The *judgment* in this action is, that the plaintiff recover a named sum for his *damages* which he hath sustained by reason of the breach or breaches of covenant, together with full costs of suit, to which the plaintiff is in general entitled, although, as previously observed, the damages recovered be under 40*s.* (6)

EXECUTION.

In covenant, the writ of execution for the plaintiff is for damages and costs.

(1) 2 B. & Ad. 773.

(2) *Huband v. Grattan*, 1 Alcock & Napier (Irish), 389.

(3) Archb. by Chitt. 1170.

(4) *Croft v. Miller*, 3 Bing. N. C. 975.

(5) *Morgan v. Edwards*, 6 Taunt. 398. 2 Marsh. 201.

(6) 2 Tidd, 945. 963. 977, 978., *et vide* ibid. 952—954.

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GENERALLY.

I. Generally.

Founded upon a contract either express or implied.

The action of debt is founded upon a contract either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum *in numero*, and not to be repaired in damages, as he is in those actions, which sound only in damages, such as *assumpsit*, &c. (1)Where action must be in the *debet* and *detinet*, and where in the *detinet*.If the action be brought for money, it must be in the *debet* and *detinet*; but if for goods and chattels, it must be in the *detinet* only. (2)If an executor bring debt for any thing in right of his testator, it must be in the *detinet* only (3); but if an executor take an obligation for a debt due to his testator by contract, in debt upon this obligation, the writ must be in the *debet* and *detinet*. (4) If the executor oblige himself to pay a debt due by contract by the testator, in debt upon this obligation the writ may be in the *debet* and *detinet*, because the obligation made it his own debt. (5)Debt lies in the *detinet* for goods.It lies in the *detinet* for goods, as upon a contract to deliver a quantity of malt; which action differs from that of detinue in respect of the property in any specific goods not being necessarily vested in the plaintiff at the time the action is brought, which is essential in detinue. (6)

When the peculiar remedy.

Debt is sometimes the *peculiar* remedy, as against a lessee for an apportionment of rent, where he has been evicted from part of the premises by a third person, though covenant is in such case sustainable against the assignee of the lessee. (7) It is also the only remedy against a devisee of land, for a breach of covenant by the deviser.

SPECIALTIES.

This action can be sustained, on leases for rent or penalties, as for ploughing up meadow, &c. (8); on annuity deeds; on mortgage deeds; and

- (1) Bull. N. P. 167. (6) Com. Dig. Debt (A. 5.). 2 Bac. Abr. Debt (F.), 626. 3 Wood. 109, 104.
 (2) 1 Rol. Abr. Extinguishment (U.), 604. 2 Bac. Abr. Debt (F.), 626. (7) *Stevenson v. Lambard*, 2 East, 579, 580.
 (3) 1 Rol. Abr. Dett. (P, Q, R, S, T.), 602, 603. 2 Bac. Abr. Debt (F.), 627. (8) Com. Dig. Debt (A. 5.), 3 Black. Com. 231. *Atty v. Parish*, 1 N. R. 104.
 (4) 2 Bac. Abr. Debt (F.), 628. 109.
 (5) Ibid.

also on an absolute covenant of A., to pay on a certain day a sum certain due from B. on mortgage. (1)

Debt lies for an amerciament in a court-leet (2); on *records*, as upon the judgment of a superior or inferior court of record (3); either generally, or against an executor or administrator suggesting a *devastavit* (4); on an erroneous but unreversed judgment (5) — and the mere circumstance of the defendant having been rendered, will not bar the action; but if the defendant have been charged in execution on the judgment, no action can be supported on such record. (6)

Debt lies upon the judgment or decree of a colonial or foreign court, &c. (7), in those instances in which *assumpsit* is maintainable upon them, upon a recognisance of bail (8); upon a *statute merchant*, though not upon a statute staple, because the seal of the party is not affixed to the latter; on a recognisance in the nature of a *statute staple*, to which the seal of the concessor is affixed (9); on a *sheriff's return* of *fieri feci*, which is in the nature of a record, to recover the money which he has received (10); for a rent-charge or annuity granted for years; by the executors of a tenant for life of a rent-charge; or by a tenant *pur autre vie*, after the death of *cestuique vie*. (11)

Debt is frequently the remedy on statutes either at the suit of the party grieved, or of a common informer. (12) In some cases it is expressly given to the party grieved, as for an escape out of execution. (13) If a statute prohibit the doing an act under a penalty or forfeiture to be paid to a party grieved, and do not prescribe any mode of recovery, it may be recovered in debt (14), as treble the value of tithes not duly set forth (15), or treble the amount of damages incurred by extortion. (16)

GENERALLY.

Leases, annuity and mortgage deeds.

RECORDS.

Executor or administrator.

Defendant charged in execution on the judgment.

Judgment or decree of a colonial or other court.

Return of *fieri feci*.

Rent-charge.

ON STATUTES.

Where penal statute does not prescribe a mode for the recovery of a penalty.

(1) *Evans v. Jones*, 5 M. & W. 295.

(2) *Wicker v. Norris*, Bull. N. P. 167. C. T. H. 116.

(3) Gilb. Debt, 391, 392. *Anon.* 1 Salk. 209. Com. Dig. Debt (A. 2.).

(4) 1 Saund. 216, 218, 219. n. 6. 8. *Woodcock v. Morgan*, 6 Mod. 306. *Hope v. Bague*, 3 East, 2.

(5) *Horsy v. Daniel*, 2 Lev. 161. *Prince v. Nicholson*, 5 Taunt. 667.

(6) *Vigers v. Aldrich*, 4 Burr. 2482. *Taylor v. Waters*, 5 M. & S. 103. *Quære*, if the defendant died in execution, *ibid.* 104.

(7) *Harris v. Saunders*, 4 B. & C. 418. 6 D. & R. 474. *O'Callaghan v. Thomond (Marchioness)*, 3 Taunt. 85. *Parkins v. Stewart*, 9 Price, 1.

(8) Gilb. Debt, 395.

(9) 2 Saund. 69, 70. n. 3. Com. Dig. Debt (A. 3.).

(10) 2 Saund. 343, 344. n. 2. *Cockram v. Welbye*, 2 Show. 79. *Speake v. Richards*, Hob. 206.

(11) 1 Saund. 282. n. 1.

(12) Com. Dig. Action on Statute (E.). 2 Bac. Abr. Debt (A.), 618.

(13) 1 Saund. 34, 35. n. 1., 39. 218. Com. Dig. Debt (A.).

(14) 1 Rol. Abr. Dett. (K.), 598. *Underhill v. Ellicombe*, 1 M'Clel. & Y. 457.

(15) *Ibid.* *President, &c. of Physicians v. Salmon*, 1 Ld. Raym. 682. In an action of debt for a tithe composition, the defend-

ant pleaded *nil debet* to a declaration containing counts in which there was no allegation that the defendant was not tenant from year to year, or of a lesser estate: — It was holden first, that the *onus probandi* as to the nature of the defendant's interest lay upon the defendant; and, secondly, that proof of payment of rent by him to a third person, was not sufficient evidence to shew, that he was tenant from year to year. *Fairtlough v. Swiney*, 1 Jebb & Symes (Irish), 333. An action of debt lay against the occupier of lands assessed for tithe composition under stat. 4 Geo. 4. c. 99., and for an apportionment of such composition, even when the incumbent died before any half yearly payment of the composition had accrued. The certificate of the composition is not affected by reason of any defect of the oaths taken by the commissioners, nor is it competent for the defendant at the trial to shew by evidence that the commissioners had not the qualification in respect of property required by the statute. The applotment is evidence that the lands applotted lie within the parish. The defendant's having admitted that he was the owner and proprietor of the lands applotted, it was held, that such admission was evidence of his being the occupier. *Carew v. Stuart*, 2 Hudson & Brooke (Irish), 465., *vide ibid.* n. (a.) 480.

(16) *Savage q. t. v. Smith*, 2 W. Black. 1101.

GENERALLY.Stat. 32 Hen. 8.
c. 36.Statute incor-
porating gas
company.ON SIMPLE
CONTRACTS,
&c.Fines, amercia-
ments.

Awards.

Bye-laws.
Judgments.

Bonds.

Corporations.

Debt is the remedy given by stat. 32 Hen. 8. c. 36. to the executor of a tenant in fee or for life, to recover rent which became due to them and their wives, for rents of the wives' freeholds during the life of the wives.

Where a statute incorporating a gas company, provided that the expenses of obtaining the act should be first paid out of the subscriptions, it was held, that the attorneys who obtained the act might recover their costs in an action of debt founded upon the statute. (1)

Debt lies upon all simple contracts, wherein there is a commutation of property for money: it lies for money lent, paid, had and received, or due on an account stated (2); for interest on the loan or forbearance of money (3); for work and labour (4); official fees (5); goods sold (6); use and occupation (7); for any debt or duty created by common law or custom (8), as on a bill of exchange, by the payee against the drawer, on default of the acceptor, or by the drawer against the acceptor, where the bill is expressed to be for value (9), or by a first indorsee against the first indorser, who was also the drawer, where the bill is payable to his own order (10), or on a promissory note, by the payee against the maker, when the note is shewn to have been drawn for value (11), but not by or against any other collateral party (12); for tolls; port duties, fines, amercia-ments (13), copyhold fines (14), or quit-rents (15); and it also lies on an award to pay money, but not if it be to perform any other act, unless an arbitration bond exists, in which case the action must be brought thereon (16); on bye-laws (17); English judgments not of record (18); as well as on such as are of record; on Irish judgments (19); and on the decree of a colonial court for payment of a balance due on a partnership account. (20)

By or against the parties to bonds, &c. and their personal representa-tives (21); against the heir of the obligor, if he be expressly named in the deed, or against a devisee having legal assets (22), and by the sheriff or his assignee on bail bonds (23), and replevin bonds. (24)

Debt lies against a corporation for the recovery of a debt, in those cases in which *assumpsit* may be maintained against them (25), and in all those

(1) *Tilson v. Warwick Gas Comp.* 4 B. & C. 962. 7 D. & R. 376.

(2) Com. Dig. Debt (A.). 1 Rol. Abr. Dett. (E.), 593. *Speake v. Richards*, Hob. 207.

(3) *Herries v. Jamieson*, 5 T. R. 558.

(4) Com. Dig. Debt (B.)

(5) 2 Bac. Abr. Debt (A.), 618. 1 Rol. Abr. Dett. (K.), 598. Com. Dig. Pleader, 2. (W. 11.)

(6) *Emery v. Fell*, 2 T. R. 28.

(7) *Egler v. Marsden*, 5 Taunt. 25. *Wilkins v. Wingate*, 6 T. R. 62. *King v. Fraser*, 6 East, 348.

(8) Com. Dig. Debt (A. 9.). *Speake v. Richards*, Hob. 206.

(9) *Priddy v. Henbrey*, 1 B. & C. 674. 3 D. & R. 165.

(10) *Stratton v. Hill*, 3 Price, 253.

(11) *Cresswell v. Crisp*, 2 Dowl. P. C. 635. *Lyons v. Cohen*, 3 ibid. 243. *Priddy v. Henbrey*, 1 B. & C. 674. 3 D. & R. 165.

(12) *Webb v. Geddes*, 1 Taunt. 540. *Bishop v. Young*, 2 B. & P. 78. 2 Camp. 187. n. (a.)

(13) *Lincoln (Earl of) v. Fysher*, Cro. Eliz. 581. Bull. N. P. 167. *Wyvill v. Shepherd*, 1 Hen. Black. 162. R. T. H. 116. *Speake v. Richards*, Hob. 206.

(14) Com. Dig. Debt (A. 9.).

(15) 5 Went. 152, 153.

(16) 2 Saund. 62. n. 5. *Perry v. Nicholson*, Burr. 278. *Foreland v. Marygold*, 1 Salk. 72. S. C. nom. *Foreland v. Hornigold*, 1 Ld. Raym. 715. *Dilley v. Polhill*, Str. 923.

(17) *Feltmakers v. Davis*, 1 B. & P. 98.

(18) 1 Saund. 92. n. 2.

(19) *O'Callaghan v. Thomond (Marchioness)*, 3 Taunt. 85.

(20) *Henley v. Soper*, 8 B. & C. 16. 2 M. & R. 153.

(21) Com. Dig. Debt (A. 4.).

(22) 4 Bac. Abr. Heir. (F.), 164. *Wilson v. Knubley*, 7 East, 123.

(23) Stat. 4 Anne, c. 16. s. 20.

(24) Stat. 11 Geo. 2. c. 19.

(25) 1 Chitt. Pl. 110.

instances in which they contract by deed to pay money. And even assuming that a corporation cannot in general contract but by deed, the court will presume, on general demurrer, that there was a deed, in order to support a count in debt, that the corporation was "indebted," &c. (1) And it may be laid down as a general rule, that debt lies upon every contract in deed or in law. (2)

This action can be supported on a contract to pay so much per load for wood, the quantity of which was not then ascertained; or to pay a proportion of the costs of a suit expected to be incurred. (3)

Debt is not sustainable when the demand is rather for unliquidated damages than for money (4), unless the performance of the contract were secured by a penalty, in which case debt may be supported for the penalty, and the real demand ascertained according to the provisions of stat. 8 & 9 Will. 3. c. 11.

In *Green v. Bicknell* (5) the question was, "whether the difference between the contract price of a cargo of whale oil of a merchantable quality, which certain persons had agreed to purchase of the plaintiffs, but had refused to accept, and the market price of the oil at the time of refusal, can be proved under a fiat of bankruptcy issued against those persons upon an act of bankruptcy committed subsequent to the refusal:"—upon which Lord Denman observed, "We have been strongly pressed with authorities, as establishing the principle, that any right to recover money, or money's worth, may be treated as a debt when its amount can be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be provable as a debt, for which the intervention of a jury is necessary. That it was so here is undeniable; for every one of the data, which form the basis of the calculation, may be denied and disputed, and is the subject of opinion rather than direct decision of facts. And, although the case finds the quantity of the oil, and that it was of merchantable quality, and that customary allowances were offered to be made, and what was the market price of oil of that quality at the time of refusal, and that such price was in the knowledge of all parties, yet it does not find that any settlement was made, or account agreed to, by the bankrupts, nor any thing which would have precluded them from disputing every one of those facts before a jury; on the contrary, it states, that the bankrupts positively refused to accept or pay for the oil, and no reason is assigned for their so doing. For these reasons we are of opinion, that the sum claimed is not a debt, but damages, and cannot be proved. Therefore our judgment must be for the defendants, that a *nolle prosequi* be entered."

On the other hand, "upon a new statute, which prescribes a particular remedy, no remedy can be taken but the particular remedy prescribed by the statute; therefore no action of debt will lie for a poor's rate" (6); and surveyors of highways cannot maintain debt to recover compensation money

GENERALLY.

Contract to pay so much per load for wood.

Expenses of suit.

WHERE DEBT DOES NOT LIE.

Where demand is for unliquidated damages.

Judgment of Lord Denman in *Green v. Bicknell*.

Statute prescribing particular remedy.

Poor's rate.

Compensation

(1) *Tilson v. Warwick Gas Comp.* 4 B. & C. 962. 7 D. & R. 376.

(2) Com. Dig. Debt (A. 1.). *Underhill v. Ellicombe*, M' Clel. & Y. 457. Stat. 3 & 4 Will. 4. c. 42. s. 14.

(3) *Sanders v. Marks*, 3 Lev. 429. 1 Chitt. Pl. 109.

(4) *Parlow v. Baily*, 1 Ld. Raym. 1040. 2 Saund. 62. (b.)

(5) 8 A. & E. 701.

(6) *Per Dennison J.* in *Stevens v. Evans*, 2 Burr. 1157.

GENERALLY.

money assessed
in lieu of sta-
tute duty.

Arrears of an
annuity.

Stat. 8. Anne,
c. 14.

Assignee of a
rent.

Money decreed
to be paid by a
court of equity.

Assignee of
part of demised
lands.

duly assessed in lieu of statute duty, the remedy by distress being prescribed by the acts of parliament. (1)

It seems that no action can be supported at law for the arrears of an annuity, unless it be granted by deed, and there must be an express grant in such deed. (2) Debt is not sustainable for the arrears of an annuity or yearly rent devised, payable out of the lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues (3); and this, although it be not stated in the declaration, that the grantor had a freehold in the premises out of which it was payable, as it must be inferred that he had such an interest where nothing appears to the contrary. (4) The reason assigned is, that the law will not *suffer a real injury* to be remedied by an action merely personal; neither does the action lie under stat. 8 Anne, c. 14., for that statute applies only to cases of demises from landlord to tenant. (5) But the assignee of a rent reserved upon a lease may maintain debt for the arrears. (6)

Where lands were enfeoffed to R. H. and defendant, to the use, intent, and purpose, that the plaintiff, his heirs and assigns for ever, should receive and take out of the lands a yearly rent of 63*l.* payable half yearly, and the defendant covenanted with the plaintiff, that R. H. and the defendant, their executors, &c. or some or one of them, would pay or cause to be paid to the plaintiff, his heirs and assigns, the said yearly rent at the terms appointed for payment thereof: — It was held, that the plaintiff could not sue the defendant in debt for arrears of the annuity. (7)

Debt will not lie for money, ascertained by the master's report and ordered to be paid by a decree of a court of equity for interest and costs on a bill filed for specific performance. (8)

Neither is it sustainable against the assignee of part of the land demised. (9)

Where a testator devised lands in fee, after the determination of certain life estates, to A., B., and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to, and to be equally divided among, the children of his niece; and A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years: — It was held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. (10)

II. *The Declaration.*

THE DECLARATION.

The rules applicable to declarations and pleadings in *assumpsit* and covenant, are, in general, applicable to those in debt on simple contract, and on specialties respectively.

(1) *Underhill v. Ellicombe*, M'Clel. & Y. 450.

(2) *Re Samuel Locke*, 2 D. & R. 603. *Nield v. Smith*, 14 Ves. 491.

(3) *Webb v. Jiggs*, 4 M. & S. 113. 2 Saund. 304. n. 8.

(4) *Pocock v. Lincoln (Bishop of)*, 3 B. & B. 30. 6 Moore, 535.

(5) *Webb v. Jiggs*, 4 M. & S. 113.

(6) *Allen v. Bryan*, 5 B. & C. 512.

(7) *Randall v. Rigby*, 4 M. & W. 150. 6 Dowl. P. C. 650.

(8) *Carpenter v. Thornton*, 3 B. & A. 53.

(9) *Curtis v. Spitty*, 1 Bing. N. C. 759.

(10) *Braithwaite v. Skinner*, 5 M. & W. 318.

It is a general principle, that where the action is founded on privity of estate, the venue is local; and in actions for injuries to, or in respect of *real property*, where the *gravamen* is necessarily local, care should be taken to make the venue local.

THE DECLARATION.

VENUE.

If the assignee of the reversion bring debt in the *debet* against the executor of the lessee, or charge him in any other way as *assignee*, the action is local.

Assignee of reversion against executor of lessee.

In debt for a rent-charge against the farmer of the profits it is local, the defendant being chargeable in respect of his possession, and not on the contract. (1)

Rent-charge.

The action of debt on a recognisance or judgment of a court of record should be laid in the county where the instrument was recorded (2), or where it first becomes operative; and an action for the breach of a custom or bye-law of a town is local.

Debt on a recognisance or judgment.

Bye-law.

Actions of debt against public officers for malfeasance or misfeasance in the execution of the duties of their offices, are by various statutes required to be laid in the county where the cause of action arose; and it is now usual to insert such a provision, wherever the duty is one of a public nature. (3)

Public officers.

In a local action of covenant, if the pleadings raise no issue on the question of locality, the defendant cannot insist upon nonsuiting the plaintiff on the ground of the venue having been laid in the wrong county. (4)

Covenant.

The venue is transitory in all simple contract debts.

Where venue transitory.

The action by the assignee of the reversion against the lessee is transitory, because stat. 32 Hen. 8. c. 34. s. 1. transfers the privity of contract. (5)

Assignee of reversion.

In an action against an heir or devisee on the bond of his ancestor, the action is transitory; for, like the action against the executor, it is founded on the contract, though the liability is commensurate only with the value of the assets descended. (6) So the action on stat. 11 Geo. 2. c. 19. for use and occupation is transitory. (7)

Heir or devisee.

Use and occupation.

Debt on a municipal charter is transitory. (8)

Municipal charter.

The offence of usury is completed by taking the illegal interest; and therefore, where the contract was made in London, the rents out of which the money was to be paid, received by the defendant in pursuance of the contract, in Middlesex, but the account by which the interest was allowed finally settled in London, the venue was holden properly laid in London;

Usury.

(1) *Pine v. Leicester (Countess of)*, Hob. 37. Vin. Abr. Trial (H. a. 2.)

(2) Com. Dig. Pleader (C. 9.).

(3) *Vide etiam* respecting magistrates, &c. stat. 21 Jac. 1. c. 12. s. 5., extended by stat. 42 Geo. 3. c. 85. s. 6. Stat. 4 Geo. 4. c. 64. s. 75. (Regulation of Gaols). Stat. 10 Geo. 4. c. 44. s. 41.; stat. 2 & 3 Vict. c. 47. s. 79. (Metrop. Police Act). Stat. 1 & 2 Will. 4. c. 32. s. 4. (Game Act). Stat. 4 & 5 Will. 4. c. 76. s. 104. (Poor Law Amend. Act). Stat. 5 & 6 Will. 4. c. 50. s. 109. (Highway Act). Stat. 5 & 6 Will. 4. c. 63. s. 39. (Regulation of Weights and Measures). Stat. 5 & 6 Will. 4. c. 76. s. 133. (Municip.

Corp. Act). Stat. 6 & 7 Will. 4. c. 76. s. 26. (Newspaper Act). Stat. 1 & 2 Vict. c. 82. s. 16. (Juvenile Offenders' Act). Stat. 1 & 2 Vict. c. 79. s. 31. (Hackney Coach Act). Stat. 2 & 3 Vict. c. 71. s. 53. (Metrop. Police Act); *et multa alia*.

(4) *Boyes v. Hewetson*, 2 Ring. N. C. 575.

(5) *Thursby v. Plant*, 1 Saund. 240.

(6) Com. Dig. Pleader (C. 9.).

(7) *King v. Fraser*, 6 East, 348. *Egler v. Marsden*, 5 Taunt. 25.

(8) *Berwick (Mayor of) v. Ewart*, 2 W. Black. 1068.

THE DECLARATION.

thus, in *Scott v. Brest* (1) Mr. Justice Ashhurst observed, that, "where there are two facts which are necessary to constitute one offence, the party may *ex necessitate* lay the venue in either county." (2) So where the usurious contract was paid by a draft in Middlesex, which draft was exchanged for cash in Smithfield:—It was holden, that the offence was completed, and the venue in consequence properly laid in London. (3)

Change of venue.

If the declaration contain one count on a cause of action in respect of which the venue cannot be changed, the insertion of other counts on causes of action in which the venue can be changed will make no difference. (4)

Debt for rent.

It cannot be changed in debt for rent (5), or in an action on an award (6), or on a specialty (7), or in covenant. (8) Yet in covenant where a view

Award.**Specialty.**

was necessary, the court allowed the venue to be changed to the county in which the premises were situate (9), though in another case it was refused (10); but in some actions on specialties, or written instruments under special circumstances, the court will change the venue after issue joined, but not before. (11)

PARTIES.**Incapable of**

A company was incorporated with power to the master, two wardens and assistants (all chosen from the body of the company) to make bye-laws for the government of the company, and to provide penalties by fine for breach of such bye-laws, the company to have the fines for their use. A bye-law was made, that every one of the livery of the company who should be chosen steward, and refuse to take the office, should forfeit 15*l.* to the master and wardens for the time being, or to one of them, for the use, relief, and maintenance of the company. Defendant was chosen steward, and refused to take office. At the time of his election and refusal, G. was master, and C. and L. were wardens.

G., C., and L. brought debt against defendant upon the bye-law, not naming themselves in the commencement of the declaration, as present or late officers, nor stating that they sued for the use of the company, but alleging the above facts, and that defendant had forfeited and become liable to pay 15*l.* to the master and wardens for the time being, or one of them, to the use, &c. of the company, whereby an action had accrued to the plaintiffs, G. so being master, and C. and L. so being wardens, to demand, &c. (not adding to the use, &c. of the company). Breach, that defendant had not rendered to the plaintiffs or the company. Plea, that at the commencement of the suit, G. was not master nor C. warden. On demurrer it was

(1) 2 T. R. 238.

(2) Sed vide dict. per Abbott C. J. in *Pearson v. M^r Gowran*, 3 B. & C. 700.

(3) *Scurry q. t. v. Freeman*, 2 B. & P. 381.

(4) *Parmeter v. Otway*, 3 Dowl. P. C. 66., vide *Wood v. Grimwood*, 10 B. & C. 689. *Walthew v. Syers*, 3 Dowl. P. C. 160. *Dawson v. Bowman*, ibid. 1 C. M. & R. 594. *Hart v. Taylor*, 2 D. & R. 164. *Arden v. Mornington*, 4 Tyrw. 56.

(5) *Duplessis v. Chalk*, Str. 857.

(6) *Whitburn v. Staines*, 2 B. & P. 355. *Stanway v. Heslop*, 4 D. & R. 635. 3 B. & C. 9.

(7) *Foster v. Taylor*, 1 T. R. 781. *Watt*

v. Daniel, 1 B. & P. 425. *Youde v. Youde*, 4 Dowl. P. C. 92. 3 A. & E. 311. *Anon.* 1 Sid. 87.

(8) *Bohrs* nom. *Maude v. Sessions*, 1 C. M. & R. 86. 2 Dowl. P. C. 699. *Weatherly v. Goring*, 3 B. & C. 352. 5 D. & R. 441.

(9) *Hadinott v. Cox*, 8 East, 268.

(10) *Anon.* 2 Chitt. 419.

(11) *Bohrs* nom. *Maude v. Sessions*, 1 C. M. & R. 86. 2 Dowl. P. C. 69. *Cotterill v. Dixon*, 1 C. & M. 661. *Parmeter v. Otway*, 3 Dowl. P. C. 66. *Youde v. Youde*, 4 ibid. 32. 3 A. & E. 311. Respecting the venue in penal actions, *post*, 1194, 1195.

held, that the action did not lie, the right to sue not remaining in the officer after they had quitted office. (1)

In declarations on specialties or records, no consideration need be shewn, for it is implied; unless where the performance of such consideration constitutes a condition precedent, then the performance must be averred; and where the action is founded on a deed, it must be declared upon, except in the instance of debt for rent (2); and the omission to set out the deed can be taken advantage of by special demurrer only. (3)

The declaration in debt on simple contract must state the consideration, and also the inducement necessary to explain the contract or consideration as in *assumpsit*; but it must be alleged, that the defendant *agreed*, not that he *promised* to pay the debt. (4)

In *Compton v. Taylor* (5) the declaration stated, that the plaintiff complained of the defendant being detained, &c. in an action on promises, and he demands of him the sum, &c. which he owes to, and unjustly detains from him. The first two counts were upon bills of exchange, and stated that the defendant promised the plaintiff to pay the same, &c.: there were also *indebitatus* counts in debt; and the whole concluded, "whereby an action hath accrued to the plaintiff to demand and have the said moneys respectively, &c. yet the defendant hath not paid, &c.:"—It was held, that the first two counts were in debt.

"It is not necessary that the plaintiff in debt should recover the exact sum demanded" (6); and it is immaterial, that the aggregate of the sums claimed in several counts exceeds the amount claimed in the *queritur*. (7) The distinction is, that where debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum mentioned in the deed will vitiate; but where the deed relates to the matter of fact, there, though the plaintiff demand more than is due, he may enter a *remittitur*. (8)

In debt on judgment of inferior court, the declaration must contain an averment, that the cause of action arose within the jurisdiction of the inferior court; otherwise it will be bad on demurrer. (9)

THE DECLARATION.

STATEMENT OF CAUSE OF ACTION.

In declaration on specialties or records no consideration need be shewn.

Declarations on simple contracts must state the consideration.

SUM DEMAND-ED.

Where requisite to aver, that cause of action arose within jurisdiction of inferior court.

III. Pleadings.

By Reg. Gen. H. T. 4 Will. 4. r. 2. s. 1., "in debt on specialty the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, includ-

PLEADINGS.

PLEAS ON SPECIALTY.

Reg. Gen. H. T. 4 Will. 4. r. 2. s. 1.

SPECIALTIES.

(1) *Quære*, Whether the action was maintainable by any one? *Graves v. Colby*, 9 A. & E. 356.

(2) *Atty v. Parish*, 1 N. R. 109. 1 Saund. 276. s. 1.

(3) *Tilson v. Warwick Gas Comp.* 4 B. & C. 962.

(4) *Bishop v. Young*, 2 B. & P. 78. *Brill v. Neele*, 3 B. & A. 208., sed vide *Ninan v. Bland*, 3 Smith, 114. *Gardner v. Bowman*, 4 Tyrw. 412.

(5) 6 Dowl. P. C. 660.

(6) Per Lord Mansfield in *Walker v. Witter*, Doug. 6. *Aylett v. Lowe*, 2 W. Black. 1221. *Lord v. Houstoun*, 11 East, 62.

(7) *Gardner v. Bowman*, 4 Tyrw. 412., vide *M^r Quillin v. Cox*, 1 Hen. Black. 249.

(8) Per Holt C. J. in *Ingledeu v. Cripps*, 2 Ld. Raym. 816.

(9) *Read v. Pope*, 4 Tyrw. 408.

PLEADINGS.

ing matters which make the deed absolutely void, as well as those which make it voidable."

The defendant must still plead, as previously to this rule, *payment* at or after the day, *performance* of the condition of the bond, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity; no *award* to an arbitration bond, or to a bail bond; no process to arrest the defendant. (1)

But the arrest cannot be traversed (2); and a plea to a declaration on a bail bond, that no *proper* affidavit was filed, is bad. (3)

The defendant must also plead specially in discharge of the action a tender or set-off. (4)

SIMPLE CONTRACTS.

Reg. Gen. H. T.
4 Will. 4. r. 2.
ss. 2, 3, 4.

Matters in confession and avoidance to be pleaded specially.

By Reg. Gen. Hilary Term, 4 Will. 4. r. 2. ss. 2, 3, 4., the plea of "*nil debet*" was abolished, and in lieu thereof it was declared that, "in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that, 'he never was indebted in manner and form as in the declaration alleged;' and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*."

"In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

Form of plea.

The form of plea to an action of debt prescribed by the above rules, must be adhered to in terms, and therefore a plea that the defendant "never did owe," was holden to be bad on special demurrer, the form being that he "never was *indebted*." (5) So likewise a plea of "never did promise" is a nullity in an action of debt. (6)

In an action for debt for goods sold and delivered.

In an action of debt for goods sold and delivered, if the defence be, that the goods were sold on a credit, which had not expired at the time of bringing the action, this in the Q. B. must be specially pleaded. (7) But from subsequent decisions it seems, that the ground of defence may be given in evidence on the plea of *nunquam indebitatus*. (8)

In an action of debt, a plea that parcel of the money claimed was the residue of a sum agreed to be paid for a boat, warranted sound and fit for use, but which was afterwards found to be of no greater value than the

(1) *Saxby v. Kirkus*, Say. 116. *White v. Ansdell*, 1 M. & W. 348. 1 Tyrw. & G. 785.

(2) *Watkins v. Parry*, Str. 444. *Taylor v. Clow*, 1 B. & Ad. 223. *Call v. Thelwell*, 3 Dowl. P. C. 443.

(3) *Hume v. Liversidge*, 1 C. & M. 332. 3 Tyrw. 257. 1 Dowl. P. C. 660. *Knowles v. Stevens*, 1 C. M. & R. 26. 2 Dowl. P. C. 664. 4 Tyrw. 1016.

(4) Tidd's N. P. 359.

(5) 1 ibid. 361. *Smedley v. Joyce*, 1 Tyrw. & G. 84. 2 C. M. & R. 721. 4 Dowl. P. C. 421.

(6) *King v. Myers*, 5 Dowl. P. C. 686.

(7) *Edmunds v. Harris*, 6 C. & P. 547. 4 N. & M. 182. 2 A. & E. 414. Tidd's N. P. 361.

(8) *Taylor v. Hilary*, 1 C. M. & R. 741. 5 Tyrw. 373. 3 Dowl. P. C. 461. *Knapp v. Harden*, 1 ibid. 47. *Cousins v. Paddon*, 2 C. M. & R. 553. 5 Tyrw. 535. *Jones v. Nanney*, 1 M. & W. 336. 1 Tyrw. & G. 638. Tidd's N. P. 361. It may be here observed, that where, in covenant in a lease, it was alleged as a breach, "that during the term, to wit, on the 25th of March, 1826, the sum of 66*l*. for two quarters of rent, ending on the day^afore-said, became and is still due and in arrear," a plea, "that no quarter's rent, ending the 25 of March, then became due, according to the provisions of the said indenture, in manner and form as the plaintiff alleged," was bad. *Baden v. Flight*, 3 Bing. N. C. 685. 4 Scott, 412.

amount paid at the time of sale, was holden to be bad on demurrer, as amounting to the general issue. (1)

PLEADINGS.

In an action of debt for work and labour on an implied contract, the defendant on the plea that "he never was indebted," may go into evidence to prove that the work was done under such circumstances, as shew that there was no implied contract to pay any thing. (2) But upon this plea the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay. (3)

Work and labour.

It is competent for a defendant, under the plea of "*nunquam indebitatus*," to prove a contract, by which he is liable only to a portion of the plaintiff's demand. (4) But in an action of *debt*, where there is no plea of payment, the defendant cannot give evidence of payment in mitigation of damages. (5) An admission in a bill of particulars, of money received on account, will not avail the defendant without a plea of payment. (6)

Proof of contract under "*nunquam indebitatus*."

In an action of debt, brought by two of three syndics of a French bankrupt, it was doubted, whether the objection to the non joinder of the third syndic, if available, could be taken on the plea of *nil debet*. (7)

Non joinder.

Where there are several breaches alleged in the declaration, payment of money into court may be pleaded generally to all of them (8); and such a plea admits a cause of action upon every breach. (9)

Pleading to breaches.

In pleading to a breach, whether by way of denial or in paying money into court, care should be taken to distinguish the breach itself from the special damage alleged to have been occasioned by it. (10)

It is better to traverse the breach in the terms of the declaration, and it is incumbent on the plaintiff to prove it as laid. (11)

Payment before action brought must be pleaded.

PAYMENT.

"Whilst it was considered to be law, that an action of debt on simple contract was founded on one entire single contract, and that the plaintiff could not recover less than the whole; doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established by several cases, that the demand in such actions is divisible, and the plaintiff may recover less; and since several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as *indebitatus assumpsit*; and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not, of necessity, import that one entire sum was paid at one time, there is not any satisfactory reason why it may not be considered capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or to part. The only difference between the two actions will therefore be, that, in

Before action brought must be pleaded.

Judgment of Mr. Baron Parke in *Cousins v. Paddon*.

(1) *Dicken v. Neale*, 5 Dowl. P. C. 176. 1 M. & W. 556.

(2) *Cooper v. Whitehouse*, 6 C. & P. 545., et vide *Cousins v. Paddon*, 2 C. M. & R. 553. 5 Tyrw. 535. 4 Dowl. P. C. 488.

(3) *Ibid*.

(4) *Jones v. Reade*, 5 Dowl. P. C. 216. 1 N. & P. 18.

(5) *Belbin v. Butt*, 2 M. & W. 422.

(6) *Ernest v. Brown*, 3 Bing. N. C. 674.

(7) *Alison v. Furnival*, 2 C. & M. 555. 4 Tyrw. 751. Tidd's N. P. 361.

(8) *Marshall v. Whiteside*, 1 M. & W. 188. Tyrw. & G. 485.

(9) *Wright v. Goddard*, 3 N. & P. 361. Kennedy's N. R. 151.

(10) *Porter v. Izat*, 1 M. & W. 381. Tyrw. & G. 639.

(11) *Hawkes v. Orton*, 5 A. & E. 367. As to the mode of assigning the breach, vide *Falmouth (Earl of) v. Thomas*, 1 C. & M. 89. *Hodges v. Gray*, 4 Dowl. P. C. 733. Kennedy's N. R. 151.

PLEADINGS.

assumpsit, the plea to the whole declaration admits no certain sum to have been originally due from the defendant to the plaintiff, whilst the plea to the whole declaration in debt admits the sum nominally claimed to have been originally due. In either, the verdict may be found for the defendant for the whole, or for the part actually paid, according to the fact." (1)

LIMITATION
OF ACTION—
PARTICULARS
OF DEMAND—
PAYMENT OF
MONEY INTO
COURT—
SET-OFF—
STAYING
PROCEEDINGS
— DAMAGES
— COSTS —
JUDGMENT
AND WRIT OF
INQUIRY —
EXECUTION.

LIMITATION OF
ACTION.

Stat. 3 & 4
Will. 4. c. 42.
s. 3

IV. *Limitation of Action — Particulars of Demand — Payment of Money into Court — Set-off — Staying Proceedings — Damages — Costs — Judgment and Writ of Inquiry — Execution.*

By stat. 3 & 4 Will. 4. c. 42. s. 3., "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance, and also all actions of debt upon any award where the submission is not by specialty or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions for debt or *scire facias* upon recognisance within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after, and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: Provided that nothing therein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

On this statute it has been holden, that covenant for rent in arrear may be brought within the time limited thereby, and is not confined to six years from the time when it became payable by stat. 3 & 4 Will. 4. c. 27. s. 42. (2)

PARTICULARS
OF DEMAND.

Reg. Gen. T. T.
1 Will. 4. s. 6.

Where re-
quired to be
delivered with
declaration, or
notice thereof.

By Reg. Gen. Trinity Term, 1 Will. 4. s. 6., it is ordered, that "with every declaration if *delivered*, or with the notice of declaration if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios, and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and to secure the delivery of particulars in all such cases it is further ordered, that if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery

(1) *Per Parke B. in Cousins v. Paddon*,
2 C. M. & R. 560.

(2) *Paget v. Foley*, 2 Bing. N. C. 679.

of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver."

PARTICULARS
OF DEMAND.

This rule is not it seems imperative on the plaintiff to deliver particulars or a statement of his demand with the declaration or notice thereof, though, if he omit to deliver such particulars or statement, he will not be allowed for them in costs if afterwards called for and delivered. And the delivery of a particular of the plaintiff's demand under the *indebitatus* counts will not prevent him from giving evidence on a special count in his declaration, if he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. (1)

Effect of non
delivery of par-
ticulars.

Generally in debt on a record or specialty, payment of money into court cannot as of course be made, because in these cases the amount of the debt is ascertained and cannot be varied from by the jury in their verdict (2); but under such circumstances the defendants can apply to the court, or a judge, to stay the proceedings on payment of the debt or penalty and costs.

PAYMENT OF
MONEY INTO
COURT.
Generally.
Specialties.

In debt upon simple contract, the defendant can pay money into court as of course (3); so in debt for rent (4); in debt on a policy of assurance (5); or for non residence. (6)

Simple con-
tracts.

If the declaration contain two counts the defendant can upon payment of the debt demanded in one of them have the proceedings stayed as to that count, and let the plaintiff proceed if he will upon the other. (7)

Payment of
debt on one
count where
declaration
contains two
counts.

The statute of set-off must now be pleaded in all cases: the general issue cannot be pleaded with notice of set-off. (8)

SET-OFF.
Mutual debts.

Mutual debts may be set off, one against the other (9), although they may be of a different nature (10); and the plaintiff shall recover the balance only. (11) The debt to be set off must be due, not only at the time the plea is pleaded, but also at the time of the commencement of the action. (12) And it must be a debt in the legal acceptance of the term, and not merely a claim sounding in damages. (13) Thus, unliquidated damages arising from the breach of a covenant cannot be set off (14); but a sum certain due upon a covenant, such as rent, or the like, may.

Unliquidated
damages.

A set-off may be pleaded to a debt of bond, conditional for the payment of money, but the defendant must shew by his plea what is really due on the bond. (15) So a set-off may be pleaded in debt on bond, conditioned for the payment of an annuity, or the like (16); but not in debt on bond conditioned to replace stock. (17)

Instruments
against which
a set-off may
be pleaded.

(1) *Day v. Davis*, 5 C. & P. 340., et vide *Cooper v. Amos*, 2 ibid. 267. *Fisher v. Wainwright*, 1 M. & W. 480. 5 Dowl. P.C. 102. *Tidd's N. P.* 302.

(2) Vide *Leapidge v. Pongillionne*, Str. 890.

(3) *M^r Quillin v. Cox*, 1 Hen. Black. 249.

(4) *Gregg's case*, 2 Salk. 596.

(5) 19 Geo. 2. c. 37. s. 7.

(6) 57 Geo. 3. c. 99. s. 43.

(7) As to staying proceedings, vide Chitt. by Archb. 1031.

(8) *Graham v. Partridge*, 5 Dowl. P. C. 108. *Duncan v. Grant*, 2 ibid. 683.

(9) Stat. 2 Geo. 2. c. 22. s. 13.

(10) Stat. 8 Geo. 2. c. 24. s. 5.

(11) Ibid.

(12) *Braithwaite v. Coleman*, 4 N. & M. 654. *Evans v. Prosser*, 3 T. R. 186.

(13) *Le Loir v. Bristow*, 4 Camp. 134. *Freeman v. Hyett*, 1 W. Black. 394. *Hardcastle v. Netherwood*, 5 B. & A. 93.

(14) *Howlet v. Strickland*, Cowp. 56. *Grunt v. Royal Exch. Ins. Comp.* 5 M. & S. 439. *Weigall v. Waters*, 6 T. R. 488.

(15) *Symmons v. Knox*, 3 T. R. 65.

(16) *Collins v. Collins*, 2 Burr. 820.

(17) *Gillingham v. Waskett*, M'Clel. 198. 13 Price, 434. As to setting off a penalty, vide stat. 8 Geo. 2. c. 24. s. 5. *Nedriffe v. Hogan*, 2 Burr. 1024. *Fletcher v. Dyche*, 2 T. R. 32.

SET-OFF.

Debts must be due in the same right.

The debts must be mutual and due in the same right (1)

In an action brought by a trustee, the defendant cannot set off a debt due to him from the *cestuique* trust. (2) So the assignee of a bond debt cannot be set off in an action against him by the obligor. (3) In an action on a debt the defendant cannot set off a debt due to him in right of his wife (4); nor can a debt due from a wife, *dum sola*, be set off in an action brought by the husband alone. (5) In an action by a certificated bankrupt for goods sold by him since his bankruptcy, the defendant cannot set off a debt due to him from the plaintiff before his bankruptcy, although the cause of action accrued before the certificate; for the old debt was barred by the certificate. (6)

Judgments and costs.

Where two parties have respectively final judgments against each other in different actions in the same or in different courts, whether for debt or damages and costs, or for costs only, either party upon application may have the one judgment set off against the other. (7)

The court however will not allow a debt for which the party has not as yet obtained judgment, to be set off against the debt and execution of his adversary. (8)

Interlocutory costs.

The judgments must be, substantially, between the same parties. (9)

Interlocutory costs may be set off against costs, &c. upon a judgment (10), or the costs, &c. upon a judgment against interlocutory costs, or interlocutory costs on one side against interlocutory costs on the other in the same suit. (11)

To a declaration in debt the defendant pleaded first, as to part, a set-off; secondly, as to further part, goods returned; thirdly, as to the residue, payment of money into court. Upon these pleas he proved sufficient to cover the plaintiff's demand stated in his particulars, but less by 2*l*. than he alleged in his plea of set-off:—It was held, that the plaintiff was entitled to a verdict for his 2*l*. (12)

STAYING PROCEEDINGS.

The defendant will be allowed to stay proceedings upon payment of debt and costs, in all cases where at common law he may pay money into court.

In debt on statute for a penalty (unless perhaps a *qui tam* action) the proceedings may be stayed upon payment of the penalty and costs (13): or if the action be for several penalties, the defendant can have the proceedings upon one or more of the counts stayed upon paying into court the penalties claimed in such counts, and allowing the plaintiff to proceed upon the other counts if he wish it. (14)

(1) *Stracy v. Deey*, 7 T. R. 361. *n. Slipper v. Stidstone*, 5 *ibid.* 493. *French v. Andrade*, 6 *ibid.* 582. *Shipman v. Thompson*, Willes, 103. *Warn v. Bickford*, 7 Price, 550. *Kilvington v. Stevenson*, Selw. N. P. 150. Stat. 2 Geo. 2. c. 22. s. 13.

(2) *Tucker v. Tucker*, 1 N. & M. 477.

(3) *Wake v. Tinkler*, 16 East, 36.

(4) *Paynter v. Walker*, Bull. N. P. 179. (a.)

(5) *Wood v. Akers*, 2 Esp. N. P. C. 594.

(6) *Huyllar v. Sherwood*, 2 N. & M. 401.

(7) *Thrustout d. Barnes v. Crafter*, 2 W. Black. 826. *Lomas v. Mellor*, 5 Moore, 95. *Hall v. Ody*, 2 B. & P. 28. *Peacock v. Jeffery*, 1 Taunt. 426. *Barker v. Braham*, 2 W. Black. 869. 3 Wils. 396. *Simpson v*

Hanley, 1 M. & S. 696. *Vaughan v. Davies*, 2 Hen. Black. 440.

(8) *Philipson v. Caldwell*, 6 Taunt. 176. Archb. by Chitt. 645.

(9) *Hewitt v. Pigott*, 8 Bing. 61. *Holroyd v. Breare*, 4 B. & A. 43. 700.

(10) *Doe v. Carter*, 8 Bing. 390. *Lang v. Webber*, 1 Price, 375. *Howell v. Harding*, 8 East, 362.

(11) *Doe d. Dangerfield v. Alsop*, 9 B. & C. 760.

(12) *Green v. Marsh*, 5 Dowl. P. C. 669.

(13) *Webb v. Punter*, Str. 1217. *Stock v. Eagle*, 2 W. Black. 1052., et vide *Rex v. Strong*, 1 Burr. 431.

(14) *Tidd*, 541.

In debt on simple contract, the proceedings may be stayed upon payment of debt and costs, so likewise in debt for rent. (1) In debt on bond in a penal sum conditioned for the payment of a less sum, the defendant may bring into the court the principal and interest (2); and also it seems such costs as have been expended in any suit in law or equity concerning the same (3), which shall be deemed and taken to be in full satisfaction and discharge of such bond. (4)

STAYING PROCEEDINGS.

Simple contract.

In debt on bond conditioned for the payment of an annuity or of money by instalments, the defendant may obtain a stay of proceedings upon payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments (5); but not otherwise. (6) But where the bond was conditioned for the payment of a sum in gross, and, by a subsequent agreement, that sum was to be paid by instalments, the court would not stay proceedings on the bond upon payment of the instalments, but required the defendant to pay the whole sum mentioned in the condition of the bond with costs (7); and the same where it was expressly stated in the bond, that the whole sum should become due upon default made in the payment of any one instalment. (8) In these cases the application is for a rule to shew cause why it should not be referred to one of the masters to compute the principal and interest due upon the bond (as the case may be), and why upon payment of such sum with costs to be taxed, &c. the proceedings of the action should not be stayed. In debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings upon the payment of the penalty of the bond and costs. In debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into court of principal and interest due on the mortgage and costs, will be deemed to be in full satisfaction of the mortgage, and the court will discharge the mortgagor of and from the same accordingly. (9)

Debt on bond conditioned for the payment of an annuity; or for a sum in gross.

Payment of debt and costs.

In debt on judgment, the court will stay proceedings upon payment of the sum recovered by the judgment and costs (10); and will stay proceedings against bail upon their recognisance, or order an *exoneretur* to be entered on the bail-piece, on payment of the sum sworn to, and costs not exceeding the amount of the recognisance. (11)

In debt, the damages are, in general, merely nominal, the recovery of the debt itself being the principal object of the action: in this case the jury first find the matter of the issue as upon *nunquam indebitatus*, that the de-

DAMAGES.

(1) *Lee v. Irish*, Hardw. 173.

(2) Vide *Farquhar v. Morris*, 7 T. R. 124. *Hogan v. Page*, 1 B. & P. 337.

(3) *Locke v. Shennar*, Hardw. 116., sed vide *Sisney v. Nevins*, Str. 699.

(4) Stat. 4 Anne, c. 16. s. 13., vide *Bonafous v. Rybot*, 3 Burr. 1373. *Lonsdale (Lord) v. Church*, 2 T. R. 388. *Wilde v. Clarkson*, 6 ibid. 303.

(5) *Darby v. Wilkins*, Str. 957. *Bridges v. Williamson*, ibid. 814. *Bonafous v. Rybot*, 3 Burr. 1370.

(6) *Van Sandau v. —*, 1 B. & A. 214.

Tighe v. Crafter, 2 Taunt. 387., vide *Steel v. Bradfield*, 4 ibid. 227. *Macdonald v. Pasley*, 1 B. & P. 161.

(7) *Bonafous v. Rybot*, 3 Burr. 1374.

(8) *Gowlett v. Hanforth*, 2 W. Black. 958.

(9) Stat. 7 Geo. 2. c. 20. s. 1., vide *Goodtitle d. Taysum v. Pope*, 7 T. R. 186. *Berthen v. Street*, 8 ibid. 326. *Skinner v. Stacy*, 1 Wils. 80.

(10) *Simpson v. Stone*, 2 W. Black. 785.

(11) Archb. by Chitt. 612.

DAMAGES.

fendant owes to the plaintiff the amount of the debt proved; upon *non est factum*, that the writing obligatory, &c. is the deed of the defendant; upon *solvit ad diem*, that the defendant did not pay, &c. &c. and then they assess nominal damages (usually one shilling) for the detention of the debt.

Stat. 3 & 4
Will. 4. c. 42.
s. 28.

By stat. 3 & 4 Will. 4. c. 42. s. 28., "upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand, until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law."

Debt on record; In actions of debt on records, the damages are only nominal (1), excepting in debt on an inland judgment, where interest may be recovered in the way of damages for the detention of the debt (2); and in some cases it has been allowed in an action on a foreign judgment, as for instance, in an action on an Irish judgment on a bond, interest has been allowed beyond the penalty. (3)

on a recogni-
sance of bail;

In debt on a recognisance of bail, they are not liable to interest on the sum recovered subsequent to the judgment. (4) In debt on statute by an informer for a penalty, no damages whatever can be given, but the verdict after finding the debt immediately passes on to the assessment of costs. (5)

on a penal
statute.

But in debt for a penalty on a statute by a party grieved, damages are in general recoverable. (6)

Articles of
agreement.

Bonds con-
ditioned for the
performance of
covenants.

Payment of
money by in-
stalments of an
annuity, &c.

In debt on articles of agreement for a penalty (7), or on bonds conditioned for the performance of covenants or agreements, such as a bond for the performance of covenants contained in the same, or in any other deed or writing (8), or for the payment of money by instalments (9), or for the payment of an annuity (10), or for the performance of an award (11), or for the performance of any other specific act, not being a bond for the payment of a sum of money in gross at a certain time, as *post obit* bonds, &c. (12), or bond for payment of money provided for by stat. 9 Anne, c. 16. s. 13. (13), or a replevin bond (14), or a bail bond (15), or the bond of a

(1) Vide *Fanshaw v. Morrison*, 2 Ld. Raym. 1138. 1 Salk. 208.

(2) *Blackmore v. Flemyng*, 7 T. R. 446. *Entwistle v. Shepherd*, 2 ibid. 78., et vide *McClure v. Dunkin*, 1 East, 436. 2 T. R. 388. *Hilhouse v. Davis*, 1 M. & S. 169. *Wood v. Siletto*, 1 Chitt. 473.

(3) *McClure v. Dunkin*, 1 East, 436. 2 T. R. 388., sed vide *Bann v. Dalzel*, M. & M. 228. *Arnott v. Redfern*, 11 Moore, 209. 3 Bing. 353. When not so allowed, vide *Atkinson v. Braybrooke (Lord)*, 4 Camp. 380. *Downes v. Back*, 1 Stark. 319. *Hilhouse v. Davis*, 1 M. & S. 173.

(4) *Waters v. Rees*, 3 Taunt. 503. *Walford v. Davidson*, 4 Burr. 2127.

(5) *Frederick v. Lookup*, 4 Burr. 2018. *Cuming v. Sibly*, ibid. 2489.

(6) Vide *Powell v. Hord*, Str. 650. 2 Ld. Raym. 1411. *North v. Wingate*, Cro. Car. 559.

(7) *Drage v. Brand*, 2 Wils. 377.

(8) *Collins v. Collins*, 2 Burr. 824. 826. 2 Ld. Ken. 530.

(9) *Willoughby v. Swinton*, 6 East, 550. 2 Smith, 636.

(10) *Walcot v. Goulding*, 8 T. R. 126.

(11) *Welch v. Ireland*, 6 East, 613. 2 Smith, 666.

(12) *Murray v. Stair (Earl)*, 2 B. & C. 82. 89. 3 D. & R. 278.

(13) *Cardozo v. Hardy*, 2 Moore, 220.

(14) 2 Saund. 187. n. 2.

(15) Ibid., et vide *Moody v. Pheasant*, 2 B. & P. 446.

DAMAGES.

petitioning creditor, &c.:—damages are recoverable (1); and where in pursuance of stat. 8 & 9 Will. 3. c. 11. s. 8., one or more breaches of the condition are assigned upon record, the jury first assess nominal damages for the detention of the debt, and then assess actual damages upon the breaches assigned. (2)

In debt, payment cannot be given in evidence in mitigation of damages, but must be pleaded. (3)

In an action for a penalty by a party grieved, where the penalty is vested in the party before he brings his action for it, then the plaintiff if he recover is entitled to his costs, for by common law in such a case he is entitled to damages for the detention of the penalty. (4)

Costs.

But in debt on a penal statute by a common informer, the plaintiff is not entitled to costs in any case, unless expressly given by the statute creating the penalty (5), because he does not incur damages by his verdict.

Penal statute.

By stat. 43 Geo. 3. c. 46. s. 4. in debt on judgment, the plaintiff shall not be entitled to any costs of suit, unless the court in which such actions shall be brought, or some judge of the same court, shall otherwise order; which statute, however, extends only to actions brought upon judgments obtained by plaintiffs, and not to such as are brought upon judgments of nonsuit or the like. (6) And in an action on a judgment, the court refused to stay proceedings on payment of the debt without costs, when there was probable ground for the plaintiff's claiming also interest in part of the debt. (7)

Stat. 43 Geo. 3. c. 46. s. 4.

The court have allowed the plaintiff his costs, where the defendant pleaded a sham plea, as *nul tiel record*, &c. (8)

Sham plea.

But where a defendant had been superseded through the neglect of the plaintiff, the court refused to allow the plaintiff the costs of an action on the judgment, although the defendant caused expense and delay by pleading a false plea. (9)

In debt on simple contract, and in debt on specialty, the plaintiff if he have a verdict is entitled to costs, unless the debt and damages be under 40s., and the judge certify.

Simple contract and specialty.

The judgment in debt, when for the plaintiff, is, that he recover his debt, damages, and costs.

JUDGMENT AND WRIT OF INQUIRY.

The judgment in debt is always *final quoad* the debt, and the damages usually being very trifling, it is not in general worth while to execute a writ of inquiry for them; but the plaintiff may at once enter up a final judgment and sue out execution, and this even in an action on a bail bond. (10) But if the damages be of sufficient consequence, the plaintiff may either execute a writ of inquiry for them, or where they are mere matters of calculation, may apply to have it referred to one of the masters: thus, in an action of

Judgment always *final quoad* the debt.

(1) *Smith v. Broomhead*, 7 T. R. 300. *bull*, 2 T. R. 154. *Barnard v. Moss*, 1 Hen. Smithey v. Edmonson, 3 East, 22., et vide Black. 107. Stat. 8 & 9 Will. 3. c. 11. *Savile v. Jackson*, 13 Price, 715. *Smith v. Archb. by Chitt* 1170.
Bond, 3 M. & Sc. 528. 10 Bing. 125.
(2) 1 Saund. 58. n. 1. 2 ibid. 107.; et vide (6) *Bennett v. Neale*, 14 East, 343.
McArthur v. Seaforth (Lord), 2 Taunt. 257. (7) *Wood v. Siletto*, 1 Chitt. 473.
(3) *Belbin v. Bott*, 5 Dowl. P. C. 604. (8) *Garnwell v. Barker*, 5 Taunt. 264.
(4) *Ward v. Snell*, 1 Hen. Black. 10. (9) *Hall v. Pierce*, 5 Dowl. P. C. 603.
(5) 2 Bac. Abr. Costs (E. 3.). 318. Bull. Archb. by Chitt. 1171.
N. P. 333. *Shore v. Madisten*, 1 Salk. 206. (10) *Moody v. Pheasant*, 2 B. & P. 446.
Hullock, 212., et vide *Woodgate v. Knatch-* *Middleton v. Bryan*, 3 M. & S. 155.

**JUDGMENT AND
WRIT OF IN-
QUIRY.**

debt on a judgment of seventeen years' standing, where the defendant allowed judgment to go by default, the court held, that the plaintiff had a right to damages for the detention of the debt, and to a writ of inquiry to ascertain the amount. (1)

**Computation of
interest by way
of damages.**

And where in debt on bond, the court referred it to the prothonotary to compute the interest by way of damages, it was holden not to be error. ()

**Where damages
are uncertain.**

If, from the nature of the contract the amount of necessity be uncertain, then, though the action be in debt, there must be a writ of inquiry to reduce it to a certainty. (3) Thus, in an action of debt for use and occupation, on a *quantum meruit* after judgment by default, a writ of inquiry would be necessary before signing final judgment; and in an action on the stat. 2 & 3 Edw. 6. c. 13. for not setting out tithes, there must be a writ of inquiry to ascertain the value of the tithes: so in an action of debt for foreign money, a jury must find the value of the money. (4)

But the court have, in an action of debt, set aside execution upon a judgment by default upon payment of costs, and referred it to the master to ascertain what was due to the plaintiff. (5) Thus, in *assumpsit* on a bill of exchange or promissory note, the courts instead of compelling the plaintiff to execute a writ of inquiry, will refer it to the master to compute the principal and interest (6), and exchange and re-exchange (7), unless the bill be for a sum in foreign money. (8)

Debt on bond.

In debt on bond conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, or of an award, or of any other specific act, although judgment by default be entered up for the amount of the penalty, yet a writ of inquiry must afterwards be executed, in order to ascertain what damages the plaintiff may have actually sustained by the breach of covenant, &c. complained of (9): this, however, does not extend to bail bonds, replevin bonds, bonds of petitioning creditors, or bonds for the payment of a sum of money in gross. (10)

EXECUTION.

The writ, in debt, is for the debt, damages, and costs.

In debt on bond, for performance of covenants, &c. where breaches are suggested, &c. under stat. 8 & 9 Will. 3. c. 11. s. 8., although the writ of execution must be for the entire penalty, damages, and costs, yet it should be indorsed to levy only the damages assessed upon the breaches; the costs found by the jury, the costs of increase, and the costs of the execution; but if the damages assessed and charges of execution exceed the penalty of the bond, the execution can be only for the amount of the penalty, and the costs of increase. (11) The writ in this case must be entered on the roll. (12) So in debt on bond conditioned to pay a sum in gross, although execution must be sued out for the entire penalty in order to make it conformable with the judgment, yet it should be indorsed only for the principal, interest,

(1) *Blackmore v. Flemyng*, 7 T. R. 446. *Rashleigh v. Salmon*, 1 Hen. Black. 252.
McClure v. Dunkin, 1 East, 436. Archb. C. *Eyre v. England (Bank of)*, 1 Bligh, 582.
Att. Pr. 337.

(2) *Holdipp v. Otway*, 2 Saund. 107.

(3) *Weald v. Brown*, 2 C. & J. 673.

(4) *Arden v. Connell*, 5 B. & A. 885. 1 87.
D. & R. 529. *Brill v. Neele*, 1 Chitt. 627.
3 B. & A. 208. *Bale v. Hodgetts*, 1 Bing.
182. 7 Moore, 602.

(5) *Taylor v. Capper*, 14 East, 442.

(6) *Shepherd v. Charter*, 4 T. R. 275. 415.

(7) *Goldsmid v. Taite*, 2 B. & P. 55.,
sed vide *Napier v. Shneider*, 12 East, 420.

(8) *Munnell v. Massarene (Lord)*, 5 T. R.

(9) Stat. 8 & 9 Will. 3. c. 11. s. 8.

(10) Archb. by Chitt. 743.

(11) 1 Saund. 58. (b.) n. 1.

(12) Vide Form of Entry, Chitty's Forms,

nominal damages, and costs; and if it be executed for more, or if the defendant be charged in execution for more, it may be reduced upon application to the court," or to a judge at chambers. (1) And where judgment was entered up for the penalty of a bond given to secure an annuity, and the defendant was taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorised the taking out execution for the arrears, and the defendant evidently had suffered by the excess, the court set aside the execution *in toto*, and not merely discharged the defendant *pro tanto*. (2)

EXECUTION.

2. DEBT ON PENAL STATUTES.

I. Commencement of Action.

The statutes which principally relate to actions founded on penal statutes are, 18 Eliz. c. 5., 31 Eliz. c. 5., 21 Jac. 1. c. 4. s. 1., and 3 & 4 Will. 4. c. 42. s. 3.

In actions brought on penal statutes, it is incumbent on the plaintiff to shew, that the action was commenced within the limited time.

By stat. 3 & 4 Will. 4. c. 42. s. 3., "all actions for penalties given to party grieved, must be commenced and sued within two years after the cause of action."

By stat. 31 Eliz. c. 5. s. 5., "all actions brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the *king only*, shall be brought within two years next after the offence committed; and all actions brought for any forfeiture upon a penal statute (except the statute of tillage, the benefit whereof is limited to the *king and the prosecutor*), shall be brought within one year after the offence committed; and in default thereof, the same shall be brought for the king, at any time within two years after that year ended. And if any action shall be brought after the time before limited, the same shall be void; provided, that (s. 6.) when a shorter time is limited by any penal statute, the action shall be brought within that time."

This statute extends to all actions brought on penal statutes, whereby the forfeiture is limited to the king, or to the king and party, whether made before or since the 31 Eliz. c. 5. (3): but it does not extend to actions brought by the party grieved. (4) And when the penalty is given to a common informer alone, the latter part of the clause has been construed to extend to them. (5)

If any offence, prohibited by any penal statute, be also an offence at common law, it is not restrained by this statute; and the defendant may take advantage of this statute on the general issue, and need not plead it. (6)

DEBT ON PENAL STATUTES.

COMMENCEMENT OF ACTION.

Statutes relative to actions founded on penal statutes.

Stat. 3 & 4 Will. 4. c. 42. s. 3.

Penal actions must be commenced within two years after cause of action. Stat. 31 Eliz. c. 5. s. 5.

Cases to which stat. 31 Eliz. c. 5. s. 5. extends.

(1) Vide *Amery v. Smalbridge*, 2 W. Black. 760. *McCormack v. Melton*, 1 A. & E. 331.

(2) *Tilby v. Best*, 16 East, 163. *McCormack v. Melton*, 1 A. & E. 331.

(3) 1 Marsh. 321. (a.) *Barber q. t. v. Tilson*, 3 M. & S. 434. 440. 444.

(4) *Calliford v. Blawford*, 1 Show, 353, 354. Carth. 233. *Speers v. Frederic*, T. T. 25 Geo. 3. K. B.

(5) *Chance v. Adams*, 1 Ld. Raym. 78. Tidd, 14.

(6) Selw. N. P. 630.

DEBT ON PENAL
STATUTES.

VENUE.

II. *Venue.*Stat. 31 Eliz.
c. 5. s. 2.

By stat. 31 Eliz. c. 5. s. 2., in any declaration or information, the offence against any *penal* statute shall not be laid to be done in any other county but where the contract, or other matter alleged to be the offence, was in truth done; and every defendant in such action or information may traverse, and allege, that the offence was not committed in the county where it is alleged; which being tried for the defendant, or if the plaintiff be thereupon nonsuited, then the plaintiff shall be barred in that action or information.

Stat. 21 Jac. 1.
c. 4. s. 2.

And by stat. 21 Jac. 1. c. 4. s. 2., in all informations to be exhibited, and in all bills, counts, complaints, and declarations, to be commenced against any person or persons, either by or on behalf of the king or any other, for or concerning any offence committed or to be committed against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed and not elsewhere.

Stat. 31 Eliz.
c. 5. extends to
all actions on
informations
brought by
common in-
formers.

Stat. 31 Eliz. c. 5. is still in force, and extends to all actions or informations brought by common informers upon penal statutes (1); and, as a general rule, the venue in such actions or informations must be laid in the county where the offence was committed.

But there is an exception in stat. 31 Eliz. c. 5. s. 3., that it shall not extend to such officers of record as had, in respect of their offices, theretofore lawfully used to exhibit informations or sue upon penal laws, which exception extends to informations by the attorney-general in the court of Exchequer (2); and there are some other exceptions in the statute, relating to offences concerning champerty.

Stat. 21 Jac. 1.
c. 4. also ex-
tends to of-
fences of omis-
sion as of com-
mission.

Stat. 21 Jac. 1. c. 4. extends as well to offences of omission, as of commission. (3)

But the statute 21 Jac. 1. c. 4. does not extend to offences created by subsequent statutes. (4)

Stat. 1 & 2
Ph. & M. c. 12.

In an action on stat. 1 & 2 Ph. & M. c. 12. for driving a distress out of the hundred, it appeared that the hundred in which the cattle were distrained was in one county, and the hundred into which they were driven was in another:—It was held, that the venue could be laid in either county. (5) But an action on stat. 3 Geo. 2. c. 26. for selling coals as and for a sort which they really were not, must be brought in the county in which the coals were delivered, and not where they were contracted for. (6)

Stat. 3 Geo. 2.
c. 26.

Non residence.

And a penal action for non residence must be brought in the county in which the living is situated (7)

Usury.

In an action brought to recover penalties on the statute of usury, it ap-

(1) Com. Dig. Action (N.) 10. Bull. N. P. 195. *Sliby v. Cuming*, 4 Burr. 2467. *Scurry q. t. v. Freeman*, 2 B. & P. 381. *Butterfield v. Windle*, 4 East, 385. *Barber q. t. v. Tilson*, 3 M. & S. 429.

(2) *Att.-Gen. v. Browne*, Bunb. 236. 261. *Att.-Gen. v. Roger Hines*, Parker, 182. 3 Anstr. 871.

(3) *Whitehead v. Wynn*, 5 M. & S. 427.

(4) Bull. N. P. 195. *Rex v. Gaud*, 1 Salk. 372. *Barber q. t. v. Tilson*, 3 M. & S. 438. Tidd, 431.

(5) *Pope q. t. v. Davies*, 2 Taunt. 252. 2 Camp. 266.

(6) *Butterfield v. Windle*, 4 East, 385.

(7) *Whitehead v. Wynne*, 2 Chitt. 420.

peared, that the contract was made in one county, and the money paid in the other and the court held the venue to have been rightly laid in the county, where the usurious interest was received. (1)

DEBT ON PENAL
STATUTES.

Where there are two facts which are necessary to constitute one offence, the plaintiff may *ex necessitate* lay the venue in either county. (2) So where the usurious interest was paid by a draft in Middlesex, which draft was exchanged by the defendant for cash in Smithfield, it was holden that the offence was completed, and the venue in consequence properly laid in London. (3).

Where there are two facts necessary to constitute one offence.

III. Parties.

PARTIES.

Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same debt, it is sustainable (4); and he need not declare *qui tam*, unless where a penalty is given for a contempt (5): but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty. (6)

By whom action can be maintained.

By stat. 18. Eliz. c. 5. s. 1. (made perpetual by stat. 27 Eliz. c. 10.) "every informer upon any penal statute shall sue in proper person, or by his attorney."

Stat. 18 Eliz. c. 5. s. 1.

Hence, an infant cannot be a common informer, for he must sue by *prochein amy*, or guardian. (7)

An infant cannot be a common informer.

Debt on penal statute will not lie against several, for what in law is a separate offence in each; as against several persons for bribery (8); and in an action of debt to recover money lost at play, the defendant cannot plead a non joinder in abatement. (9)

Against whom debt will not lie.

An action cannot be supported against an executor for a penalty forfeited by a testator under a penal statute. (10)

IV. Statement of Cause of Action.

STATEMENT OF
CAUSE OF ACTION.

In debt on a statute at the suit of the party grieved, or by an informer, where the whole of the penalty is given to him, the commencement is the same as in debt on a contract: but when a part of the penalty is given to the informer and the king, the poor of the parish, &c. the commencement and other parts of the declaration usually state, that the plaintiff sues *qui tam*, &c.; though this is not necessary, unless there has been a contempt of the king. (11)

Debt on statute at suit of party grieved.

In a declaration on a public statute, it is not necessary or advisable to Public statute.

(1) *Pearson v. M^r Gowran*, 3 B. & C. 700. 5 D. & R. 616.

(2) *Scott q. t. v. Brest*, 2 T. R. 238., sed vide *Pearson v. M^r Gowran*, 3 B. & C. 700.

(3) *Scurry q. t. v. Freeman*, 2 B. & P. 381.

(4) Com. Dig. Action Debt (E. 1, 2.).

(5) Ibid. 2 Saund. 374. n. 1, 2. 1 ibid. 136. n. 1.

(6) *Fleming q. t. v. Bailey*, 5 East, 313. 1 Bac. Abr. Action Qui Tam (A.). 74.

(7) *Maggs v. Ellis*, M. T. 25 Geo. 2. B. R. Bull. N. P. 196. (b.)

(8) 1 Chitt. Pl. 86.

(9) Ibid.

(10) Com. Dig. Administration (B. 15.).

(11) Com. Dig. Action on Statute (E. 1.) 1 Saund. 136. n. 1. 2 ibid. 374. n. 1.

DEBT ON PENAL STATUTES.

The offence should appear to be within the provisions of the statute.

state the title or year of the reign when the statute was passed, or to recite any part of the act. (1)

In all cases the offence or act charged to have been committed or omitted by the defendant, should appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged, and the conclusion *contra formam statuti* will not aid the omission. (2)

If however the necessary matter be stated in substance and effect, it will suffice, although the precise words of the statute are not used.

When an act of parliament which has been *recently* passed, enacts that if a party commit an offence after a named day he shall be liable to a penalty, it is usual to aver, that the offence was committed after that day; but when the act has been long passed, such averment is not necessary. (3)

Limitation of time for commencement of action.

It is usual also, when the particular statute limits the term within which the action should be brought, to aver that the offence was committed within such time, but this also does not seem material. (4)

Where act or omission, which is the foundation of the suit, is not an offence at common law.

Where the act or omission, which is the foundation of the suit, was not an offence at common law, it is necessary in all cases "to conclude against the form of the statute," or "statutes" (5), or to show at least that the declaration is founded on the statute, by introducing the words *de placito transgressionis et contemptus contra formam statuti*; and this is necessary also in an action to recover back money won at play. (6)

Where an offence prohibited by several statutes, but only one the foundation of the action.

Where an offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory or restrictive, it is proper to conclude against the form of the statute in the singular number. (7) The omission of the words "against the form of the statute," or "statutes," when proper to be inserted, is fatal even after verdict. (8)

DAMAGES.

In an action by a common informer, as he is not entitled to damages, no claim for them should be inserted. (9)

PLEADINGS.**V. Pleadings.**

Stat. 21 Jac. 1. c. 4. s. 4.

By stat. 21 Jac. 1. c. 4. s. 4., "if any information, suit, or action shall be brought and exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king, or by any other, or on the behalf of the king or any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same; which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action; and the said matters shall be then as available to him or them, to all intents and

(1) 1 Chitt. Pl. 372.

(2) 1 Saund. 135. n. 3.

(3) Ibid. 309. (a.) n. 5. 8 Bac. Abr. Usury (K.) 339.

(4) *Lee v. Clarke*, 2 East, 340. 362.

(5) 1 Saund. 135. n. 3.

(6) 1 Chitt. Pl. 373.

(7) 2 Saund. 377. n. 12.

(8) *Lee v. Clarke*, 2 East, 333. *Thistlewood v. Cracroft*, 1 M. & S. 500. *Wells v. Iggulden*, 3 B. & C. 186.

(9) *Frederick (Bart.) v. Lookup*, 4 Burr. 2021. *Cuming v. Sibly*, *ibid.* 2490.

purposes, as if he or they had sufficiently pleaded, set forth, or alleged, the same matter in bar, or discharge of such information, suit, or action."

DEBT ON PENAL
STATUTES.

The foregoing section of the statute, unlike the three former, applies to all penal actions, and to those given by subsequent statutes. Notwithstanding the new rules, therefore, the defendant may still plead not guilty, or *nil debet* to a penal action (complying with the rule of Trinity Term 1 Vict.), and give any defence under it in evidence. (1)

The statutory rules of pleading do not contain any particular directions as to the mode of pleading in debt on penal statutes, though these actions are subject to the general rules and regulations applicable to all pleadings.

By Reg. Gen. Hilary Term, 4 Will. 4., the plea of "*nil debet*" shall not be allowed in any action; and doubts subsequently arose, whether such rule applied to debt on penal statutes; and Mr. Justice Littledale observed, that "the rules were never meant to apply to these cases as actions for penalties; if they do, it was an oversight in drawing them up." (2)

Reg. Gen. H.
T. 4 Will. 4.
Plea of *nil debet*.

It has, however, been subsequently decided, that the words are large enough to include such actions, although the judges had no power to take away the plea of not guilty or "*nil debet*," which is given in penal actions by stat. 21 Jac. 1. c. 4. (3)

Where in an action of debt by a common informer upon a penal statute, which gave one moiety of the penalty to the informer, and the other to the house of correction of the county where the offence was committed, it was pleaded, first, that the cause of action did not accrue to the plaintiff within one year next before the commencement of the suit. Secondly, that, before the commencement of the suit, the defendant was impleaded by R. W. for the same offence and cause of action, which suit was still pending. To which it was replied, that to the second plea, the suit of R. W. was, with the privity of the defendant, instituted to the intent to protect the defendant, and to enable him to plead its pendency as a defence to any suit which may be brought by any person against him for that penalty, and that it was instituted, and was still pending by the fraud and covin of defendant and R. W.:—It was held, that the first plea was good, but that the replication to the second plea was bad. (4)

Bad replication
to a plea, that
defendant was
impleaded.

It is requisite, in accordance with a rule of court of Trinity Term, 1 Vict. to insert the words "by statute" in the margin of the plea, whereon the defendant intends to give the special matter in evidence under the general issue, by virtue of an act of parliament.

"By statute"
must be in-
serted in the
margin of the
plea.

VI. Amendment of Declaration — New Trial — Venire Facias — Evidence — Compounding — Costs.

AMENDMENT OF
DECLARATION
— NEW TRIAL
— VENIRE
FACIAS—
EVIDENCE—
COMPOUNDING.
COSTS.

There is no difference as to the doctrine of amending at common law, between penal and other actions. (5)

(1) *Spencer (Earl) v. Swannell*, 3 M. & W. 154. 6 Dowl. P. C. 326. *Faulkner v. Chevell*, 5 A. & E. 213. 6 N. & M. 704. *Jones v. Williams*, 4 M. & W. 375. *Jervis*, N. R. 130.

(2) *Faulkner v. Chevell*, 5 A. & E. 213. 6 N. & M. 704., *vide etiam* Tidd's N. P. 363.

(3) *Spencer (Earl) v. Swannell*, 3 M. & W. 155. *Jervis*, N. R. 130. *Kennedy's* N. R. 149. *Ramshay*, PL 37. 138. *Lutw.* PL 114. 123.

(4) *Barrett v. Johnson*, 2 Jones (Irish), 197.

(5) 1 Saund. 250. (d.) *Philips v. Smith*, Str. 137.

DEBT ON PENAL STATUTES.**AMENDMENT OF DECLARATION.****NEW TRIAL.****VENIRE FACIAS.**

Stat. 24 Geo. 2. c. 18. s. 3.

Stat. 16 & 17 Car. 2. c. 8. s. 2.

EVIDENCE.**Commencement of action.****Offence where committed.****Where venue has been changed.****Proof of averment.****Variance.****General verdict for one penalty.**

In a penal action for usury, the times of payment of certain notes, in which the usury was charged to consist, have been altered (1); and in an action against an attorney for practising without a certificate, the court has amended the allegations to make them conformable to the facts. (2) In such cases it is immaterial, whether a new action would be barred, or whether the plaintiff would be too late to declare *de novo*.

The court will grant a new trial, after a verdict for the defendant in a penal action, on account of a mistake or misdirection of the judge (3); but where the case is properly left to a jury, although they should draw a wrong conclusion, the court will incline against disturbing the verdict. (4)

An action for a penalty by a party grieved is not, however, within the exception, and therefore in debt for not setting out titles, if the verdict for the defendant be against evidence, a new trial will be granted. (5)

By stat. 24 Geo. 2. c. 18. s. 3., every *venire facias*, for the trial of any issue in any action or information upon any penal statute, in the king's courts of record at Westminster, in the counties palatine of Lancaster, Chester, Durham, and Wales, shall be awarded of the body of the proper county where such issue is triable.

The proviso in stat. 16 & 17 Car. 2. c. 8. s. 2., that this act shall not extend to any action or information upon any penal statute, must be understood of popular actions and informations, and not of remedies given by statute to the parties grieved. (6)

The commencement of the action is the writ, and on its production will shew the day on which it was issued. The return of the writ need not be shewn. (7)

An offence against a penal statute must in general be alleged and proved to have been committed within the proper county, and a variance in this respect is a matter of defence at the trial.

Although the venue be changed into another county for the purpose of trial, the cause of action must still be proved to have accrued in the county where the venue is laid. (8)

Where a person is charged with a criminal omission, the proof of the negative lies upon the party who makes the charge: where, however, the action is founded on the doing an act without a legal qualification, the existence of which, if it exist at all, is peculiarly within the knowledge of the defendant, it seems to be incumbent on him, notwithstanding the rule, to prove his qualification. (9)

It is requisite in penal actions, that the same proof should be given of a contract, where the evidence of a contract is essential, as in an action on the contract. (10)

If the jury find a general verdict for one penalty, it is for the plaintiff to apply it; but after applying it to one count which turns out to be defective,

(1) *Maddock v. Hammet*, 7 T. R. 55.(2) *Cross v. Kaye*, 6 *ibid.* 543.(3) *Wilson v. Rastall*, 4 T. R. 753. *Calcraft v. Gibbs*, 5 *ibid.* 19.(4) *Reaveley v. Mainwaring*, 3 Burr. 296. 1306. *Wilson v. Rastall*, 4 T. R. 753. *Calcraft v. Gibbs*, 5 *ibid.* 19. *Brook q. t. v. Middleton*, 10 East, 268.(5) *Selsea (Lord) v. Powell*, 6 Taunt. 297.

(6) Bull. N. P. 197.

(7) *Parsons v. King*, 7 T. R. 6.(8) *Robinson q. t. v. Garthwaite*, 9 East,

(9) 2 Stark. Ev. 615.

(10) *Martin v. Greenleaf*, 2 Esp. N. P. C. 729.

he cannot afterwards apply it to another, although the evidence would have warranted a verdict on the latter. (1)

DEBT ON PENAL
STATUTES.

By stat. 18 Eliz. c. 5. s. 3., "no informer or plaintiff shall or may compound or agree with any person or persons that shall offend, or shall be surmised to offend, against any penal statute, for such offence committed, or pretended to be committed; but after answer made in court unto the information or suit in that behalf exhibited or prosecuted, nor after answer, but by the order or consent of the court in which the same information or suit shall be depending, upon the pains and penalties (2) hereafter in this present act set down and declared."

COMPOUNDING.
Stat. 18 Eliz.
c. 5. s. 3.

The informer, when the action is compounded by leave of the court, may stipulate for the payment of his costs, as well as of his share of the penalty, even where he would not have been entitled to costs if he had proceeded to trial. (3) Where part of the penalty goes to the crown, notice of the motion must be given to the proper crown officer. (4) The attorney-general's consent must be obtained, and the queen's part of the penalty be paid. (5)

By stat. 18 Eliz. c. 5. s. 3., "if any such informer or plaintiff shall willingly delay his suit, or shall discontinue or be nonsuit in the same, or shall have the trial or matter past against him therein by verdict or judgment of law, that then, in every such case, the same informer or plaintiff shall yield, satisfy, and pay unto the party defendant, his costs, charges, and damages, to be assigned by the court in which the same suit shall be attempted, for the recovery and execution, whereof every such defendant shall immediately, upon the same costs, charges, and damages assigned, have his *capias ad satisfaciendum*, *fieri facias*, or *elegit*, to be awarded unto him out of the same court, in which the same shall be so assigned as is aforesaid, as in other cases of execution."

COSTS.
Stat. 18 Eliz.
c. 5. s. 3.

In all personal actions damages are given, even where they are not the gist of the action; and this rule holds in penal as well as in other actions where the right vests before the commencement of the action. An informer is not entitled to costs if he recover, unless expressly given to him by statute, since he does not recover damages by his verdict (6); but in an action by the party grieved, where the penalty is vested in him before he brings his action for it, he is entitled to costs if he recover; for in such a case, by common law, he is entitled to damages for the detention of the penalty. (7)

Rights of in-
former and
party grieved
to costs.

In *Shinler v. Roberts* (8) it was moved by the defendant, that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion; for the court having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security.

Security for
costs will not
be ordered.

(1) *Holloway v. Bennet*, 3 T. R. 448.
Hardy v. Cathcart, 5 Taunt. 11.

Wood q. t. v. Johnson, 2 W. Black. 1157. *Lee v. Cass*, 2 Taunt. 213.

(2) The punishment of the pillory — (or since stat. 56 Geo. 3. c. 138. fine and imprisonment) a disability afterwards to sue upon any penal statute — and a penalty of 10*l.* Sect. 4.

(4) Reg. Gen. H. T. 2 Will. 4. s. 99.

(5) *Jervis*, N. R. 371.

(6) *Wilkinson v. Allot*, Cowp. 366. Bull. N. P. 195.

(7) *Ward v. Snell*, 1 Hen. Black. 10.

(3) *North q. t. v. Smart*, 1 B. & P. 51.

(8) Bull. N. P. 196, 197.

BRIBERY AND
TREATING.

3. BRIBERY AND TREATING.

I. *Defined.*

DEFINED.

Every species of bribery (1) is criminal, and bribery at elections of members of parliament must always have been a crime at common law, and punishable by indictment or information. (2)

The principal statutes which relate to treating and bribery are, 7 Will. 3. c. 4., 2 Geo. 2. c. 24., 9 Geo. 2. c. 38., 49 Geo. 3. c. 118., 7 & 8 Geo. 4. c. 37.; and upon some of these enactments Mr. Justice Blackstone (3) observes, "to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution."

Bribery defined
by Lord Glen-
bervie.

Bribery is said to be committed "wherever a person is bound by law to act, without any view to his own private emolument, and another, by a corrupt contract, engages such person, on condition of the payment or promise of money, or other lucrative consideration, to act in a manner which *he* shall prescribe; both parties are, by such contract, guilty of bribery." (4)

Bribery defined
by stat. 2 Geo.
2. c. 24. s. 7.

Bribery is described by stat. 2 Geo. 2. c. 24. s. 7. to be committed, where any person, claiming a right to vote at any election, "shall ask, receive, or take, any money or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself, or any person employed by him, doth, or shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election." (5)

Treating is the giving money, meat, drink, or clothing to a voter during an election, in order to secure his vote and interest.

THE BRIBERY
ACTS.II. *The Bribery Acts — Stats. 2 Geo. 2. c. 24. and 49 Geo. 3. c. 118.*Stat. 2 Geo. 2.
c. 24.

The insufficiency of stat. 7 Will. 3. c. 4., and the gross scene of corruption which had taken place at Beverly in Yorkshire, occasioned stat. 2 Geo. 2. c. 24., and which made effectual provisions to put a check to bribery in general, by inflicting severe penalties on the offenders, and by making it the interest of persons privy to the offence, to make such dis-

(1) All the parliamentary and legal decisions respecting bribery and treating have been collected in 1 Stephens on Elections, 235—295.

(2) *Rex v. Pitt*, 3 Burr. 1338.

(3) 1 Comment. 179.

(4) 2 Doug. 400.

(5) In the *Evesham case*, F. & F. 520., it was resolved, "That the committee must look to the statute law, and not to the resolution of the House of Commons of

1677, for the definition of the offence of bribery."

It was contended by the counsel for the sitting member in the *Barnstaple case*, that the mere offer of a bribe, not accompanied by any actual gift or promise, and not accepted by the voter, is not such an offence as will disqualify a man to sit in parliament; but the committee came to no express resolution on that point. 1 Peck. 91. 1 Stephens on Elections, 262.

coveries as might bring them to justice. It recites, "that it is found by experience, that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament," for remedy therefore of so great an evil, and to the end that all elections of members to serve in parliament may hereafter be freely and indifferently made, without charge or expense, it is enacted by the first section, that persons having or claiming to have a right to vote or be polled at any election, if required by either of the candidates, or by any two of the electors, shall take an oath that they have not received, directly or indirectly, any sum or sums of money, office, place, or employment, gift, or reward, or promise, or security for any money, office, employment, or gift, to give their vote, and that they have not before polled at the same election. (1)

**BRIBERY AND
TREATING.**

If persons who have or claim to have a right to vote at any election, shall ask, receive, or take, any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, or employment, or other reward whatever, to give his vote, or to refuse or forbear to give his vote, in any election; or if any person by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person to give his vote (2), or to forbear to give his vote (3); in any election such person forfeits 500*l.*, to be recovered with costs by action of debt in any of the superior courts at Westminster, and after judgment obtained against him in any of the ways mentioned in the act, or being otherwise lawfully convicted thereof (4), he is for ever disabled from voting at elections, and from holding any office or franchise in any city, borough, town corporate, or cinque port. (5)

Persons taking a bribe or corrupting others, forfeit 500*l.*

In construing remedial statutes, the court are not tied down to the letter of the enactment; but effect will not be given to a penal statute, unless the offence charged comes within its very words. The legal distinction between remedial and penal statutes is this, — the former give relief to parties grieved, the latter impose penalties upon offences committed: judging it by that rule, the 2 Geo. 2. c. 24. is a penal act.

General construction of stat. 2 Geo. 2. c. 24.

The legislature have, in the stat. 2 Geo. 2. c. 24. s. 7., distinctly defined what bribery is, and in what it consists, both as it relates to a voter and to

Definition of bribery.

(1) Returning officers admitting any person to be polled, without taking such oath, if demanded, forfeit 100*l.*: and persons voting without taking the oath, if demanded, incur the like penalty (s. 2.).

(2) It was resolved in the cases of *Coven-try* (1 Peck. 97.) and *Bridgwater* (ibid. 102.), that a voter offering a bribe to another voter for his vote was not himself disqualified by such offer.

(3) The giving a bribe to forbear voting at an election is an offence within this act, although the man did not forbear to vote, but actually voted for his opponent's candidate. *Bush v. Ralling*, Sayer, 289. So where the bribe is given to vote for A., and the voter, in fact, voted for B. *Sulston v. Norton*, 3 Burr. 1237.

(4) Lord Glenbervie remarks, That from these words, the incapacities created by this act attach upon a conviction on a prosecution for bribery, by way of information at common law, as well as when the proceeding is by an action under this statute. 4 Doug. 294. The act to incapacitate voters at New Shoreham is an authority to shew, that the House of Commons will preclude the necessity of formal conviction against parties, where their guilt is sufficiently apparent from the proceedings of the committee, and will at once disqualify the voters by name. 1 Stephens on Elections, 260.

(5) Sect. 7.

**BRIBERY AND
TREATING.**

a candidate. The voter is guilty of bribery, if he *asks*, receives, or takes, or agrees or contracts for any money, &c. to give or to forbear to give his vote. The candidate is guilty of bribery, if he, by any gift or reward, or by any promise, agreement, or security, for any gift or reward, *corrupts* or *procures* any person to give or refuse his vote. In the voter it is a crime to ask; but to *offer* on the part of the candidate, which appears to be as it were the counterpart of a request by the elector, seems to have been studiously omitted in the second part of the clause; and an actual corruption, or procurement, is made necessary to complete the offence. Therefore, the consent of the voter is essential, for otherwise no person can be said to have been corrupted. The reason for this distinction is very substantial and important. It would be a dangerous and unjust thing, to leave a candidate, who in the course of his canvass must solicit the votes of a number of electors, at the mercy of any one of them who could be brought to swear, that he accompanied his solicitation with the offer of a bribe. But where his own consent constitutes part of the offence, he will be compelled, in accusing the candidate, to accuse himself also, from which it will generally follow, that the proof of such crimes will be sought for in the more indifferent and unsuspected testimony of a bystander.

Stats. 7 Will. 3. c. 4., 4 Geo. 2. c. 24., and 49 Geo. 3. c. 118., contemplate an act completed by payment or promise on the one side, and acceptance by the other.

"Knowledge of and consent to bribery."

That stats. 7 Will. 3. c. 4., 4 Geo. 2. c. 24., and 49 Geo. 3. c. 118., against corruption by bribery, contemplate an act completed by payment or promise on the one side, and acceptance on the other, is proved by *Henslow v. Fawcett* (1), in which Mr. Justice Patteson said, "In that part of the 2 Geo. 2. c. 24. s. 7. relating to the voter, the word 'ask' is used, and not repeated in the latter part. Something *more* is requisite in the case of the briber than the mere *offer* of a bribe." (2)

"Under stat. 49 Geo. 3. c. 118., not only if a person gives or promises any money or office, but if he *knows of and consents to* the giving or the promising, if returned, his return is void; if not returned, he forfeits 500*l.*; and in either case the party receiving forfeits 500*l.*; and if the party conferring any place within s. 3. holds office under the sovereign, the penalty is 1000*l.*, to be sued for by any person in any of the superior courts of record by action of debt, &c.

"If 'knowledge of and consent to' an act done by others are sufficient to make a candidate liable for all the consequences of this act, it is not necessary that a party should direct an act to be done, that is, be the moving party in doing it, or ratify it when done; if he knows of its being done, and sanctions it by his silence and non intervention, and reaps the benefit of it afterwards, it seems that it would be a knowing of, and consenting to, within this statute." (3)

(1) 4 N. & M. 585.

(2) In the cases of *Bridgwater* (1 Peck. 102.) and *Coventry* (ibid. 97.) it was held, that an offer of a bribe by one voter to

another voter, did not disqualify the voter making the offer.

(3) Rogers on Elections, 249. cit. *Baynton v. Cattle*, 1 M. & Rob. 265.

III. *Stats. 7 Will. 3. c. 4. and 7 & 8 Geo. 4. c. 37. s. 2.*

Upon April 2. 1677, the House of Commons came to a resolution against treating (1), but which not proving sufficient to correct the evils arising from bribery by candidates and their agents, caused the enactment of stat. 7 Will. 3. c. 4., entitled "An act for preventing charge and expense in elections of members to serve in parliament," and begins with reciting "that grievous complaints are made, and manifestly appear to be true, in the kingdom, of undue elections of members to parliament, by excessive and exorbitant expenses, contrary to the laws, and in violation of the freedom due to the election of representatives for the Commons of England in parliament, to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments;" and "that all elections of members to parliament may be hereafter freely and indifferently made, without charge or expense," then enacts, "that no person or persons hereafter to be elected to serve in parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, after the teste of the writ of summons to parliament, or after the teste or issuing out or ordering of the writ or writs of election, upon the calling or summoning of any parliament hereafter, or after any such place becomes vacant hereafter, in the time of this present or of any other parliament, shall or do hereafter by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to serve in parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, directly or indirectly, give, present, or allow, to any person or persons, having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall, at any time hereafter, make any promise, agreement, obligation, or engagement, to give, or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, town, borough, port, or place in general, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, place or places, in order to be elected, or for being elected, to serve in parliament for such county, city, borough, town, port, or place."

"That every person and persons so giving, presenting, or allowing, making, promising, or engaging, doing, acting, or proceeding, shall be, and are hereby declared and enacted, disabled and incapacitated, upon such election to serve in parliament for such county, city, town, borough, port, or place, and that such person or persons shall be deemed and taken" to be "no members in parliament, and shall not act, sit, or have any vote or place in parliament, but shall be, and are hereby declared and enacted to be, to all intents, constructions, and purposes, as if they had never been returned or elected members for the parliament." (2)

TREATING.

STATS. 7 WILL.
3. C. 4. AND 7
& 8 GEO. 4.
C. 37. S. 2.

Candidates after the teste of the writ, or after any such place becomes vacant, giving or promising any present or reward to any person having a vote, for being so elected.

Incapable to serve in parliament upon such election.

(1) 1 Stephens on Elections, 240.

been decided that it does. *Talbot's Forfar*

(2) It has been questioned whether the Treating Act applied to Scotland, but it has

case, 50.

**BRIBERY AND
TREATING.****Effect of the
Treating Act.**

The only effect of this act, as stated by Mr. Rogers (1), was to enact and declare, that all entertainment or refreshment given or allowed by a candidate, directly by himself or his agents, or indirectly, "by any other ways or means on his behalf, or at his charge," that is, "ways or means," resorted to by others at his desire or with his knowledge, without reference to the extent or extravagance of the entertainment, or to any corrupt intent, or to the effect it might have upon the result of the election, should, if given after the teste of the writ, or after a place became vacant, avoid the election, the object being, by this stern and inflexible provision, to put an end to treating at the election altogether, to stop candidates from setting up the plea of moderate or even necessary refreshment, and to take from the committee of privileges and elections, and from the House, all discretion as to their judgments upon the intent and effects of treating at such a time; a discretion which, if not grossly abused from personal or political motives, had been, at that period, to say the least, frequently exercised in an arbitrary and unsatisfactory manner.

Before teste of writ, no person can be complained of for treating.

Judgment of Lord Lyndhurst in *Hughes v. Marshall*.

Before the teste of the writ no person can be legally complained of for treating. The offence must also have been committed "in order to be elected, or for being elected," there must have been a providing by the candidate, or by some person legally authorised by him.

In *Hughes v. Marshall* (2) the defendants, who were supporters of Mr. Slaney at the election for Shrewsbury in July 1830, had, during four days of the election, given orders, either personally or by written tickets, to the plaintiff, an innkeeper, to supply with provisions, &c. upwards of a hundred voters in the interest of Mr. Slaney, and also other persons who were not voters, and had likewise themselves taken refreshment at the plaintiff's house; the bill amounted to 23*l.* 18*s.* 6*d.* The house had been opened by Mr. Slaney's committee after the polling commenced. A verdict having been found for the plaintiff, on a rule for a new trial, which was discharged, Lord Lyndhurst C.B., after citing the language of stat. 7 Will. 3. c. 4., said, "Now it is perfectly clear from these words, that, to bring a case within the above provision, the acts mentioned in the statute must be done by the candidate, that is, not by him only in his own person, but by him or by some person acting for him and on his behalf." His lordship likewise observed, "In the first place it does not appear, that the parties to whom these refreshments were furnished had not previously voted; in the next place, it does not appear, whether they resided in the town or came from a distance, which might make it requisite for them to have moderate refreshment."

Judgment of Mr. Baron Parke in *Thomas v. Harries*.

If a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, and orders supplies for the voters, he is personally liable to pay; and stat. 7 Will. 3. c. 4. will afford him no defence, if the goods were supplied entirely on his credit: thus, in *Thomas v. Harries* (3) Mr. Baron Parke observed, "If a person who is not himself a candidate, and who is not known to the party who supplies the refreshments to be the agent of a candidate, open a public-house at an election, and orders supplies for the voters, he is personally liable to pay; and the stat. 7 Will. 3.

(1) On Elections, 247.

(2) 2 C. & J. 118.

(3) 6 C. & P. 615.

c. 4., commonly called the Treating Act, will afford him no defence, provided that the goods were furnished entirely on the credit of the person who so ordered them."

**BRIBERY AND
TREATING.**

By stat. 7 & 8 Geo. 4. c. 37. s. 2., "no person to be hereafter elected to serve in parliament shall, after the teste of the writ of summons, or after such place becomes vacant in time of parliament, before his election, by himself or agent, directly or indirectly, give or allow to any person having a vote at such election, or to any inhabitant of the county, city, town, borough, port, or place, any cockade, ribbon, or other mark of distinction."

Stat. 7 & 8 Geo.
4. c. 37. s. 2.

Cockades and
ribbons not to
be given by
candidates.

And by section 3., "any person so giving or allowing shall, for every such offence, forfeit the sum of 10*l.* to such person as shall sue for the same, to be sued for and recovered in any of his majesty's courts of record, by action of debt, bill, plaint, or information."

Penalty.

IV. *The Declaration.*

**THE DECLARA-
TION.**

The venue is local. (1) In *Petre v. Craft* (2) an amendment was allowed in the King's Bench, in an action for a penalty under the Bribery Act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action, the particularity of the declaration making it appear probable to the court, that the plaintiff was proceeding on the same fact for which the action was originally brought, when laid by mistake in the wrong county, though there was no affidavit that it was the same. And in *Dover v. Mestaer* (3) such amendment was allowed, though it appeared, that there were distinct causes of action in the two different counties, upon an affidavit that the plaintiff proceeded on a mistake, in supposing that both causes of action could be proved in the county where the election was holden. But in the Common Pleas, where the defendant had put off the trial at the assizes on the absence of a witness, the court refused to let the plaintiff amend, by changing the venue to Middlesex.

VENUE.
Amendment of
venue.

By stat. 2 Geo. 2. c. 24. s. 11., "no person shall be made liable to any incapacity, disability, forfeiture, or penalty by this act laid or imposed, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, or penalty shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay."

**COMMENCE-
MENT AND CON-
SOLIDATION OF
ACTIONS.**

Stat. 2 Geo. 2.
c. 24. s. 11.

It is incumbent on the plaintiff to shew, that the action was commenced within that period, either by the record, or, in case it does not appear on the face of the record, that the action was commenced within the limited period, then by the production of the writ.

Where three actions were brought for bribery at an election of members of parliament, and in each action there were counts for forty different penalties for distinct acts of bribery, the court of King's Bench would not consolidate, on account of the difficulty of doing justice between the parties, if so many distinct acts of bribery were to be discussed in one action. (4)

Consolidation
of actions.

(1) *Antd.*, 1194.

(2) 4 *East*, 433.

(3) *Ibid.*

(4) 1 *Smith*, 423.

BRIBERY AND
TREATING.

PARTIES.

Two cannot be
jointly sued for
bribery.

Stat. 2 Geo. 2.
c. 24. s. 7.

When penalties
of the statute
are incurred by
the corrupter.

Judgment of
Mr. Justice
Patteson in
Henslow v.
Fawcett.

Any person, unless legally incapacitated, can maintain an action for a breach of the bribery acts.

In some cases the House of Commons will direct the attorney-general to prosecute those who have infringed the provisions of such statutes. (1)

There are some torts which in legal consideration may be committed by several, and for which a *joint* action may be supported against all the parties. Thus, a *joint* action may be brought against several for a malicious prosecution, or an assault and battery, or for composing, publishing, or signing a libel. (2) But, if in legal consideration the act complained of *could not have been committed by several persons*, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrong-doer only, or against each, must be brought. Therefore a joint action for debt on a penal statute will not lie against several in the case of bribery, for in law, it is a separate offence by each. (3)

Under stat. 2 Geo. 2. c. 24. s. 7., if a person give a promise, money, or other reward to a voter, in order to procure his vote for one candidate, although the voter afterwards vote for another candidate, the penalties of the statute are, it is said, incurred by the corrupter. (4)

So also the offence is committed by the corrupter, although the party bribed never intended to vote for the person on whose behalf the money was given, if the money was given and professedly accepted on the terms that he should so vote. (5)

A man cannot be said to have *procured* a voter to vote for a candidate if the vote be not actually obtained; but the offence of corrupting will be complete, though the vote be not given. Thus, in *Henslow v. Fawcett* (6) Mr. Justice Patteson said, "If it had been distinctly shewn, that the party never did *intend* to give his vote—that, in fact, all he did was for the purpose of entrapping the defendant,—my present impression is, that the offence of the corrupter would nevertheless be complete. Where the corrupter has done all that in him lay towards the corruption of the voter, I am not disposed to think, that the intention of the voter can affect the corrupter's liability. If that were otherwise, there would be this extraordinary result, that the voter who made the corrupt agreement, not intending to perform it, would be liable under the former part of the section, while the corrupter, who had completed the offence, as far as in him lay, would not be liable. If there be an actual agreement to corrupt, and money given by the corrupter in performance, on his part, of that agreement, I must say it seems to me, at present, that the corrupter is liable under this statute."

"It has been adjudged bribery to give money to forbear to vote, though the party has not forborne." (7)

(1) *Hindon case*, 1 Doug. Elect. 180. 4 ibid. 271. *Webster's case*, St. Alban's Election, 1841.

(2) 2 Saund. 117. (a.) n. 2. *Pencarvin v. Trapping*, Latch. 262. *Rex v. Benfield*, 2 Burr. 985. 1 Bac. Abr. Actions in general (C.). 58—65.

(3) *Griffiths v. Stratton* (in error), cit. 1 Chitt. Pl. 86.

(4) *Sulston v. Norton*, 3 Burr. 1235., vide etiam *Bush v. Ralling*, Sayer, 289., recog. in *Henslow v. Fawcett*, 3 A. & E. 57, 58.

(5) Per Patteson and Coleridge Js. in *Henslow v. Fawcett*, 3 A. & E. 51. 4 N. & M. 591, 592.

(6) 4 N. & M. 591.

(7) *Simeon*, 207.

The declaration should state by way of inducement the name of the county, city, or borough, where the election occurred, and the number of knights, citizens, or burgesses, entitled to be returned members of parliament for such place, under stat. 2 & 3 Will. 4. c. 45.

A copy of the election writ should then be set out, with an averment of its delivery to the sheriff, and, for boroughs, the precept of the sheriff to the returning officer, to proceed to an election, should likewise be averred.

It is not however requisite to set out the precept, or to state that the precept was returned. (1)

The holding of the election under the writ or precept, names of the candidates, and the precise nature of the offence, should then be detailed.

The nature and amount of the bribe must be accurately set forth, and when the declaration stated, "that the defendant received a gift or reward" (2), without specifying the nature of the bribe, whether money or goods, judgment was arrested after a verdict for the plaintiff.

An allegation, that the party corrupted gave his vote, or that he forbore to give it in consequence of the bribe, should be made. (3)

In an action on stat. 2 Geo. 2. c. 24. (4), the declaration recited the writ to the sheriff for the election of members to serve in parliament, and then proceeded to state, that the sheriff made his precept to the portreeve of the borough of Honiton, which concluded in these words: "and if the said election so made, distinctly and openly, under the seal of the portreeve, and the seals of those who should be present at such election, the said portreeve should certify to the said sheriff, so that the said sheriff should certify to his said majesty, in his said majesty's chancery, at the day and place aforesaid without delay, remitting to the said sheriff one part of the aforesaid indentures, so that the said sheriff might remit the same to his said majesty, annexed to his majesty's writ." The precept when produced at the trial had not the word "if;" upon which Eyre B. nonsuited the plaintiff for the variance. But the court of King's Bench set aside the nonsuit; and Buller J. said, "The declaration in this case is much longer than it need have been. There was no necessity to set out the precept; but, being set forth, the question is, whether the variance is or is not material? I think it is impossible for any person to read this part of the declaration, without knowing what it should be; every one must see by it, that the portreeve is absolutely to certify to the sheriff, &c. The insertion of the word 'if' is a mere mistake. The case of the *King v. Beach* (5) is much stronger than the present: there the court supplied a letter to make up a word, which was necessary in setting out an indictment; but here it was not necessary to state the precept at all. But it does not rest here only; there are other cases equally strong, as *Hendray v. Spencer* (6) and *Cuming v. Sibly* (7), which was an action for bribery. There, the declaration stated the precept to be directed to the mayor only; but the precept which was proved, was directed to the mayor and burgesses; and the only question in the case which was reserved for the opinion of the court, was, whether the precept that was proved, sup-

BRIBERY AND
TREATING.

STATEMENT OF
CAUSE OF AC-
TION.

Name of coun-
ty, &c. where
election oc-
curred.

Election writ.

Precept.

Holding of the
election.

Nature and
amount of the
bribe.

Judgment of
Mr. Justice
Buller in *King*
v. Pippet.

(1) *Mead v. Robinson*, Willes, 422.

(2) *Davy v. Baker*, 4 Burr. 2471.

(3) *Bush v. Ralling*, Sayer, 289.

(4) *King v. Pippet*, 1 T. R. 235.

(5) Cowp. 229.

(6) *Sittings at Westminster after Michael-*
mas, 1773.

(7) E. T. 9 Geo. 3. C. B.

**BRIBERY AND
TREATING.**

ported the declaration? The court of Common Pleas was of opinion that it did, and gave judgment for the plaintiff. In that case there was a variance in the person to whom the precept was directed; but the court was of opinion, that if it were the same in substance, as that which was set forth in the record, it was sufficient, unless the tenor was stated: so in this case, the variance, to have any effect, must be a variance of sense, and of something material."

**INDEMNIFICA-
TION AGAINST
BRIBERY.**

Stat. 2 Geo. 2.
c. 24. s. 8.

V. Indemnification against Bribery.

By stat. 2 Geo. 2. c. 24. s. 8., "if any person offending against this act shall, within the space of twelve months next after such election as afore-said, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act."

The person who
will be consi-
dered the first
discoverer.

As to the person who will be considered the first discoverer, in order to be indemnified from the penalties under this statute, it has been decided, that the circumstance of a party having been within the limited time a plaintiff in an action on the statute, and having prosecuted it to judgment, does not prove him to be the first discoverer. Lord Mansfield C. J. observed, "That the court had not said, nor would say, that a plaintiff cannot be the discoverer: but the act of parliament does not make him so, or consider him as the discoverer. Here is no evidence that the plaintiff was the discoverer; and another person must have been the witness, for the plaintiff could not be the witness himself: it is not to be presumed, without any evidence at all of it, that the plaintiff in the action was the discoverer." (1)

Making an af-
fidavit will be
a sufficient dis-
covery to in-
demnify the
discoverer.

Making an affidavit will be a sufficient discovery to indemnify the discoverer, and from that period will serve as a bar to all actions under the foregoing statute, and a discharge from all penalties and liabilities, even though the discoverer has been convicted of bribery since his discovery; but if an action for bribery be actually commenced against the discoverer *previous* to the discovery, and prosecuted to conviction, he will be liable to all the penal consequences. (2)

Delay of legal
proceedings.

If, however, the discoverer after making his affidavit were to delay the legal proceedings beyond a reasonable period, such delay would be considered "wilful," and he could not avail himself of the protection of the statute. (3)

Offenders dis-
covering others
indemnified.

Offenders against this act not having been before convicted, upon the discovery of another offender within twelve months, are indemnified and discharged from all penalties and disabilities then incurred. (4)

(1) *Curgenven v. Cuming*, 4 Burr. 2504.
1 Stephens' Corporation Acts, 106.

(2) *Sliby v. Cuming*, 4 Burr. 2464.

(3) *Petrie v. White*, 3 T. R. 5.

(4) The discovery of an offender who is already indemnified, is not sufficient to indemnify a person prosecuted. *Porchester*

(*Lord*) *v. Petrie*, K. B. E. T. 32 Geo. 3. In the case of *Heward v. Shipley* (4 East, 180.) it was held to be no objection to a witness under this clause of the act to prove such bribery, although a similar action was pending against the witness himself for bribery at the same election.

It is provided by stat. 2 Geo. 2. c. 24. that prosecutions shall be commenced within two years after the offence is committed ; but the 9 Geo. 2. c. 38., after reciting that act, and that "prosecutions may have been or may be commenced against persons offending against the said act, by suing out original or other writs or processes," "and such prosecutors may have delayed, or may delay, to serve the same, without giving the persons against whom such original or other writs or processes may have been or may be sued out, any notice thereof, by reason of which practice the said provision for limiting the time for the prosecution of persons offending against the said act is or may be evaded," enacts, "that no person shall be made liable to any incapacity, disability, forfeiture, or penalty, by the said act laid or imposed, unless such person has been or shall be actually and legally arrested, summoned, or otherwise served with any such original, or other writ or process, within the space of two years after any offence against the said act has been or shall be committed, so as the service of any such original or other writ or process hath not been, or shall not be prevented by such person absconding or withdrawing out of this kingdom."

**BRIBERY AND
TREASONING.**

Prosecution to be commenced within two years, stat. 9 Geo. 2 c. 38.

Defendants to be personally served with the process in two years after the facts.

In a civil action, no penalty takes place till judgment be given on the verdict, because an offender might prosecute another to verdict, and thereby secure his own indemnity, and then proceed no farther ; and consequently, a verdict *per se* will not constitute a conviction under the statute. (1)

Verdicts *per se* do not constitute a conviction.

The judgment, when obtained, will relate, for the purpose of the indemnity, to the time when the discovery was first made. (2)

Judgment relates to time of discovery.

VI. Evidence.

EVIDENCE.

The plaintiff must prove some bribe, or promise, or agreement, previous to voting.

Variance.

The material fact is, that the party was bribed to vote ; and where the declaration alleged that the party was bribed to vote for L. and E., and it was proved that he was bribed to vote for L. *and his friend*, it was held that the variance was not fatal. (3)

To prove the allegation that A. B. was a candidate, where the bribery was previous to the election, it is sufficient to show that a poll was demanded for him, for till then every one is a candidate for whom a poll is asked ; and that fact makes the person on whose behalf the bribe was given a candidate. (4)

To prove the allegation that A. B. was a candidate.

After the time of election, the poll-books are the proper evidence to prove that a particular person was a candidate. (5)

Poll-books.

A copy of the poll taken at the election, examined with the original, and signed by the returning officer, is admissible evidence ; for being signed by the officer, it may be considered as an original ; or if it be a signed copy, it is admissible in evidence as such, on the same ground as copies of books of a public nature, registers of births, marriages, burials, &c.

(1) *Sutton v. Bishop*, 1 W. Black. 665.
4 Burr. 2283,
(2) *Ibid*.

(3) *Combe v. Pitt*, 3 Burr. 1586.
(4) 2 Stark. Ev. 189. cit. *Anon.* Loft. 523.
(5) *Ibid*.

**BRIBERY AND
TREASON.****Proof of pre-
cept.**

In *Mead v. Robinson* (1), to prove the issuing of the precept, the under-sheriff produced the precept itself under the sheriff's official seal, together with the indenture, which indenture without the precept had been returned with the writ by the sheriff: it was objected, that the precept ought to have been returned with the indenture and filed in chancery, and that a copy of the precept or record ought to have been produced; but this objection was overruled, because it was not laid in the declaration that the precept was returned, but only that such precept issued, and *therefore* they were of opinion that the evidence was sufficient. (2)

In an action for bribery of one who had a vote at an election, the very offer to bribe is evidence against the defendant that the party solicited had a right to vote. (3)

Loan of money. Although the defendant took the note of the voter to whom the money was paid, and insists that it was a mere loan, it is a question for the jury whether it was not a gift. (4)

Wagers. A wager with a voter that he does not vote for a particular candidate is, as previously observed, within the statute (5), if it be to procure a particular vote. Thus, where the plaintiff and defendant were voters and partisans of the respective candidates, and had canvassed and taken decided parts on opposite sides before the bet was made; and it was stated in the first count of the declaration, that the bet was made before the poll began, and that both parties voted for their respective friends, and solicited other voters, Mr. Justice Buller said, "If you put the case of a wager between a voter and another person who is not one, it is a palpable bribe; it is a sum of money laid to procure a particular vote; and that case cannot be distinguished from the present; the bias is exactly the same, it is a pecuniary compensation;" but if two persons make a wager respecting a doubtful question, provided there be no fraud or colour in the case, such an act is not prohibited by any positive law, nor contrary to any principle of sound policy or morality. (6)

Competency of witness. A *particeps criminis* may be examined as a witness in both civil and criminal cases, notwithstanding the immorality or illegality of his conduct, provided that he has not been convicted of any crime that incapacitates him.

The person bribed is a competent witness. Thus, in an action of bribery, the person bribed is a competent witness, although, by stat. 2 Geo. 2. c. 24., the party who discovers the bribery of another is exempted from an action, and the witness intends to avail himself of this exemption by way of defence to an action pending against him for bribery, committed at the same election. (7) In these cases, as observed by Lord Ellenborough and Denison J., the statute gives a parliamentary capitulation to the witness notwithstanding his interest in the result of the cause; for it is not probable, that the legislature should intend to discharge one offender upon his discovering another, so that the latter might be convicted,

(1) Willes, 425.

(2) *Vide etiam* judgment of Mr. Justice Buller in *King v. Pippet*, ante, 1207.

(3) *Combe v. Pitt*, 3 Burr. 1586. *Rigg v. Cargenven*, 2 Wils. 395.

(4) *Sulston v. Norton*, 1 W. Black. 317, 318.

(5) *Anon. Lofft. 552. Allen v. Hearn*, 1 T. R. 60.

(6) *Jones v. Randall*, Cowp. 39. *Anon. Lofft. 552.*

(7) *Bush v. Ralling*, Sayer, 289. *Howard v. Shipley*, 4 East, 180. *Edwards v. Evans*, 3 ibid. 451. *Phillips v. Fowler*, cit. Sayer, 291.

without intending that the discoverer should be a competent witness. (1) No one, however, can be a witness for another whilst he is a party to the record; but a co-defendant may be rendered competent by entering a *nolle prosequi*. (2)

On a declaration for corrupting one Moor, and bribing him to vote for the defendant, it was held to be no defence to shew that Moor did not vote for the defendant. (3)

It will be a defence to an action under stat. 2 Geo. 2. c. 24. to prove that the payment was a voluntary payment after the election. Thus, Mr. Justice Bayley in *Huntingtower (Lord) v. Gardiner* (4) said, "The offence in the terms of the act is receiving or agreeing to receive a reward, to give or to forbear to give a vote; the plain meaning of which is, in order that he may give or forbear to give his vote. The words used are clearly prospective, not retrospective; and such an operation it probably was the intention of the legislature to give them when the act passed. Other parts of the statute may assist us in forming a judgment as to that intention. The first section prescribes an oath to be taken by each elector, that he has not received any sum of money, &c. or any promise or security for any money, &c. in order to give his vote. It has been argued, that the mischief is as great if money be received for having voted, as if it be taken in pursuance of an agreement to vote. Admitting that to be so, still it is plain that the oath only applies to that which passes before the election. The legislature might very easily have introduced into that clause the words, that the voter would not receive money, &c. for having voted, had it been intended to make that an offence. There is also another clause in the act which throws some light upon this question. The eighth section enacts, that any person discovering another offender, shall be himself indemnified against all penalties incurred by offending against the act. Now that discovery is to be made within a period of twelve months, which are to be computed from the time of the election. If then it be an offence to receive money after an election without any previous agreement, and that money be not paid within twelve months next after the date of the election, an offender against the act may be discovered, and yet the benefit of the eighth section will not be conferred upon the discoverer. It may for these reasons be well doubted, that the legislature intended to extend the penalty to such a transaction as was proved in this case; and the meaning of the words of the statute is plainly prospective; that therefore is the only operation which we are authorised to give them."

The presumption of a corrupt expectation or promise of reward has been received as evidence in cases of bribery. Thus, in the *City of Dublin* (5) it was resolved, "that the payment of money must be connected with a promise or expectation previous to voting, which the committee consider indispensable to the establishment of a charge of bribery;" but, if an equitable presumption be raised, by holding out a promise of reward to the voter, it would substantiate the allegation.

In an action for bribery on stat. 2 Geo. 2. c. 24. the courts will stay the

**BRIBERY AND
TREASONING.**

An action under stat. 2 Geo. 2. c. 24. cannot be maintained for a voluntary payment after the election.

Judgment of Mr. Justice Bayley in *Huntingtower (Lord) v. Gardiner*.

**PRESUMPTIVE
EVIDENCE.**

Equitable presumption.

STAY OF PROCEEDINGS.

(1) *Heward v. Shipley*, 4 East, 183., et Burr. 1235. *Bush v. Ralling*, Sayer, 289. per Denison J., Sayer, 290. *Phillips v. Fowler*, Pasch. 7 Geo. 2. C. B.

(2) *Man v. Ward*, 2 Atk. 237.

(4) 1 B. & C. 300.

(3) *Sulston v. Norton*, 1 W. Black. 317. 3

(5) F. & F. 205.

**BRIBERY AND
TREATING.**

proceedings, even after verdict, upon the clause of discovery (1), or if there has been any wilful delay in prosecuting the action. (2) But, until the defendant appears to the writ, the question as to the wilfulness of the delay does not arise. Therefore, where the writ was returnable on the first return of Trinity Term, 1821, and the plaintiff did not declare till the 1st of June, 1822, and no appearance had been entered for the defendant, the court held, that the proceedings could not be stayed under the above statute. (3)

**DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.****STATUTABLE
ENACTMENTS.****4. DEBT AGAINST SHERIFF FOR ESCAPE OF PRISONER.****I. Statutable Enactments.**

An escape is either negligent or voluntary: negligent, where the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to go at large. For a voluntary escape, an action will lie against the gaoler as well as against the sheriff, because he is a wrong-doer; but, for a negligent escape, it will only lie against the sheriff.

Debt lies
against a sheriff
when a person
in custody on
final process
escapes, by
equity of stats.
Westm. 2. and
1 Rich. 2. c. 12.

Debt lies against a sheriff where a person in custody on final process escapes by equity of stats. Westm. 2. and 1 Rich. 2. c. 12. by the party at whose suit the execution was (4); but an action on the case is the only remedy against the sheriff for the escape of prisoners who have been arrested on mesne process. The statutes of 13 Edw. 1. c. 11. and 1 Rich. 2. c. 12., being confined to escapes out of execution, but, at the same time, such statutes being in affirmance of the common law, have not taken away the common law remedy by action on the case, and it is at the election of the party to bring either the one or the other. (5)

Remedy by
statute gene-
rally pursued.

The remedy by statute is generally pursued, because, where an action on the case is brought for an escape, the jury are at liberty to give such damages as they shall think right under all the circumstances of the case, and a small sum is generally considered as sufficient in cases of great hardship against the gaoler: but when a prisoner escapes out of execution (6), and recourse is had to the provisions of stats. 13 Edw. 1. c. 11. and 1 Rich. 2. c. 12., the gaoler is placed in the same situation in which the original debtor stood, and the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ and the legal fees of execution.

Stat. 1 Anne,
st. 2. c. 6. s. 2.

By stat. 1 Anne, st. 2. c. 6. s. 2., the same remedy is given against sheriffs who permit the escape of persons who have been retaken on an escape warrant authorised by the first section of that statute.

Imprisonment making part of the debtor's punishment, against whom a judgment was had, and who could not pay, if, after the defendant had been

(1) *Sutton v. Bishop*, 4 Burr. 2287. 1 W. Black. 665., sed vide *Pugh v. Curgenven*, 3 Wils. 35. 2 Saund. 148. (b. c.), n. 1. where the party was put to his *audita querela*.

(2) *Petrie q. t. v. White*, 3 T. R. 5., sed vide *Irwin v. Manners* (Sir William), E. T. 44 Geo. 3. K. B.

(3) *Talmash (Bart.) q. t. v. Gardiner*, 1 D. & R. 512. 1 Stephens on Elections, 235—295.

(4) Bro. Abr. 19. 2 Inst. 382.

(5) *Burton v. Eyre*, Cro. Jac. 289.

(6) *Bonafous v. Walker*, 2 T. R. 126.

committed to prison on a *capias ad satisfaciendum*, he was seen at large, it was at all times deemed an escape in the sheriff. (1)

Debt lies for an escape against the sheriff, who permits a prisoner taken under a *ca. sa.* to go at large, although the sheriff returns not the writ (2); for there is a record of which the party shall take advantage, though the writ be not returned.

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

Prisoner al-
lowed to go at
large.

II. Where Action can be maintained.

If the officer take a defendant upon a *ca. sa.*, and allow him to go about with the officer's follower, before he takes him to prison, an action for an escape will lie against the sheriff. (3)

So where the officer, under a warrant upon a *ca. sa.* not having any clause of *non omittas* in it, entered a franchise and arrested the defendant, and suffered him to go at large without removing him:—It was holden, that an action for an escape would lie against the sheriff. (4)

Even if the officer allow a party arrested under a *ca. sa.* to go at large upon receiving from him the amount of the debt and costs, it will be an escape, and an action will lie against the sheriff. (5)

Upon a *habeas corpus* to a gaoler to bring a prisoner in execution before the court, the gaoler shall have a convenient time only for that purpose, and for carrying him back again to prison (6); which, if he exceeds, it is an escape.

But to persons taken on mesne process only, the sheriff might shew them what indulgence he pleased, provided he had them forthcoming at the return of the writ. (7) This proposition has, however, received a qualification from stat. 8 & 9 Will. 4. c. 27. s. 1. (8)

By stat. 8 & 9 Will. 3. c. 27. s. 1., "prisoners upon contempt or mesne process or in execution, committed to the custody of the marshal of the King's Bench or warden of the Fleet, shall be actually detained within the said prisons, or the respective rules of the same, until they shall be from thence discharged by due course of law; and if at any time the said marshal or warden or any other keeper of any prison shall suffer any prisoner committed to their custody, either on mesne process or in execution, to go or to be at large out of the rules of their respective prisons (except by virtue of some writ of *habeas corpus* or rule of court, which rule shall not be granted but by motion made or petition read in open court), every such going or being out of the said rules shall be adjudged and deemed an escape." And by section 8., "if the keeper of any prison, after one day's notice in writing, refuse to shew any prisoner committed in execution to the creditor or his attorney, such refusal shall be adjudged an escape." And by section 9. "if any person desiring to charge another with an action or execution, shall desire to be informed by the keeper of the prison whether such person be

WHERE ACTION
CAN BE MAIN-
TAINED.

Allowing pri-
soner to go
about with an
officer.

Entering a
franchise with-
out a clause of
non omittas.

Receiving debt
and costs and
not paying
them over.

WHAT SHALL
BE AN ESCAPE.

Time allowed
for bringing a
prisoner before
the court upon
a *habeas corpus*.

Persons taken
on mesne pro-
cess, sheriff can
shew in-
dulgence.

Stat. 8 & 9
Will. 3. c. 27.
s. 1.

(1) *Balden v. Temple*, Hob. 202.

(2) *Clipton's case*, cit. per Periam J. Cro. Eliz. 17.

(3) *Benton v. Sutton*, 1 B. & P. 24. *Hawkins v. Plomer*, 2 W. Black. 1048.

(4) *Piggott v. Wilkes*, 3 B. & A. 502.

(5) *Slackford v. Austen*, 14 East, 468.

(6) Resolved by all the judges, Cro. Car. 14, 466.

(7) 3 Black. Com. 415.

(8) As to cases in which arrest on mesne process is allowed, vide stat. 1 & 2 Vict. c. 110.

**DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.**

Negligent
escape.

a prisoner or not, the keeper shall give a true note in writing thereof to such person upon demand at his office for that purpose, or in default thereof shall forfeit the sum of 50*l.*, and such note shall be sufficient evidence that such person was at that time a prisoner in actual custody."

By this statute the rules are, to all intents and purposes, the same as the walls of the prison. A defendant in execution, who had the liberty of the rules of the Marshalsea prison, upon his giving security to the marshal, was proved to have been out of the rules for several days; but, on the marshal's hearing of the escape, was put in close custody before the action brought for the escape: — It was holden, that this was a negligent and not a voluntary escape; Mr. Justice Buller observing, "that an escape is not voluntary, unless it be with the consent or by the default of the marshal; but his allowing the rules of the prison is no default in him, because the law has given a sanction to it, and it cannot be inferred from thence, that he consented to the prisoner's escape, because he took security that the prisoner should not go beyond the rules, and immediately on his return the marshal had confined him in close custody; therefore this must be taken to be a negligent escape." (1)

Escape and
death of pri-
soner.

If the defendant escape, and fresh suit be made after him, but before he is retaken he dieth, an action will lie, and the fresh suit is no excuse unless he be retaken, for he died at large out of gaol. (2)

Distinction be-
tween void and
erroneous pro-
cess.

A distinction is to be observed between process which is void and that which is erroneous; for where the process is void, no action will lie against the sheriff for an escape; but it will when the process has been erroneous or irregular only (3); but the sheriff cannot take advantage of error in the process. (4)

**WHERE ACTION
CANNOT BE
MAINTAINED.**

Escape of pri-
soner by the
act of God or
the king's ene-
mies.

Prisoner not
taken to gaol,
but plaintiff
not delayed or
prejudiced.

Prisoner must
have been le-
gally arrested
by the sheriff's
officers.

III. Where Action cannot be maintained.

If prisoners escape by the act of God, or the king's enemies, it will excuse the sheriff (5); but it is otherwise if the prisoners escape from the lawless proceedings of the queen's subjects. (6) No action as for an escape will lie against the sheriff for his officer keeping the defendant in his custody after the return of the writ, instead of taking him to prison, if the plaintiff have not been thereby delayed or prejudiced in his suit. (7)

In no case will the sheriff be liable for an escape, except the person who has escaped has been in actual custody; that is, unless legally arrested by his own officers, handed over to him in the gaol by the former sheriff, or regularly delivered into custody.

1. "The prisoner must have been legally arrested by the sheriff's own officers: — for where the plaintiff, having taken out a *capias ad satisfaciendum* against the defendants, sent it to Painter his agent in Cornwall, he applied to the sheriff for a warrant directed to Painter's own clerk, assigning as a

(1) *Bonafous v. Walker*, 2 T. R. 126.

(2) *Gilb. Execution*, 85.

(3) *Shirley v. Wright*, 1 Salk. 273. *Bushe's case*, Cro. Eliz. 188. *Gold v. Strode*, Carth. 148. 2 Esp. N. P. 115.

(4) *Burton v. Eyre*, Cro. Jac. 289.

(5) 1 Rol. Abr. Escape (D.), 806. *Alsept v. Eyles*, 2 Hen. Black. 113.

(6) *Southcote's case*, 4 Co. 84. *Elliott v. Norfolk (Duke of)*, 4 T. R. 789. *O'Neil v. Marson*, 5 Burr. 2812. Stat. 20 Geo. 3. c. 64.

(7) *Planck v. Anderson*, 5 T. R. 37.

reason for not applying to the under-sheriff, that the under-sheriff was attorney for one of the defendants: the sheriff, after some objection, granted a warrant to Rogers, Painter's clerk, who arrested, and suffered the defendant to escape:—It was held that the sheriff was not liable in this case, nor in any case where a special bailiff is appointed on the nomination of the plaintiff himself; for he must take the consequence of all his acts, particularly as by such means the sheriff might be charged either by their fraud or neglect. (1)

2. "Or he must be handed over to him in gaol by the former sheriff:"—for where the old sheriff had a person in custody in a private house and would there have assigned him over to the new sheriff, who refused to accept him, and the prisoner escaped, it was adjudged to be an escape in the old sheriff, but not in the new; for the prisoners can only be assigned in the common gaol. (2)

3. "Or regularly delivered into custody" in order to subject the sheriff to an escape:—for where the prisoner was out on bail, and came and surrendered himself in discharge of his bail, by entering a *reddidit se* in the judge's book, the plaintiff's attorney accepted him in execution, and filed a *committitur* with the officer, and afterwards the prisoner escaped, this action was held not to lie against the marshal, for he was not chargeable without notice, which should be done either by serving him with a rule, or entering a *committitur* also in his book. (3)

If a sheriff arrest a person on mesne process, and he is rescued in going to gaol, the sheriff is not liable, because he cannot be supposed to have the *posse committatus* there with him. (4) But if such person be once within the walls of the prison after the arrest on mesne process, the sheriff will be liable, except when rescued by the king's enemies, or by the act of God. (5)

And the law is the same in the case of arrests on final process (6); for wherever the sheriff has time to prepare the *posse committatus*, he will be liable in case of a rescue. (7)

If the party at whose suit the arrest was made, elect to proceed against the rescuers, it seems that the sheriff would be discharged. (8)

In general, to charge the sheriff or his officers with an escape, it must have proceeded either from connivance, from neglect, or want of due care; and therefore, in all cases where the sheriff or his officers are acting under proper authority, and an escape happens, he is excused. Therefore, where in an action for an escape against the marshal, he gave in evidence that the person in prison had been let out to bail by order of the court to prosecute the attain, it was held a good justification; for it was not done out of his own head, but by command of the justices. (9)

In the case of voluntary escapes, the action lies against the officer permitting it, and the sheriff seems to be discharged if the party proceed against the officer.

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

Must be handed
over in gaol by
the former
sheriff.

Or he must be
regularly de-
livered into
custody in
order to sub-
ject the officer
to an escape.

If rescue of
prisoner occur
while going to
gaol, sheriff ir-
responsible;
sed aliter, if in
prison.

Party at whose
suit arrest was
made electing
to proceed
against the
rescuers.

To charge
sheriff with an
escape, it must
have proceeded
either from
connivance, ne-
glect, or want
of due care.

VOLUNTARY
ESCAPES.

Sheriff dis-
charged where
party proceeds
against the
officer.

(1) *De Moranda v. Dunkin*, 4 T. R. 120.
Hamilton v. Dalziel, C. B. Hill, 1774, cit.
per Buller J. in *ibid*.

(2) *Dawbridgecourt's case*, cit. Cro. Eliz.
366.

(3) *Watson v. Sutton*, 1 Salk. 272.

(4) *May v. Proby*, Cro. Jac. 419. *Clerk's*
case (*Sir William*), Cro. Eliz. 873.

(5) 1 Rol. Abr. Escape (D.), 808. *South-*
cote's case, 4 Co. 84. (a.)

(6) 1 Rol. Abr. Escape (D.), 808.

(7) *Crompton v. Ward*, Str. 429.

(8) *Mynn v. Coughton*, Cro. Car. 109.
Congham's case, Hutt. 98.

(9) *Vast v. Gaudy*, Cro. Eliz. 5. *Field v.*
Jones, 9 East, 151.

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

RECAPTION.

From the voluntary escape of a prisoner, the gaoler becomes a wrong-doer.

By whom prisoner can be retaken, and against whom action can be sustained.

Subsequent assent of plaintiff, will not purge a voluntary escape.

Escape without default of gaoler.

NEGLIGENT
ESCAPE.

By whom prisoner can be taken, and against whom action will lie.

IV. *Recaption.*

Whenever the gaoler suffers a voluntary escape, from that moment he is a wrong-doer; and though the original defendant returns, and the plaintiff proceeds against him to judgment after his return, yet it is no waiver of the action against the gaoler, but he may still be sued for damages. (1)

In the case of voluntary escapes the gaoler cannot retake the prisoner (2); but the plaintiff may by an escape warrant, and proceed against him to judgment, or against the gaoler; this is in the case of mesne process. (3)

But if the party so suffered to escape was in execution, the plaintiff may retake him after the twelvemonths without a *scire facias*, for he is on the first execution (4); and this, though the plaintiff had recovered in an action against the gaoler, if the sum recovered was less than the debt. (5)

As the judgment remains still in force, the plaintiff may either bring debt (6), or *scire facias* (7), on the judgment; or sue out another writ of *capias ad satisfaciendum* (8), or of *feri facias* (9); and if the plaintiff die, his personal representatives may have a *scire facias*. (10)

In the case of a voluntary escape, no subsequent assent of the plaintiff in the action can purge it; for where to a *scire facias quare executionem non*, &c. upon a judgment, the defendant pleaded that he had formerly been taken in execution on a *ca. sa.* upon the same judgment, and by the sheriff suffered to escape, to which escape the plaintiff consented: — It was held no plea, for the subsequent assent could not make it an escape with the consent of the plaintiff, but that he may either sue the sheriff or retake the party. (11)

The circumstance of an escape having been without any default on the part of the gaoler, will not afford a justification. (12)

In the case of negligent escapes, the gaoler may at any time retake the prisoner (13); though if the defendant escape out of prison, and the plaintiff send a discharge while he be so at large, the gaoler cannot justify retaking him for his fees. (14)

The prisoner must be taken on a fresh suit to justify, or to excuse the sheriff, and though he may have been out of sight even for a day and a night, yet may the recapture be deemed fresh suit, and the sheriff be excused; and though the prisoner might have fled into another county, yet may the sheriff there retake him on a fresh suit. (15)

But the recaption must be before action brought, or it shall not be deemed fresh suit; for where it appeared that the recaption was not till after the action had been commenced, the marshal was held to be liable

(1) *Ravenscroft v. Eyles*, 2 Wils. 294.

(2) *Featherstonhaugh v. Atkinson*, Barnes, 373., recog. in *Atkinson v. Jameson*, 5 T. R. 25.

(3) *Per* Wilmot C. J. in 2 Wils. 295., cit. *Key and Briggs*, Skin. 582.

(4) *Lenthall v. Gardiner*, Bull. N. P. 69.

(5) *Collop v. Brandley*, ibid. *Pitcher v. Bailey*, 8 East, 171.

(6) *Buxton v. Home*, 1 Show. 174.

(7) *Alanson v. Butler*, 1 Lev. 211. *Allen v. Vinter*, Sir T. Jones, 21.

(8) *Anon.* 1 Vent. 4.

(9) *Ibid.*

(10) *Sudall v. Wytham*, 2 Lutw. 1264.

(11) *Scott v. Peacock*, 1 Salk. 271.

(12) *Alsept v. Eyles*, 2 Hen. Black. 108.

(13) F. N. B. 130.; or the plaintiff, per cur. in *Allanson v. Butler*, 1 Sid. 330.

(14) *Willing v. Goad*, Str. 909.

(15) *Rigwaie's case*, 3 Co. 52.

for the escape from his prison. (1) And where the recaption was upon the day on which the action was commenced, the officer was held not to be discharged, the right of action having attached to the plaintiff. (2)

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

If the escape was involuntary, and the party return of himself before action brought, and be in prison, it will excuse the officer, for it is tantamount to a recapture on fresh suit. (3)

INVOLUNTARY
ESCAPE.

The judgment is satisfied by the discharge of the prisoner (once in execution), with the consent of the creditor; the creditor loses the benefit of his judgment, and is deprived of every remedy upon it, as well by action of debt (4), or writ of execution against the goods (5), as by writ of execution against the person; and he can never resort to the judgment again for the purpose of enforcing it in any manner, although the party in execution has been discharged on an undertaking to pay the debt by instalments (6), or to render himself on a given day (7); or to pay the debt at a future time (8); and on failure thereof, that he should be liable to be taken in execution again (9), or discharged upon giving a fresh security to satisfy the judgment, which was afterwards defeated on account of a mere informality (10); or on an agreement by the defendant (11) on his being discharged out of custody with the plaintiff's consent, that the judgment should stand revived for twelve months.

Escape of prisoner with consent of plaintiff.
Judgment satisfied if prisoner escape with consent of creditor.

So where a bond was conditioned for surrender of a debtor who had been discharged out of execution (12) with the creditor's consent on a certain day, so that the debtor might be again taken in execution, the condition was holden void.

If one of several defendants be taken on a joint *ca. sa.*, and discharged by the plaintiff's order, the plaintiff cannot afterwards take any of the other defendants (13); but a discharge by act of law, or under an insolvent debtors' act, of one of several defendants taken on a joint *ca. sa.*, has been holden not to operate as a discharge of the other defendants. (14)

If a prisoner be discharged by the order of a court not having jurisdiction, the creditor may retake him on an escape warrant. By stat. 8 & 9 Will. 3. c. 27. s. 7., "if a prisoner committed in execution to prison shall escape from thence by any ways or means, the creditor at whose suit such prisoner was charged in execution at the time of his escape, may retake him by any new *capias* or *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if such prisoner had never been in execution."

Prisoner in execution discharged by incompetent jurisdiction.

Stat. 8 & 9
Will. 3. c. 27.
s. 7.

V. Relief of Debtors in Execution for small Debts.

It may not perhaps be considered irrelevant to observe, that, by stat. 48 Geo. 3. c. 123., "all persons in execution upon any judgment obtained in any court, whether such court be or be not a court of record for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered

RELIEF OF
DEBTORS IN
EXECUTION FOR
SMALL DEBTS.

Stat. 48 Geo. 3.
c. 123.

(1) *Whiting v. Reynel* (Sir George), Cro. Jac. 657. *Stonehouse v. Mullins*, Str. 873.

(2) *Bail v. Briggs*, 1 Jones, (Irish) 145.

(3) *Chambers v. Gambier*, Com. 554. *Bonafous v. Walker*, 2 T. R. 126.

(4) *Vigers v. Aldrich*, 4 Burr. 2482.

(5) *Tanner v. Hague*, 7 T. R. 420.

(6) *Vigers v. Aldrich*, 4 Burr. 2482.

(7) *Clark v. Clement*, 6 T. R. 525.

(8) *Tanner v. Hague*, 7 *ibid.* 420.

(9) *Blackburn v. Stupart*, 2 East, 243.

(10) *Jaques v. Withy*, 1 T. R. 557.

(11) *Thompson v. Bristow*, Barnes, 165.

(12) *Da Costa v. Davis*, 1 B. & P. 242.

(13) *Clark v. Clement*, 6 T. R. 525.

(14) *Nadin v. Battie*, 5 East, 147.

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by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may upon his or their application in term time to one of the superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution by rule or order of such court."

The word "damages" in the foregoing statute comprehends damages for an assault. (1)

Under the foregoing statute a prisoner is not entitled to his discharge after remaining in execution twelve months, if the debt exceed 20*l.*, although the excess consists of interest only, which has accrued after action brought. (2)

**THE DECLARA-
TION AND
PLEADINGS.
VENUE.**

VI. The Declaration and Pleadings.

If a prisoner escape in Essex, and is seen at large in Hertfordshire, the venue may be laid in Hertfordshire. (3)

Plaintiff cannot remove his prisoner from an inferior to a superior jurisdiction to answer a new action for the same debt.

If a creditor have arrested a debtor by process out of an inferior court, he cannot by *habeas corpus ad respondendum* (4) remove him into the custody of the court of Queen's Bench to answer to a new action there for the same debt.

It has been previously stated, that debt lies against a sheriff, where a person in custody on final process escapes; by the equity of stats. Westm. 2. (13 Edw. 1. c. 11.) and 1 Rich. 2. c. 12., by the party at whose suit the execution was. (5)

PARTIES.
Who may sue.
Prisoner taken on a *capias utlagatum*.

Detainer lodged against prisoner.

Executor.

In *Moor v. Reignalls (Sir George)* (6), the action, which was for an escape of a prisoner who had been taken on a *capias utlagatum* after judgment, was brought at the suit of the party only, it was objected that it ought to have been *tam pro domino rege quam pro seipso*, but the prothonotaries certifying that the precedents had been both ways, the objection was disallowed.

If while the defendant be in the custody of the sheriff, in an action at the suit of A., a writ be lodged in the office of the sheriff at the suit of B., and the defendant escape, A. as well as B. may sue for the escape. (7)

An executor can sue in his own right on a judgment obtained by him, whether in his representative character or not (8); and he can support debt for an escape on final process (9):—but it has been doubted, whether an executor could sue for an escape on *mesne process* in the lifetime of his testator, although it seems that on principle he might. (10)

Cases of rescue.

In cases of rescue, the party at whose suit the arrest was made may maintain his action either against the sheriff or against the rescuers. (11)

(1) *Winter v. Elliott*, 1 A. & E. 24.

(2) *Cooper v. Bliss*, 2 Dowl. P. C. 749.

(3) *Walker v. Griffith*, M. T. 25 Geo. 2. cit. Bull. N. P. 67.

(4) *Melsome v. Gardner*, 1 Cowp. 116. cit. per Lord Tenterden C. J. in *Rogers v. Jones*, 7 B. & C. 90.

(5) Bro. Abr. 19. 2 Inst. 382.

(6) Cro. Jac. 619, 620., recog. in *Throgmorton v. Church*, D. P. 1 P. Wms. 693.

(7) *Benton v. Sutton*, 1 B. & P. 24. *Jackson v. Humphreys*, 1 Salk. 273.

(8) *Bonafous v. Walker*, 2 T. R. 126.

(9) *Berwick v. Andrews*, 1 Ld. Raym. 973.

(10) 1 Chitt. Pl. 69. cit. 1 Vent. 31. 1 Rol. Abr. 912. Latch. 168. Sir W. Jones, 173. 4 Mod. 404. Cro. Car. 297. Vin. Abr. Executors (P.), pl. 2. acc. 1 Ld. Raym. 973. 12 Mod. 72. 1 Salk. 12. contra. Owen, 99. 7 East, 134. 136.

(11) *Mynn v. Coughton*, Cro. Car. 109. *Congham's case*, Hutt. 98.

The nominal plaintiff in an action for mesne profits can sue for an escape from a *ca. sa.* upon a judgment thereon. (1)

The hundred can sue for an escape on a judgment obtained by them. (2)

By stat. 3 Geo. 1. c. 15. (repealed as to some of its provisions by stat. 3 & 4 Will. 4. c. 99.) s. 8., in case of the death of the high-sheriff, the under-sheriff shall execute his office until another sheriff be appointed, and shall be answerable for the execution of the office in all things during that interval, as the high-sheriff would have been if living.

If a sheriff die, the new sheriff *ex necessitate* must at his peril take notice of all persons in custody, and of the several executions wherewith they are charged. (3)

All actions for a breach of duty in the office of sheriff should be brought against the high-sheriff, although arising from the default of the under-sheriff or sheriff's officer (4): and even when a sheriff's officer arrested and detained a defendant under pretence of a warrant, which had been issued on a *fieri facias*, the court held, that the defendant might maintain trespass for it against the sheriff. (5)

It is against the sheriff, in whose time the escape occurred, that the action must be brought, although the officer continue to be the officer of the new sheriff, and the new sheriff have returned the writ. (6)

If the old sheriff at the expiration of his office omit to turn over a prisoner by assignment to the new sheriff, he is liable for an escape (7): thus, in *Davidson v. Seymour* (8) Chief Justice Abbott said, "At all events the debtor was not comprised in the indenture by which his predecessor delivered over his prisoners to him. That ceremony is necessary to the change of custody."

If there be two sheriffs, the action must be brought against both, for the two persons make but one sheriff. (9)

Where there are two sheriffs who suffer an escape, and one dies, the action may be continued against the survivor. (10)

If the prisoner returns to prison after a voluntary escape (11), the plaintiff may admit him to be in execution; and if he be turned over to a new sheriff, &c. and afterwards escape, the plaintiff may bring an action against the new sheriff for such escape.

The marshal of the King's Bench permitted a prisoner in execution to escape (12), who afterwards returned to prison again, the marshal died, and his successor permitted the same person to escape again:—It was holden, that the second marshal was liable for this escape, and that the escape permitted by his predecessor did not discharge him.

By stat. 37 Geo. 3. c. 112., justices of the peace were authorised (13), at the first or second general quarter session or general session, to be holden

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

Nominal plain-
tiff in action for
mesne profits.

The hundred.

WHO MAY BE
SUED.

Death of
sheriff.

Action for
breach of
duty in the
office of sheriff
should be
brought against
the high-sheriff;

must be brought
against the
sheriff in whose
time the escape
occurred.

Prisoner must
be regularly as-
signed to fix
the new sheriff.

Where there
are two sheriffs,
the action must
be brought
against both.

Stat. 37 Geo. 3.
c. 112.

(1) *Doe v. Johnson*, 2 M. & S. 473.

(2) *Lawress (Hundred of) v. —*, Fitz. 296.

(3) 3d res. in *Westbies' case*, 3 Co. 72. (b.), affirmed on error in Exch. Ch. Cro. Eliz. 366.

(4) *Cameron v. Reynolds*, Cowp. 403.

(5) *Smart v. Hutton*, 2 N. & M. 426.

(6) *Rex v. Middlesex (Sheriff of)*, 4 East, 604.

(7) *Westbies' case*, 3 Co. 71. (b.)

(8) M. & M. 35., sed vide *Poulter v. Greenwood*, Barnes, 367.

(9) *Ryding v. Edwin and Fleet, &c.* Carth. 145.

(10) *Bennion v. Watson*, Cro. Eliz. 625.

(11) *James v. Peirce*, 1 Vent. 269., in which the case of a sheriff of Essex in Hob. 202. is denied to be law.

(12) *Lenthal v. Lenthal*, 2 Lev. 109.

(13) *Brown v. Compton*, 8 T. R. 424., in which *Orby v. Hales* (1 Ld. Raym. 3.) was overruled.

**DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.**

Actions under
an illegal order
of magistrates.

after the passing the act or some adjournment thereof, to discharge insolvent debtors under certain circumstances. The justices of the county of S., at a general quarter session holden by adjournment," after the passing the act, but which appeared to have been an adjournment of a session holden before the act, ordered the gaoler of the sheriff's gaol to discharge an insolvent who was in custody of the sheriff in execution. It was holden, that this adjourned session not being an original session, holden after the passing of the act, nor an adjournment of such a session, had not any jurisdiction under this act; and, as the court of general session or general quarter session had not, independently of this act, any authority over a person charged in execution in a civil suit, the proceeding was *coram non judice*, and consequently the sheriff being responsible for the act of his servant, was liable to the party at whose suit the insolvent was in custody for the escape, agreeably to the rule laid down in the case of the *Marshallsea* (1), and that when the court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action lies against the officer who executes the process of the court.

Husband and
wife in execu-
tion, but wife
escaped.

If husband and wife be taken in execution, and the wife be suffered to escape, although the husband continue in prison, an action will lie against the sheriff for the escape, and in which action the whole debt can be recovered. (2)

Bailiff of a
liberty taking
prisoner to
wrong place
of custody.

The bailiff of a liberty (3), who had the execution and return of writs, was held to be liable to an action of debt for an escape, for removing a prisoner in his custody in execution to the county gaol situate out of the liberty, and there delivering him into the custody of the sheriff.

Heir or exe-
cutor of sheriff.

No action can be maintained against the heir or executor of the sheriff. (4)

STATEMENT OF
CAUSE OF AC-
TION.

The declaration should aver the escape of the prisoner, and likewise shew that he was lawfully in custody and how. (5)

Averment of
escape of pri-
soner.

If a prisoner be in the custody of the sheriff (6), and brought by *habeas corpus* before a judge, and committed to a different custody, *e. g.* to the custody of the marshal of the King's Bench, who suffers him to escape, in an action against the marshal for such escape it must be averred in the declaration, that the commitment was of record, otherwise it will be bad on special demurrer; for the prisoner is not in point of law in the marshal's custody until the commitment is entered of record. (7)

THE JUDG-
MENT.

The judgment must be stated, and that it is in force and unsatisfied, and if there be a substantial variance, it will be fatal; thus stating the judgment to be on certain promises and undertakings, when it was only on a promise and undertaking, would be bad. (8)

Stating a judgment of the court of "Queen's Bench" to have been recovered "in the court of the bench," would be bad. (9)

If, however, the judgment be substantially proved as alleged, it will answer. Thus, where the judgment was stated to have been recovered as of Trinity Term, and the proof was of a judgment of Easter Term, it was held

(1) 10 Co. 76. (a.)

(2) 1 Rol. Abr. Escape (F.), 810.

(3) *Boothman v. Surry* (Earl of), 2 T. R. 5.

(4) 2 Chitt. Pl. 267. *n. cit.* Dyer, 271. 322. 1 Ld. Raym. 299.

(5) *Brazier v. Jones*, 8 B. & C. 130.

(6) *Wightman v. Mullens*, Str. 1226., recog.

(7) *Turner v. Eyles*, 3 B. & P. 461.

(8) Sed vide *Wigley v. Jones*, 5 East, 440.

(9) *Edwards v. Lucas*, 5 B. & C. 339.

(9) *Mill v. Pollon*, 7 Taunt. 271.

to be immaterial, and this although the declaration referred to the record of the judgment, for such reference was surplusage. (1)

DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.

So where the declaration stated,—that the plaintiff recovered a judgment against H. W., and that in Trinity Term afterwards, such proceedings were had in the said court; that it was considered that the plaintiff should have execution against H. W. for the damages, as appeared by the record thereof; and that thereupon a *ca. sa.* was issued, and H. W. committed to the marshal's custody in execution—it was considered unnecessary to prove the judgment on the *scire facias*, and that any variance in the statement of it was not material. (2)

If upon a judgment by an intestate (3), his administrator brings a *scire facias*, and has judgment, whereupon a *ca. sa.* issues, and the defendant is taken and permitted to escape, in an action against the sheriff for such escape, the plaintiff may declare briefly on the judgment in the *scire facias*, without setting forth the gradual proceedings at length.

The teste of the *capias ad satisfaciendum*, the writ, whether a *testatum*, or *non omittas ca. sa.*, is to be set out *verbatim*, or according to the substance.

THE WRIT.

The word "damages," when the writ is for "damages and costs," is not a variance (4), for costs are in a legal sense included in the word "damages."

It is sufficient to allege, that the writ directing the arrest was duly indorsed for bail, without adding, "by virtue of an affidavit made and filed of record."

An amendment of any mistake may it seems be allowed. (5)

AMENDMENT.

In *Brazier v. Jones* (6), which was an action against the marshal for an escape, the bill was entitled generally of Michaelmas Term, and the escape was alleged to have taken place on the 15th of November. There was a special demurrer, for that the cause of action appeared to have accrued after the first day of the term, to which the bill had relation. The court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit, that the prisoner had returned into the custody of the marshal, before any application for liberty to amend was made.

By Reg. Gen. Hilary Term, 4 Will. 4. r. 4. s. 1., in an action for an escape, the plea of not guilty will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

PLEADINGS.
Reg. Gen. H.
T. 4 Will. 4.
r. 4. s. 1.

By stat. 8 & 9 Will. 3. c. 27. s. 6., "no retaking on fresh pursuit shall be given in evidence, on the trial of any issue, in any action of escape against the marshal, his deputy, or keeper of any prison, &c. unless the same be specially pleaded; nor shall any special plea be taken, received, or allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner, for whose escape such action is brought, did without his consent, privity, or knowledge, make such escape." (7)

It is not necessary in the pleas to traverse a voluntary escape. (8)

A plea to an action for an escape, that defendant forcibly escaped, but

Escape of pri-

(1) *Stoddart v. Palmer*, 3 B. & C. 2. (5) Stat. 9 Geo. 4. c. 15. 3 & 4 Will. 4. *Phillips v. Shaw*, 4 B. & A. 435. 5 *ibid.* c. 42. s. 29. *Barns v. Eyles*, 8 Taunt. 515. 964. 2 Chitt. Pl. 268. (6) 6 B. & C. 196.

(2) *Bromfield v. Jones*, 4 B. & C. 380.

(3) Per cur. in *Gold v. Strode*, Carth. 146.

(4) *Phillips v. Bacon*, 9 East, 298.

(7) As to the form of affidavit, vide *West v. Eyles*, 2 W. Black. 1059.

(8) 1 Saund. 35. n. 1. 2 Chitt. Pl. 268.

**DEBT AGAINST
SHERIFF FOR
ESCAPE OF
PRISONER.**

soner, but sub-
sequent return.
EVIDENCE.

has since returned, is a good defence to an action for an escape, but must be pleaded specially. (1)

VII. Evidence—Process—Limitation of Action—Damages.

The plaintiff must prove on debt against the sheriff, 1. An examined copy of the record or judgment; 2. The issuing and delivery to the defendant of the writ of *ca. sa*; 3. The arrest; 4. The escape.

If the process has been returned, an examined copy of the writ and return will be evidence of the issuing of the process, and its subsequent delivery to the sheriff. If not returned after proof of notice to produce, and search made at the proper office, secondary evidence will be admissible; and the sheriff is bound by his return, both as to the fact and time of the arrest. (2)

Respecting evidence of the arrest, if the debtor be seen abroad after the return of the writ, and that bail has not been put in, it will be evidence of an escape. (3)

An admission of the escape by the under-sheriff is evidence against the sheriff, and the party escaping may be called to prove a voluntary escape (4); for though the whole debt may be recovered against the sheriff, yet in an action against the original debtor for the debt, he can neither plead in bar, nor prove in evidence in reduction of damages, the judgment obtained in the action against the sheriff. (5)

If the writ has not been returned, evidence must be given to connect the bailiff and the sheriff.

PROCESS.

**LIMITATION
OF ACTION.**

Stat. 3 & 4
Will. 4. c. 42.
s. 3.

DAMAGES.

The process in actions against the sheriff is by writ of summons, as in ordinary non bailable actions.

By stat. 3 & 4 Will. 4. c. 42. s. 3., this action must be commenced and sued within six years after the cause of such action.

If the party proceed by action of debt, against the sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, that is, the sum indorsed on the writ, and the legal fees of execution (6); if he can still recover the debt, the damages may be diminished accordingly. (7) If there has been no misconduct in the sheriff, or if the defendant who escaped was insolvent, so that, although he had not escaped, the party would have had no fruit from his action, the damages are generally nominal. (8)

5. DEBT FOR RENT ARREAR.

I. Statutable Enactments.

**DEBT FOR
RENT AR-
REAR.**

**STATUTABLE
ENACTMENTS.**

At common
law no action
of debt lay
for the ar-
rears of a free-
hold rent.

At common law no action of debt lay for the arrears of a freehold rent during the continuance of the lease. (9) But after the determination of the estate for life, the arrears then due were recoverable at common law by

(1) *Bonafous v. Walker*, 2 T. R. 126.

(2) *Cook v. Round*, 1 M. & Rob. 512.

(3) *Fairlie v. Birch*, 3 Camp. 397.

(4) Bull. N. P. 67.

(5) *Per Abbott C. J. in Hunter v. King*,
4 B. & A. 210.

(6) *Bonafous v. Walker*, 2 T. R. 126.

(7) *Scott v. Henley*, 1 M. & Rob. 227,
vide *Morris v. Robinson*, 3 B. & C. 206.

(8) 2 Esp. N. P. 116.

(9) *Andrew Ognel's case*, 4 Co. 49. Co.
Litt. 162. (a.)

action of debt, for the sum due was not as a freehold rent, but as a personal charge. (1)

DEBT FOR
RENT ARREAR.

But an alteration was effected by stat. 32 Hen. 8. c. 37., which enacted, that the executors or administrators of a tenant for life (that is, *pur autre vie* living *cestuique vie*) (2), in tail or in fee, may have an action of debt to recover all arrearages of rent due in the lifetime of the lessor, and during the continuance of the estate for life, from the tenant for life, who continues in possession, and ought to have paid the rent to the lessor when living, or against the executors or administrators of such tenant.

Alteration effected by stat. 32 Hen. 8. c. 37.

And by sect. 3. of the same statute, the husband may have debt for arrearages during the lifetime of his wife in her right.

This statute only provided for the recovery of the rent in arrear at the death of the lessor, but gave no action of debt to him during his life, so that, during that time, his only remedy was an assize. (3)

But that was provided for by stat. 8 Anne, c. 14. s. 4., which enacted that any person entitled to rent arrears on a lease for life or lives, may have an action of debt *during* the existence of the life, as on a lease for years during the term.

Stat. 8 Anne, c. 14. s. 4.

Such was the case of rents reserved on freehold leases, but rents reserved on *leases for years* were at all times recoverable by action of debt. (4)

Leases for years.

So where there is a *tenant at will*, with a rent reserved, the lessor could always maintain an action of debt for arrears of rent. (5)

Tenant at will.

II. The Declaration.

DECLARATION.

In debt for rent upon a lease, founded on the privity of estate, as when brought by the assignee or devisee of the lessor against the lessee (6), or by the lessor or his personal representatives against the assignee of the lessee (7), or against the executor of the lessee in the *debet* and *detinet* (8), the action is open, and the venue must be laid in the county where the estate lies; but in debt by the lessor against the lessee or his executor, in the *detinet* only, the action is transitory, and the venue may be laid in any county.

VENUE.

When local.

When not local.

In an action of debt for rent, the venue cannot be changed on the common affidavit. (9)

If the venue be laid in the wrong county, advantage may be taken of it on demurrer. (10)

Debt for rent by lessor against lessee lies in respect of the privity of estate between them. As soon as this privity is transferred, the remedy by debt is also transferred.

PARTIES.

As long as privity of estate lasts between lessee and lessor, debt can be maintained.

If, therefore, the lessor grant his reversion to A. the remedy by debt is gone from him (11), and follows the reversion to the grantee, with whom it remains as long as the reversion; for, if he assign it, then the remedy by debt passes with the reversion to his assignee. (12) So after the lessor's

(1) 1 Rol. Abr. Dett. (H.) 595. Co. Litt. 162. (a.)

(2) Co. Litt. 169.

(3) *Winchester (Bishop of) v. Wright*, 2 Ld. Raym. 1056.

(4) Litt. Sect. 58.

(5) Ibid. Sect. 72.

(6) *Thrale v. Cornwall*, 1 Wils. 165.

(7) *Taylor v. Shum*, 1 B. & P. 23.

(8) *Woodfall* by Harrison, 614. cit. 1 Esp. N. P. 213.

(9) *Pratt v. Ward*, 1 Alcock & Napier (Irish), 145.

(10) *Cornel v. Lisset*, 2 Lev. 80.

(11) *Walker's case*, 3 Co. 22. (b.) 23. (a.)

(12) *Humble v. Glover*, Cro. Eliz. 328.

**DEBT FOR
RENT ARREAR.**

death, debt lies by his heir (1) or devisee for arrears due after the testator's death (2); and if only part of the reversion be assigned, debt lies by the assignee for his proportion. (3) In like manner debt lies by the lord who has the reversion by escheat. (4) And if a reversion be granted in mortmain, debt lies for the rent by the lord who entered for the alienation in mortmain. (5) But sometimes debt lies, though the plaintiff have no reversion; for if the lessor assign his term to B. and so leave himself no reversion, debt will nevertheless lie by him against B. the assignee, or the assignee of B. (6) And where the lessor assigns his rent without the reversion, the assignee may maintain debt for rent, because the privity of contract is transferred. (7)

Against whom
maintainable.
Lessee.

The lessee, his executors and administrators, remain liable to an action of debt by the lessor or his assignee as long as the term continues. The privity of estate may be transferred by the lessor, but the lessee cannot by his own act discharge himself. (8)

If therefore the lessee assign the term, he or his executors still remain liable to an action of debt for the rent (9), unless the lessee accept rent from the assignee, and so recognise him as his tenant. (10) In like manner though the executor assign the term, he still remains liable to an action of debt. (11)

Assignee.

But if the lessee assign, the lessor may have debt for arrears, accruing due after the assignment against the assignee, or the lessee, at his election. (12) And when the lessee assigns part of his estate, debt lies against the assignee *pro tanto*, and against the lessee for the residue. (13) If, however, the lessee of a term, or his executor, assign, and the lessor accept the whole or any part of the rent of such assigned estate from the assignee, and in any other manner recognise the assignee as his tenant, his remedy by debt against the lessee or executor is gone. (14) If the lessee assign his whole term to the lessor, rendering rent, debt does not lie against the executor of the lessee for the rent, because such assignment amounts to a surrender, and therefore, after the lessee's death, the only remedy against his executor is in equity. (15)

Debt lies against the assignee only so long as he remains possessed of the term, for if he assign it, his liability, which arose from the privity of estate, is destroyed, even though he assign it to a beggar. (16)

The heir.
Executor.

After the ancestor's death, the debt lies against the heir in respect of assets by descent, for arrears of rent due in the ancestor's life. Because if the lease were for the ancestor's life, his death put an end to the estate; and if it were *pur autre vie*, or for a term of years, and the lessee die

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|---------------------------------------------------------------|---------------------------------------------------------------|
| (1) 1 Rol. Abr. Dett. (B.) 591. | (9) Ibid. |
| (2) Com. L. & T. 365. | (10) <i>Rich (Lord) v. Frank</i> , 1 Bulst. 42. |
| (3) <i>Broom v. Hore</i> , Cro. Eliz. 633. <i>Ards</i> | <i>Howse v. Webster</i> , Yelv. 103. |
| <i>v. Watkin</i> , ibid. 637. | (11) <i>Devereux v. Barlow</i> , 2 Saund. 181. (d.) |
| (4) <i>Walker's case</i> , 3 Co. 23. (a.) | (12) <i>Gamon v. Vernon</i> , 2 Lev. 231. |
| (5) 5 Hen. 7. 19. (a.) | (13) Com. L. & T. 368. |
| (6) <i>Newcomb v. Harvey</i> , Carth. 161. | (14) <i>Walker's case</i> , 3 Co. 24. (b.) <i>Marrow</i> |
| <i>Lloyd v. Langford</i> , 2 Mod. 174. | <i>v. Turpin</i> , Cro. Eliz. 715. <i>March v. Brace</i> , |
| (7) <i>Marle v. Flake</i> , 3 Salk. 118. Respect- | 2 Bulst. 151. |
| ing right of executors to sue, <i>vide antè</i> , 1134. | (15) <i>Lloyd v. Langford</i> , 2 Mod. 174. |
| —1138., <i>et post</i> , tit. EXECUTORS. | (16) <i>Tongue v. Pitcher</i> , 3 Lev. 295. |
| (8) <i>Walker's case</i> , 3 Co. 23, 24. <i>Coghill</i> | <i>Pitcher v. Tovey</i> , 1 Salk. 81. <i>Lekens v. Nash</i> , |
| <i>v. Freelove</i> , 2 Vent. 209. <i>Hellier v. Casbard</i> , | Str. 1221. |
| 1 Sid. 266. | |

living *cestuique vie*, or the term unexpired, the estate in either case passes to the executor, who becomes chargeable in respect thereof.

DEBT FOR
RENT ARREAR.

When a lease is made to a *feme sole*, who afterwards marries, and rent becomes due, after which the term expires, and the wife dies, debt lies against the husband for such rent, for he is chargeable after the wife's death in respect of the perception of the profits by himself. (1)

Husband and
wife.

If the lessor, or his assignee, bring debt against the lessee, or his assignee, the action should be both in the *debet* and *detinet*. (2) When the action is by the executor or administrator of the lessor, or the grantee of the reversion for rent, due either in the testator's or intestate's lifetime, or since his death, it must be in the *detinet* only.

When the ac-
tion should be
in the *debet* and
detinet, when
in the *detinet*.

It is a general rule, that, wherever an action is founded on a deed, the deed must be declared upon. But the action of debt for rent arrear forms an exception to this rule, for in this case it is not necessary to declare upon the deed. (3)

Not necessary
to declare upon
the deed.

The declaration ought to shew the local situation of the lands demised, the rent reserved, and the period at which it became due. (4)

STATEMENT OF
CAUSE OF AC-
TION.

But it is unnecessary to state the entry of the lessee into the lands, except in the case of a lease at will, where the tenant is chargeable merely in respect of his occupation.

Averments in
declaration.

In an action by the lessee it is sufficient to declare, that he is possessed of the premises, without shewing what estate he has; but when the assignee is plaintiff, he must shew the assignment by which he took the estate; and in debt by a remainder-man for rent reserved upon a lease by tenant for years under a power, the plaintiff must shew what authority the tenant for life had to make such lease.

III. Pleadings.

The defendant, where the rent is reserved by deed indented, can plead *non est factum* (5); if there be no deed, *non dimisit, riens in arrere*, or that he never entered; but the plea of *nil debet* cannot be pleaded.

PLEADINGS.

All other matters of defence must be specially pleaded.

Where the demise is by deed-poll or by parol (6), the defendant can plead *nil habuit in tenementis*.

NIL HABUIT IN
TENEMENTIS.

If to debt on a demise without deed, the defendant pleads *nil habuit in tenementis*, the plaintiff ought in his replication to shew specially what estate he had in the premises. (7)

If the plaintiff declare upon an indenture of lease, the defendant cannot plead *nil habuit in tenementis* or *non dimisit* (8), because the defendant, by the execution of the counterpart of the indenture, is estopped from controverting either the power of the plaintiff to demise, or the actual demise.

In debt for rent reserved upon a lease by indenture (9), if the defendant

(1) *Vane v. Minshall*, 1 Lev. 25.

(2) Com. L. & T. 370.

(3) Adm. per cur. in *Atty v. Parish*, 1 N. R. 109. Selw. N. P. 608.

(4) Where in debt for rent it was not shewn in what parish the lands were situated, and a particular of the plaintiff's demand described them in a wrong parish: — It was held, that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that the defendant held

more than one parcel of land of the plaintiff so as to be misled by it. *Davies v. Edwards*, 3 M. & S. 380.

(5) Gilb. C. B. 61. 3d ed. cit. Selw. N. P. 610.

(6) Per cur. in *Lewis v. Willis*, 1 Wils. 314.

(7) — v. *Glasse*, Yelv. 227.

(8) Gilb. Debt, b. iii. c. 3. cit. Selw. N. P. 613.

(9) *Heath v. Vermeden*, 3 Lev. 146. *Kemp v. Goodal*, 1 Salk. 277.

**DEBT FOR
RENT ARREAR.**

plead *nil habuit in tenementis*, the plaintiff need not reply the estoppel, but may demur; because the declaration being on the indenture, the estoppel appears on the record.

Nil habuit in tenementis (1) cannot be pleaded to debt for use and occupation.

Assignment before rent due cannot be pleaded.

In debt for rent against the lessee (2), or his personal representative (3), an assignment before the rent became due cannot be pleaded in bar of the action, for the privity of contract remains notwithstanding the assignment; but an assignment and an acceptance on the part of the lessor of the assignee of his tenant, may be pleaded in bar either by the lessee (4) or his personal representative (5), because the lessor's acceptance of the assignee as his tenant destroys the privity of contract. Upon this principle it was holden, that debt would not lie on the *reddendum* against a bankrupt lessee (6) for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioner's assignment, the lessor's assent to such assignment being virtually in the statute authorising the assignment, and being equivalent to an express assent.

Contract to give up possession upon lessor relinquishing his claim for rent, a valid defence.

In an action of debt for 63*l.*, rent for two years and one quarter, due 25th of March, 1837, reserved on a demise for 45 years at 28*l.* *per annum*, it was pleaded, that before any of the sum claimed became due, and more than two years and a quarter before 25th March, 1837, and before 25th December, 1834, viz. 17th April, 1834, plaintiff and defendant agreed, that defendant should give up, and plaintiff take possession of, the premises before 25th December, 1834, in consideration whereof defendant should be discharged for the rent which would have become due for the occupation after 25th December, 1834; that possession was given up by the defendant and accepted by plaintiff accordingly; and that plaintiff entered on 17th April, 1834, and had held ever since, and defendant had not held since, "and the said tenancy and the defendant's said interest were thereby then surrendered and extinguished:" — It was held, that, on this plea, the objection did not arise, whether the term was shewn upon the record to be regularly surrendered according to the Statute of Frauds, 29 Car. 2. c. 3 s. 3., the defence being merely an executed contract, that in consideration of defendant's giving up possession, the plaintiff should abandon his claim to the rest; and that such defence was valid. (7)

A plea of eviction by a stranger must shew, that the stranger had good title to evict. (8)

As an eviction causes a suspension of the rent, it may be pleaded in bar; but a mere trespass (9), or an illegal ouster (10), will not be sufficient.

If there be a lawful eviction from part by an elder title, the rent cannot be apportioned, and the lessor cannot distrain for any part of the rent. (11)

If the land be evicted, or the lease determined before the legal time of

(1) *Curtis v. Spitty*, 1 Bing. N. C. 15.
 (2) *Walker's case*, 3 Co. 22. (a.)
 (3) *Helier v. Casebert*, 1 Lev. 127.
 (4) *Marsh v. Brace*, Cro. Jac. 334.
 (5) *Marrow v. Turpin*, Cro. Eliz. 715. F. Moore, 600.
 (6) *Wadham v. Marlowe*, 8 East, 314. n.
 (7) *Gore v. Wright*, 8 A. & E. 118.

(8) *Jordan v. Twells*, C. T. H. 171. 1 Saund. 204. n. 2.
 (9) *Reynolds v. Buckle*, Hob. 326. *Hunt v. Cope*, Cowp. 242.
 (10) *Vochell v. Dancastell*, F. Moore, 891.
 (11) *Neale v. Mackenzie*, 1 M. & W. 747. *Gardiner v. Williamson*, 2 B. & Ad. 336.

payment, no rent can be recovered (1), because there can never be any apportionment in respect of part of the time, as there may be in respect of part of the land. (2)

DEBT FOR
RENT ARREAR.

By stat. 11 Geo. 2. c. 19. s. 15., where tenant for life dies before or on the day on which rent is reserved or made payable upon any demise or lease of lands, &c. which determines on the death of such tenant for life, his personal representative may in an action on the case recover from the under-tenant of such lands, &c. if the tenant for life die on the day on which the same was made payable, the whole, or, if before such a day, then a portion of such rent, according to the time the tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportional part. (3)

Stat. 11 Geo. 4.
c. 19. s. 15.

To remove doubts which had been entertained upon the construction of the foregoing provisions, it was enacted and declared by stat. 4 & 5 Will. 4. c. 22. s. 1. (4), that rents reserved and made payable on any lease of lands, &c. which shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life for which such person was entitled to such hereditaments, shall so far as respects the rents reserved by such lease, and the recovery of a proportion thereof by the person granting the same, his executors or administrators (as the case may be), be considered as within the foregoing provision of stat. 11 Geo. 2. c. 19. s. 15.

Stat. 4 & 5
Will. 4. c. 22.
ss. 1 & 2.

By s. 2., "all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments in Great Britain and Ireland made payable at fixed periods, shall be apportioned in such manner, that on the death of any person interested in any such rents, annuities, &c. or in the estate, fund, office, or benefice, &c. from which the same shall be issuing, or on the determination by any other means of the interest of any such person, he and his executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c. and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his interest, all just allowances and deductions in respect of charges on such rents, &c. and other payments being made; and that every such person, his executors, administrators, and assigns, shall have the same remedies at law and in equity for recovering such apportioned parts, when the entire portion of which such apportioned parts shall form part shall become payable and not before, as he would have had for recovering such entire rents, annuities, &c. if entitled thereto, but so that persons liable to pay rents reserved by any lease, and the lands, &c. comprised therein shall not be resorted to for such apportioned parts specifically, but the entire rents of which such portions shall form a part shall be re-

(1) *Chen's case*, 10 Co. 128. (a.)

(2) "Where our books speak of an apportionment in case, where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like,

where the rent is lawfully extinct in part." 1 Inst. 148. (b.)

(3) Vide *Botheroyd v. Woolley*, 5 Tyrw. 522.

(4) June 27. 1834.

**DEBT FOR
RENT ARREARS.**

ceived and recovered by the persons who, if this act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from such persons by the parties entitled to the same under this act, in any action or suit at law or in equity, provided (1) that such provisions "shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description."

**LIMITATION OF
ACTION.**

Stat. 21 Jac. 1.
c. 16. s. 3.

IV. Limitation of Action.

By stat. 21 Jac. 1. c. 16. s. 3., actions of arrears of rent must be commenced and sued within six years next after the cause of such action. The enactments of this statute are restrained to actions for arrears of rent (2) upon a demise without deed, and do not extend to cases of rent reserved by specialty.

Stat. 3 & 4
Will. 4. c. 42.
s. 3.

By stat. 3 & 4 Will. 4. c. 42. s. 3., all actions of debt for rent upon an indenture of demise must be commenced and sued within ten years after August 29. 1833, or within twenty years after the cause of such actions or suits, but not after. (3)

**FOR USE AND
OCCUPATION.**

Situation of
premises, par-
ticulars of de-
mise.

Liability of te-
nant on holding
over by under-
tenant.

V. For Use and Occupation.

In debt for use and occupation, the plaintiff may declare generally for the use and occupation of divers messuages, lands, and tenements, belonging to the plaintiff, occupied by the defendant for a long time, and at his request, without specifying where they are situate. (4) The declaration need not set forth the particulars of the demise. (5)

In *Ibbs v. Richardson* (6) it appeared that the lessee, for a term ending on 11th October, underlet to C. from year to year, subject to the determination of his own interest: upon the expiration of the term C. refused to quit, and held over against the will of the lessee: on 16th of October the lessee distrained upon him for rent due before the 11th: on 14th of December C. quitted, and the lessee then tendered possession to the original landlord, who refused to accept it: — It was holden, that the lessee was liable, in an action for use and occupation, to pay rent to his landlord between the 11th of October and the 14th of December, but not for any longer period.

**DEBT FOR DOU-
BLE VALUE —
STAT. 4 GEO. 2.
C. 28.****VI. Debt for double Value—Stat. 4 Geo. 2. c. 28.**

As to tenants at sufferance, or tenants holding over after determination of their interests, either in consequence of a notice from the landlord or given by themselves, it was enacted by stat. 4 Geo. 2. c. 28., that "if any tenant or tenants for any term of life, lives, or years, or other person or persons,

(1) S. 3.

(2) *Freeman v. Stacy*, Hutt. 109.

(3) *Vide etiam* stat. 3 & 4 Will. 4. c. 27.

s. 42. *Paget v. Foley*, 2 Bing. N. C. 679.

(4) *King v. Fraser*, 6 East, 348. 2 Smith, 462.

(5) *Wilkins v. Wingate*, 6 T. R. 62. *Bristow v. Wright*, Doug. 668., *vide post*, "PARTICULARS OF DEMAND," under tit. "USE AND OCCUPATION."

(6) 9 A. & E. 849.

who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made and notice in writing given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his, her, or their agent or agents thereunto lawfully authorised, then and in such case such person or persons so holding over, shall, for and during the time he, she, and they shall so hold over or keep the person or persons entitled, out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of his majesty's courts of record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity."

Where the defendant was a weekly tenant, Lord Ellenborough said, "I am strongly inclined to think that this case does not come within the statute which speaks of 'tenants for life, lives, or years.' I am aware that a tenant for half a year may for some purposes be considered and denominated a tenant for years. (1) But this is a penal statute, and is to be construed strictly. (2) A tenant from week to week, I therefore cannot include in the description of 'tenants for life, lives, or years,' and I do not remember any instance of a tenant for a less time than a year being held within this act of parliament."

From *Wilkinson v. Hall* (3) it is very questionable, whether a quarterly tenancy comes within the provisions of the foregoing statute.

Upon the words "demand made and notice in writing given," it has been held, that the notice includes the demand, and consequently, though a demand ought to be stated in the declaration, proof of service of a notice in writing will be sufficient proof of a demand. (4)

The statute extends only to cases in which the tenant has been guilty of fraud or contumacy, and not to cases in which the tenant maintains possession *bond fide*, or upon any fair ground of defence; and it is said to have been held by Lord Mansfield; and where there had been a treaty for a further term between the landlord and tenant, which afterwards went off, the tenant who had held over during the treaty was not within the meaning of the statute. (5)

A tenant who holds over under a fair claim of right will not be considered as wilfully holding over within the meaning of the statute, and consequently will not be liable to pay double value, though it eventually turns out he had no right. (6)

But a notice is requisite in all cases in which the landlord would avail himself of this statute; for though where premises are demised for a term certain, no notice is required to put an end to the tenancy, yet the tenant

**DEBT FOR
RENT ARREAR.**

Weekly tenants not within the words "any tenant or tenants."

Quarterly holdings.

Construction of the words "demand made and notice in writing given."

Service of notice in writing sufficient proof of demand.

Statute extends only to cases in which the tenant has been guilty of fraud or contumacy.

Holding over pending a treaty.

Holding over under a fair claim of right.

Notice is requisite to come within the statute.

(1) Co. Litt. 52. (b.) 53. (a.)

(2) *Lloyd v. Rosbee*, 2 Camp. 453.

(3) 3 Bing. N. C. 533.

(4) *Wilkinson v. Colley*, 4 Burr. 2694.

(5) Com. L. & T. 304.

(6) *Wright v. Smith*, 5 Esp. N. P. C. 203.

**DEBT FOR
RENT ARREAR.**

Notice ought to be given before the expiration of the term.

But it may be given after, if landlord have done no act to acknowledge the tenancy.

Notice given to a feme sole who subsequently marries.

Notice by receiver from the court of Chancery.

Notice by agent.

Where administrator of an executor cannot sue.

Landlord does not wave his right to sue for double value by bringing an ejectment.

who holds over beyond the term can only be charged for double value from the time at which the notice was served. (1)

If the notice be given before the expiration of the term, the landlord will then be entitled to recover double value as from the time at which the term expired. (2)

But it may be given after the expiration; and if the landlord have done no act to acknowledge the continuation of the tenancy, he will be entitled to double value, as from the time of the notice or demand; but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. (3)

Where notice to quit is given to the tenant, a feme sole, and she afterwards marries, the landlord may maintain debt for double value against the husband, without serving another notice upon him. (4)

A person appointed by the court of Chancery to receive the rents and profits of an estate, is an agent lawfully authorised within the meaning of the statute. And therefore, where a notice has been given by a receiver so appointed to receive the rents of an estate bequeathed in trust for infant children, it was held sufficient to enable the trustee and executor to recover double value against the tenant who held over after such notice. (5)

In *Poole v. Warren* (6) it appeared, that the defendant in an action for double value, under stat. 4 Geo. 2. c. 28. s. 1., had notice to produce the original notice to quit, but refused. The plaintiff then produced and proved a copy, by which it appeared that there was an attesting witness:—It was held, that the attesting witness need not be called. K. being beneficially interested in the reversion, joined with the trustee who was legally entitled, in mortgaging it to the plaintiff; and K. by the mortgage deed, with the approbation of plaintiff, testified by plaintiff's executing the deed, appointed G. to be receiver, agent, and attorney of K., to demand and collect rents, to adjust accounts, to sue or distrain for rent, give notice to quit, and eject on refusal, and to do all that K. could have done if the deed had not been made; K., the trustees, and plaintiff, executed the deed:—It was held, that G. was an agent lawfully authorised to give the notice required by the statute.

But the administrator of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, without taking out an administration *de bonis non*, even though the tenant have attorned to him. (7)

The landlord does not wave his right to sue for double rent, by bringing an ejectment against the tenant. The two remedies are perfectly independent of each other; and therefore, although the lessor obtain possession of the premises demised by his ejectment, this does not affect his right to sue for the double value of the premises during the time for which the tenant held over between the period of the expiration of his notice, and the time when the possession was recovered. (8)

(1) *Cobb v. Stokes*, 8 East, 358.

(2) *Cutting v. Derby*, 2 W. Black. 1075.

(3) *Cobb v. Stokes*, 8 East, 358. Com. L. & T. 305.

(4) *Lake v. Smith*, 1 N. R. 174.

(5) *Wilkinson v. Colley*, 4 Burr. 2694.

(6) 8 A. & E. 582.

(7) *Tingrey v. Brown*, 1 B. & P. 310.

(8) *Souleby v. Neving*, 9 East, 310.

If however the landlord, after the expiration of his notice, receive the single rent from his tenant, the notice is thereby waved, and the tenancy being re-established, the landlord's right to sue for double value is gone. (1) And, on the other hand, the landlord cannot recover his single rent, for the time for which he recovers the double value. (2)

DEBT FOR
RENT ARREAR.

Waver of notice
by receipt of
single rent.

The defendant can plead that the plaintiff has waved the notice to quit, and demand of possession; and where the plaintiff has accepted rent from the defendant, after the expiration of the notice to quit, it is a question for the jury, whether such rent was received in part satisfaction of the double value, or as a waver of it (3); and where the landlord declared in debt, 1st, for the double value, and 2nd, for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent before action brought to the second, and paid the money into court, which the plaintiff took out of court, and proceeded:—It was held, that this was no waver of the plaintiff's right to the double value, so as to be ground of nonsuit, but that it was a case to go to the jury; and that the plaintiff going on with the action, after taking the single rent out of court, was evidence to shew that he did not mean to wave his claim for the double value, but to take the single rent *pro tanto*.

Waver of notice.

Tenants in common cannot sue jointly, under stat. 4 Geo. 2. c. 28. s. 1., for double value, where there has been no joint demise. They must sever, if the tenant hold the premises by a separate demise for each, for persons cannot join in an action unless they have a joint interest. (4)

PARTIES.
Tenants in
common cannot
sue.

"Where one entire injury is done to both tenants in common, they shall have one entire remedy; but where the injury is separate, they may have several separate actions." (5)

The plaintiff should, under the foregoing statute, prove the demise, the determination of the term, the holding over, the demand and notice in writing given to the defendant, and the amount of the double value claimed, or such of those facts as are denied by the pleadings. (6)

EVIDENCE.

VII. Debt for double Rent—Stat 11 Geo. 2 c. 19. s. 18.

The stat. 4 Geo. 2. c. 28. applies only to cases where the tenancy is determined by act of the landlord, but the stat. 11 Geo. 2. c. 19. s. 18. applies to cases where the tenant gives notices, and by which, after reciting "that great inconveniences have happened, and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same," it is enacted, "that from and after the 24th day of June, 1738, in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in

DEBT FOR DOU-
BLE RENT—
STAT. 11 GEO.
2. c. 19, s. 18.
Distinction be-
tween stat 4
Geo. 2. c. 28.
and 11 Geo. 2.
c. 19. s. 18.

(1) Doe d. *Cheny* v. *Batten*, Cowp. 243.
Ryal v. *Rich*, 10 East, 48.

(2) *Cobb* v. *Stokes*, 8 East, 362.

(3) *Ryal* v. *Rich*, 10 *ibid.* 52.

(4) *Wilkinson* v. *Hall*, 1 Bing. N. C. 713.

(5) Per cur. in *Cutting* v. *Derby*, 2 W. Black. 1077.

(6) *Roscoe's Ev.* 422.

**DEBT FOR
RENT ARREAR.**

such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum, which he, she, or they should otherwise have paid; to be levied, sued for, and recovered at the same times, and in the same manner, as the single rent or sum before the giving such notice could be levied, sued for, or recovered, and such double rent or sum shall continue to be paid, during all the time such tenant or tenants shall continue in possession as aforesaid."

Distinction between stats.
4 Geo. 2. c. 28.
and 11 Geo. 2.
c. 19.

The chief difference between stats. 4 Geo. 2. c. 28. and 11 Geo. 2. c. 19. is, that in the case of the former, the notice (which must be in writing) proceeds from the landlord; in the case of the latter (where the notice may be parol) it is the act of the tenant, and that the one imposes double value by way of penalty, and not as rent, whilst the other still treats the party as tenant, and recognises him by that name, which the other statute does not. Therefore, in *Soulsby v Neving* (1) Lord Ellenborough delivered it as his opinion, that the landlord's having recovered in ejectment was no bar to his afterwards suing for the double value, but "that there might be some incongruity in applying the remedy for double rent, after the remedy by ejectment, which treats the person in possession as a trespasser."

This statute merely gives double rent, where the notice proceeds from the tenant. Yet, according to *Messenger v. Armstrong* (2), if the landlord gives notice to his tenant to quit at the expiration of the lease, and the tenant hold over, the landlord is entitled to double rent.

Lease by parol is a holding.

A lease by parol is a holding within this statute. (3) And a parol notice to quit by the tenant is sufficient to make him liable for double rent in case he hold over. (4)

Notice must be direct and positive.

But to bring the tenant within the statute, his notice must be direct and positive; for where tenant from year to year gave his landlord notice that he will quit upon a contingency (viz. as soon as he can find another situation), and he did afterwards get another situation, but neglected to quit the premises, Lord Ellenborough C. J. ruled, that the notice was too vague, and that the case did not come within the statute. (5)

In *Johnstone v. Hudlestone* (6) it was held, the statute only applies to those cases in which the tenant has the power of determining his tenancy by notice, and where he actually gives a valid notice sufficient to determine it.

DAMAGES.

In an action for double rent under stat. 11 Geo. 2. c. 19. s. 18., for holding over after notice, the jury may find for so much as the tenant appears to have overheld, without reference to the sum demanded, so that it be not more than that sum. (7)

In *Booth v. Macfarlane* (8) it was held, that a tenant who, after having given notice to quit, holds over for a year, paying double rent according to stat. 11 Geo. 2. c. 19. s. 18., may quit at the end of such year without fresh notice, Lord Tenterden observing, "The words of the statute are very clear; 'such double rent shall continue to be paid during all the time such tenant shall continue in possession as aforesaid.' Here the double rent has

(1) 9 East, 314.

(2) 1 T. R. 53.

(3) *Timmins v. Rowleson*, 3 Burr. 1603.
1 W. Black. 533.

(4) *Ibid.*

(5) *Farrance v. Elkington*, 2 Camp. 591.

(6) 4 B. & C. 922.

(7) *Anon.* Lofft. 275.

(8) 1 B. & Ad. 906.

been paid during all the time the tenant has continued in possession, and he is not bound to pay it after he has quitted."

DEBT FOR
RENT ARREAR.

6. DEBT ON JUDGMENT.

The best course for acquiring the benefit of a judgment is by writ of execution; the proceeding by debt on judgment being discountenanced by the superior courts; and by stat. 43 Geo. 3. c. 46. s. 4., the plaintiff in such actions shall not recover costs, unless the court in which the action is brought, or some judge of the same court, shall otherwise order.

DEBT ON JUDGMENT.

Remedy by debt on judgment discountenanced.

A judgment upon the same point between the same parties will operate as an estoppel, if so pleaded, in a second action; but if only offered in evidence, and not so pleaded, it is not conclusive. (1)

Effect of judgment.

If a debt or damages be recovered in the superior courts for any injury in any action, real or personal, the plaintiff may afterwards have an action of debt on that judgment. (2)

Where debt on judgment lies.

And debt on judgment was, previous to stat. Westm. 2. c. 45., the common law remedy, in cases where execution had not been sued out before the expiration of the year and a day after the judgment. (3)

Debt lies upon a judgment recovered in one of the courts of the city of London, by special custom, although the original action could not have been brought in the superior courts (4): so also upon a judgment in an inferior court; but the declaration must allege, that the cause of action in the original suit arose within the jurisdiction of the inferior court (5), it not being sufficient to allege that the plaintiff recovered his damages within that jurisdiction, and for a sum recovered from a court-baron. (6)

City courts of London.

Inferior courts.

Court-baron.

Debt is likewise sustainable on judgment for damages in a real action; for, by the judgment, the damages are reduced to personalty, as for damages recovered in an action of waste (7): so on a judgment in *scire facias* on a recognisance. (8)

Damages in real action.
Scire facias.

Debt will lie on a judgment for the remainder of the sum recovered, where part was levied on the goods of the defendant (9): so it can be maintained pending a writ of error. (10)

Pending writ of error.

But the judgment must be an actual subsisting judgment at the time of the action brought, for if by any means it has been discharged, this action will not lie. (11)

Must be an actual and subsisting judgment.

Thus, where the defendant's person had been taken in execution by a *ca. sa.* on the first judgment, and had been afterwards discharged out of custody by consent of the plaintiff, on the defendant's entering into an agreement to pay certain sums at certain stipulated times, part whereof he had paid when

(1) *Outram v. Morewood*, 3 East, 365. *Stafford v. Clark*, 2 Bing. 381. *Vooght v. Winch*, 2 B. & A. 662. Per cur. in *Doe v. Huddart (Sir Joseph)*, 2 C. M. & R. 316. 320.

(2) *Speaks v. Richards*, Hob. 206. Noy, 22. *Perkinson v. Gilford*, Cro. Car. 539.

(3) 1 Esp. N. P. 228.

(4) 1 Rol. Abr. Dett. (N.), 600.

(5) *Read v. Pope*, 1 C. M. & R. 302. 4 Tyrw. 403.

(6) *Shaw v. Thompson*, Cro. Eliz. 426.

(7) 43 Edw. 3. 2.

(8) *Lovelesse's case*, 2 Leon. 14.

(9) *Glascock v. Morgan*, 1 Lev. 92.

(10) *Gribble v. Abbot*, Cowp. 72.

(11) *Fish v. Horner*, 7 Mod. 62. 14. *Adamson v. Tomlinson* Sid. 236.

**DEBT ON
JUDGMENT.**

the plaintiff brought debt on the judgment for the whole: the action was held not to lie, for the judgment was discharged by the plaintiff's own consent. (1)

So where to an action of *assumpsit* the defendant pleaded a set-off of a judgment recovered by him, Trinity Term, 22 Geo. 3., against the plaintiff, the plaintiff replied and admitted the judgment, but said that in Michaelmas Term, 23 Geo. 3., he had been charged in execution by virtue of such judgment, and that on the 6th February, 1783, he had, by the consent, privity, and authority, of the defendant, been discharged out of custody, and from the said execution; the defendant rejoined, that the discharge was in consideration of the plaintiff giving him a bond to the amount of the debt to ensure an annuity, which annuity bond, &c. had been set aside by the court of Queen's Bench, the memorial having been erroneously entered: to this there was a demurrer, where it was held clearly, that the first judgment was completely at an end by discharging the plaintiff out of custody, and that the defendant could never resort to it again, even though the consideration had failed, for which he had discharged him. (2)

**FOREIGN JUDG-
MENT.**

Debt will lie upon a judgment of a foreign court, such as a judgment by the Supreme Court of Jamaica; but it cannot be declared on as a matter of record, for in England it is but of the nature of a simple contract debt; therefore, the judgment is sufficient only to establish a demand, and put the defendant to impeach the justice of it, or shew the same to have been unduly or irregularly obtained. (3)

And as it is but a simple contract, *assumpsit* will lie on a foreign judgment; which was decided in *Crawford v. Whittal* and *Sinclair v. Fraser* (4), one of which was a judgment from Jamaica, and the other from Bengal; and also in another case, where the judgment was from France.

But where it was attempted to maintain an action on a judgment from Tobago against the defendant, where he had not appeared, and the judgment given after a summons to appear, which was nailed up on the court-house door of the island, and it did not appear that he was even then in the island, or subject to the jurisdiction of that court:—it was decided, that the judgment gave no legal cause of action. (5)

**Proof of judg-
ment.**

If debt be brought on a foreign judgment, the seal of the island or colony abroad, from whence the judgment comes, must be proved: it is not sufficient to prove the judge's hand subscribed. (6)

VENUE.

The venue in the action must be laid in the county where the judgment was given, and not in the county where the original cause of action arose. (7)

**STATEMENT OF
RECORD.**

In an action of debt on a judgment, if the declaration state the judgment to have been recovered in such a term, *prout patet*, &c. and it appears in evidence to have been recovered in another term, the variance is fatal, because the judgment is the gist of the action. (8)

PLEADINGS.

If there be not any such record as the plaintiff has declared on, the defendant must plead *nul tiel record*; which issue is tried by producing

(1) *Vigers v. Aldrich*, 4 Burr. 2483.

(2) *Jaques v. Withy*, 1 T. R. 557.

(3) *Walker v. Witter*, Doug. 1.

(4) H. T. 13 Geo. 3. Doug. 4. *Duplein v. De Roven* 2 Vern. 540.

(5) *Buchanan v. Rucker*, 9 East, 102.

(6) *Henry v. Adey*, 4 Esp. N. P. C. 228.

(7) *Hall v. Winckfeild*, Hob. 196.

(8) *Rastall v. Straton*, 1 Hen. Black. 49.

the record itself, if it be a record of that court in which the action is brought.

DEBT ON
JUDGMENT.

By Reg. Gen. Hilary Term, 4 Will. 4. s. 8., it is directed, "that where a defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge."

Nul tiel record.
Judgment re-
covered.

This rule does not apply to a plea by an executor of a judgment against himself, in an action by another creditor, which is in effect only a plea, that he has not assets sufficient to answer the plaintiff's demand. (1)

A plea of *nul tiel record* (2), pleaded to an action of debt on an Irish judgment recovered, must conclude to the country; for it is only provable by an examined copy on oath, the veracity of which is only triable by a jury.

Nul tiel record
on an Irish
judgment.

A defendant cannot plead any matter to a *scire facias* upon a judgment which he might have pleaded to the original action, and therefore, when to a *scire facias* on a judgment, the defendant pleaded the *bankruptcy* of the plaintiff, but it did not distinctly and affirmatively appear that the bankruptcy had occurred after the judgment on the original action, the plea was holden to be bad on special demurrer. (3)

Matter which
might have
been pleaded
to the original
action inadmis-
sible.

A writ of error pending on the judgment may be pleaded in abatement (4), but not in bar. (5)

WRIT OF ER-
ROR.

If the defendant bring a writ of error, and the plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment, until the writ of error be determined. (6)

7. DEBT ON BOND.

DEBT ON BOND.

I. Bond defined.

An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed.

BOND DEFINED.

If this be all, the bond is called a single one, *simplex obligatio*; but there is generally a condition added, that if the obligor do some particular act, the obligation shall be void, or else shall remain in full force — as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest, which prin-

(1) *Power v. Izod*, 1 Bing. N. C. 304. 1 Scott, 119. S. C. nom. *Power v. Fry*, 3 Dowl. P. C. 140.

(2) *Collins v. Mathew* (Lord), 5 East, 473., sed vide *Harris v. Saunders*, 4 B. & C. 411.

(3) *Baylis v. Hayward*, 4 A. & E. 256. Tidd's N. P. 363. Lutw. Pl. 115.

(4) *Aby v. Buxton*, Carth. 1.

(5) *Rogers v. Mayhoe*, ibid.

(6) *Taswell v. Stone*, 4 Burr. 2454. *Benwell v. Black*, 3 T. R. 643.

DEBT ON BOND. cipal is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law. (1)

All bonds are writings obligatory, although the converse of that proposition will not always hold good. (2)

Bond, how distinguishable from an indenture.

A bond is distinguishable from an indenture, which is *inter partes*, by its being obligatory only on the obligor, and requiring only one seal, expressive of the assent of the party intended to be bound by it. The distinction between a bond and recognisance is, that a bond is the creation of a new debt, whereas a recognisance is the acknowledgment upon record of a former debt.

Defeasance on a bond.

A defeasance on a bond is called a specialty, the debt being therein particularly specified in writing; and the party's seal, acknowledging the debt or duty, and confirming the contract, renders it a security of a higher nature than those entered into without the solemnity of a seal. Hence, bond debts are preferred to those due on simple contract, a condition which, when performed, defeats or rescinds it in the same manner as a defeasance of an estate.

II. *Who can and cannot be Parties.*

WHO CAN AND CANNOT be PARTIES.

All persons having a legal capacity to contract in general, may bind themselves in bonds and obligations. (3)

Joinder of competent and incompetent persons.

If an infant, feme covert, or other incompetent person, bind themselves in bonds together with a stranger, who is under no legal disability, it will bind the stranger, though it be void as to the infant, &c. (4)

Corporations.

Sole corporations, as bishops, prebendaries, parsons, vicars, &c. cannot be obligees in their ecclesiastical character; and therefore a bond made to such persons shall enure to them in their natural capacities (5); but a corporation aggregate may take bonds, &c. in its political capacity, which will go in succession, such corporation being always in existence. (6)

Aliens.

Aliens can sue on bonds, and an alien enemy under safe conduct may be the obligee in a bond and sue thereon. (7)

Partners.

The authority of one partner to bind the firm is confined to cases of simple contract; he cannot therefore bind it by bond, unless express power to that effect be given, or he be present at the execution and delivery of the deed. (8)

Agents.

An agent by executing a bond in his own name, is liable as principal. (9) And he cannot bind the latter by entering into an obligation, unless he was authorised by deed to execute such an instrument. (10)

(1) Perk. Fait, 119. Co. Litt. 172. (a.) 5 Bac. Abr. Obligation (A.), 799, *et seq.* 4 Cruise's Dig. 99. 2 Black. Com. 342.

(2) *Rex v. Dunnett*, 2 East, P. C. 985. 2 Leach, C. C. 581.

(3) *Slingsby's case*, 5 Co. 19. *Beverly's case*, 4 *ibid.* 124.

(4) *Winscombe v. Piggott*, 1 Rol. 41.

(5) *Fulwood's case*, 4 Co. 65. Cro. Eliz. 464.

(6) *Dyer*, 48. (a.) Co. Litt. 9. (a.) 46.

(b.) *Arundel's case*, Hob. 64. 1 Rol. Abr. Corporations (L.), 515. 1 Stephens's Corporation Acts, 430.

(7) *Wells v. Williams*, 1 Ld. Raym. 282. 1 Salk. 46.

(8) *Harrison v. Jackson*, 7 T. R. 207. *Thomson v. Frere*, 10 East, 418. *Ball v. Dunaterville*, 4 T. R. 313.

(9) *Talbot v. Godbolt*, Yelv. 137.

(10) *Harrison v. Jackson*, 7 T. R. 209. *Elliot v. Davis*, 2 B. & P. 338.

The bond of an idiot lunatic is void (1), as also the bond of an inebriated person. (2) DEBT ON BOND.

The bond of a feme covert is *ipso facto* void, and neither binds her nor her husband. (3) But she may be obligee if the husband assent; but if he disagree, the obligation loses its force, so that afterwards the obligor may plead *non est factum*; but if he neither assent nor disaffirm the act of his wife, the bond will be good, for his non interference is a tacit consent. (4) Idiots, lunatics, and drunkards.
Married women.

An infant can, for necessities, bind himself by *bond*, but it must be in a bond to the *exact amount* and value of the necessities furnished; and where an infant gave a single bill for payment of necessities, it was held good against the infant (5); but if a bond be given with a penalty, it will be void. (6) Infants.
An infant can bind himself for necessities.

An infant cannot give a security for interest (7); therefore to a bond with a penalty, conditioned for payment of interest as well as principal, infancy may be pleaded in bar. Security for interest.

Infancy cannot be given in evidence under the general issue, *non est factum*. (8) Evidence.

III. General Liability of Parties.

Though money has been lent *to be applied* to uses contrary to law by the obligor of the bond, and that known to the obligee, the bond is good. Though, if the bond had been given to discharge a debt arising from an illegal transaction between the obligor and the obligee, it would be otherwise. (9) GENERAL LIABILITY OF PARTIES.
OBLIGOR.
Bonds void for illegality of consideration.

If a bond be for the performance of an entire agreement, and part of it be contrary to law, though another part is legal, yet the bond is void *in toto*. (10)

But if the condition consist of two distinct and independent parts, in the alternative, one legal and the other illegal, the bond will not be therefore void *in toto*, as where the condition of a bond was, that A. B. should pay a sum of money, or surrender a person who had been previously charged in execution and discharged, in order that he might be taken in execution again for the same debt, the bond was held void as to the latter part, and good as to the former.

Upon the principles of the common law, the consideration of every valid contract must be meritorious. The sale and delivery of goods, and the agreement to sell and deliver, is *prima facie* a meritorious consideration to support a contract for the price; but if a vendor sell goods with a knowledge of their intended future illegal destination, he cannot recover. (11) Illegal traffic.

A bond is void when given for the purpose of tempting a man to trans-

(1) *Yates v. Boen*, Str. 1104.

(2) *Cole v. Robins*, Bull. N. P. 172. (a.)

(3) 1 Bac. Abr. Baron and Feme (L. M.), 734, *et seq.*

(4) *Whelpdale's case*, 5 Co. 119. (b.) Co. Litt. 3. (a.)

(5) *Russel v. Lee*, 1 Lev. 87. 1 Inst. 172. (a.)

(6) *Ayliff v. Archdale*, Cro. Eliz. 290. Moore, 679., vide etiam *Corpe v. Overton*, 10 Bing. 252.

(7) *Fisher v. Mowbray*, 8 East, 330.

(8) *Whelpdale's case*, 2d res. 5 Co. 119.

(9) *Faikney v. Reynous*, 4 Burr. 2069. *Petrie v. Hannay*, cit. 1 Esp. N. P. 219.

(10) *Lee v. Coleshill*, Cro. Eliz. 529. 1 Esp. N. P. 219.

(11) *Biggs v. Lawrence*, 3 T. R. 454.

Lightfoot v. Tenant, 1 B. & P. 551., *antè*, CONTRACTS AGAINST STATUTABLE RESTRICTIONS, 260—278.

DEBT ON BOND.
Compounding
a criminal pro-
secution.
OBLIGEE.

gress the law: thus, a bond given to compound a criminal prosecution is illegal. (1)

If the bond be forfeited by a breach of the condition, the penalty is the debt in law; and in an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. (2)

By stat. 4 Anne, c. 16. s. 13., the obligor will be discharged on payment of principal and interest.

SURETY.
Bonds of in-
demnity.

If a party bind himself generally to indemnify another from the consequences of a particular act, or against the acts of a third person, the obligee on being damnified, is immediately entitled to be re-imbursed, and he may sue on the bond without giving notice to the obligor of its being forfeited. (3) An undertaking to indemnify against any act or engagement, will extend to any expense incurred by the obligee, by virtue of such act or engagement. (4)

Extent of
liability of
surety.

The liability of a surety will not be extended beyond the scope of his engagement, as understood at the time he entered into it (5); and if one of several co-sureties be compelled to pay the whole sum recovered, he may maintain an action against his co-surety for contribution (6), even though he had given a subsequent surety to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety. (7)

HEIR.

If in the obligatory part of a bond the heir be expressly mentioned, he is liable in respect of assets by descent, but his liability does not extend beyond the value of the land. (8)

DEVISEE.

The devisee is only liable when the debt becomes due in the lifetime of the testator; but under stat. 11 Geo. 4. and 1 Will. 4. c. 47. the devisee is liable for specialty debts to the value of the lands devolved.

EXECUTORS OR
ADMINISTRATORS.

Executors or administrators are liable to the extent of assets, whether mentioned or not, and the interest of the obligee always passes to them. (9)

If executors or administrators enter into a bond, they are personally liable, though they make it expressly as executors. (10)

IV. Bonds acquired by Duress.

BONDS AC-
QUIRED BY DU-
RESS.

It is essential to a bond, that it is entered into voluntarily; for if *obtained by duress*, the bond is voidable by the obligor; and if the bond on the face of it appear to be good, the obligor must avoid it by pleading duress, for the court must decide by the verdict of a jury whether it was obtained by duress or not.

Duress must
be of the per-
son of the de-
fendant or his
wife.

The duress must be of the person of the defendant or his wife. (11)

If a bond be given by the defendant when under an arrest, but made without any cause of action; or if the arrest was for a just debt, but made

Arrest made

(1) *Collins v. Blantern*, 2 Wils. 344.

(2) *M^r Clure v. Dunkin*, 1 East, 436. 1 Saund. 58. (a.)

(3) *Cutler v. Southern*, 1 Saund. 115. *Challoner v. Walker*, 1 Burr. 547.

(4) *Duffield v. Scott*, 3 T. R. 374. *Sparkes v. Martindale*, 8 East, 593.

(5) *Per De Grey C. J.* in *Wright v. Russell*, 2 W. Black. 935.

(6) *Cowell v. Edwards*, 2 B. & P. 268.

(7) *Dunn v. Slee*, 1 Moore, 2.

(8) 4 Bac. Abr. Heir. (F.), 164—176. Touchst. by Atherley, 368, 369. *Barber v. Fox*, 2 Saund. 136. Stats. 3 & 4 W. & M. c. 14. and 11 Geo. 4. and 1 Will. 4. c. 47.

(9) Touchst. by Atherley, 369. *Hyde v. Skinner*, 2 P. Wms. 197.

(10) *Childs v. Monins*, 2 B. & B. 460. *King v. Thom*, 1 T. R. 489. *Gardner v. Baillie*, 6 ibid. 591.

(11) Bro. Abr. Duress, pl. 18.

without good authority; or if the arrest was made by a justice of the peace upon a charge of felony, when no felony was in fact committed; or if a felony was committed, yet if the arrest was unlawfully made, it is duress; and bonds entered into by persons in custody under these circumstances are voidable in law. (1)

DEBT ON BOND.

without cause of action, or good authority.

To a penal action on stat. 32 Geo. 2. c. 28. ss. 1. 12., against the sheriff for carrying a party arrested by him to a tavern, without his free and voluntary consent, the defendant pleaded that he did not carry the plaintiff to a tavern *without* his free and voluntary consent, *modo et formâ*:—It was held on issue joined thereon, that as the plea admitted an arrest by the defendant, and as the evidence shewed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer by proof of the warrant.

Stat. 32 Geo. 2. c. 28. ss. 1. 12.

The fact of a prisoner consenting to accompany the officer is immaterial: thus, where an officer was illegally carrying the party to gaol, within twenty-four hours after arrest, and the prisoner, to avoid being taken to goal, *consented* to go to a tavern, and there draw up an agreement for the purpose of getting discharged:—It was held, that a consent so obtained was not free and voluntary within the statute, and that the plea was properly negatived by the jury. (2)

To a plea of duress the plaintiff can reply, that the defendant was at large at the time of the execution (3), and that he sealed and delivered the bond voluntarily, and not by duress of imprisonment.

If a man threaten me, except I make him a bond for 40*l.*, and I tell him I will not do it, but I will give him a bond for 20*l.*, the court will not expound this bond to be a voluntary one; for *non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit*. (4)

What is not duress.

Duress of goods will not be sufficient to avoid a bond, though formerly held otherwise. (5)

Duress of goods will not be sufficient to avoid a bond.

Duress will only avoid the bond as to the obligor himself; therefore, it will be no discharge to the surety who had joined in the bond, and against whom there had been no duress practised. (6)

Duress only avoids the bond as to the obligor.

And it is the same in a court of equity: for though a man be arrested by due course of law, yet if a wrong use be made of it, as compelling him to execute deeds not before thought of, a court of equity will consider it as a duress, and relieve him. (7)

V. Form of Bonds.

It is essential to the nature of a bond that it be written or printed on paper or parchment; and it will not be a valid instrument if the materials used consist of wood, stone, leather, or cloth. (8)

FORM OF BONDS.

(1) *Wooden v. Collins*, Bull. N. P. 172. (a.)

(2) *Barsham v. Bullock*, 10 A. & E. 23. *Quære*, Whether the plea operated as a denial both of the carrying to the tavern, and of the consent, or only of the consent?

(3) *Clayt. Ass.* 77.

(4) *Bac. Reg.* 22. *cit.* Bull. N. P. 173. (a.)

(5) 1 Rol. Abr. Dures d'Emprisonment (B.) 687. *Sumner v. Ferryman*, Str. 917.

(6) *Huscomb v. Standing*, Cro. Jac. 187.

(7) 1 Esp. N. P. 209. *cit.* *Nicholls v. Nicholls*, Atk. 409.

(8) Co. Litt. 35. (b.) 229. (a.) Com. Dig. Fait (A. 1.). Bro. Abr. Obligation, 30. 67. F. N. B. 122.

DEBT ON BOND.

"Where bonds are not sufficiently explicit, or where their language, if construed literally, would be nonsense, we must endeavour to discover the intent of the obligor, and be guided thereby." (1)

Bonds being merely acknowledgments of a debt, it is not necessary that they should be expressed to be deeds, but may be in any form, if the language will admit a construction, that the party making it intended to acknowledge his liability (2); therefore a letter of attorney (3), and an acknowledgment written on a page of a book, whereto a seal was affixed (4), have been respectively holden to constitute good bonds.

What amounts to an acknowledgment.

As to what amounts to a sufficient acknowledgment:—A direct acknowledgment has been holden to constitute a bond, as "I acknowledge to owe" A. B., for which payment I bind, &c. (5). And every deed that expressly recognises a debt in the obligor (6); as "*concedo vobis solvere*," &c. (7); or if it be in the imperfect tense, as "*I have agreed*" to pay, &c. (8); or when the bond was "*I am content* to give to W. 10*l.*," &c. (9); and even the expression, "*I shall pay*," &c. are sufficiently explicit of the obligation. So a deed acknowledging a legal liability to pay money, as where the obligor acknowledges that he has in his hands money belonging to another (10); or a memorandum of a loan accompanied by a promise to pay the lender. (11)

There are only three things essentially necessary to a bond, viz. writing, sealing, and delivery.

Signing.

As to signing, that circumstance was not necessary in former times; and the Statute of Frauds does not extend to bonds, for no estate or interest in lands is immediately created by them (12); therefore the variance in the name signed and the name in the obligation is not material, because subscribing is no essential part of the bond. (13)

Sealing.

Sealing seems to be an indispensable requisite (14); and if the seal of the obligor be removed, the bond is vacated as to that party. (15) The sealing of a joint bond by one of two partners, but in the presence and with the sanction of the other, is binding. (16)

Delivery.

The delivery being merely indicative of the obligor's intention to adopt the bond as his deed, it is settled, that if such design can be shewn by circumstances (17), the bond will be obligatory on the party without any formal act or verbal declaration that the party intends to deliver. (18) Hence, if the obligor take up a bond placed or thrown on a table, with intent to deliver it, that, will constitute a valid delivery. (19)

(1) Per cur. in *Cromwell v. Grunsden*, 12 Mod. 194. Holt, 122. 502. 1 Ld. Raym. 335. 2 Salk. 462.

(2) Bro. Abr. 67. Co. Litt. 137. 139.

(3) *Plymouth (Countess of) v. Throgmorton*, 3 Mod. 153. Comb. 87.

(4) *Fox v. Wright*, Cro. Eliz. 613.

(5) *Hardman v. John*, ibid. 886.

(6) *Anon.* Dyer, 21.

(7) 2 Rol. Abr. Obligation (D.), 146.

(8) *Bedowes' case*, 1 Leon. 25.

(9) *Kettell's case*, 3 ibid. 119.

(10) *Anon.* Dyer, 21.

(11) 2 Rol. Abr. Obligation (D.), 146. 22 Edw. 4. 22. (a.) Dyer, 22. (b.) *Shaw v. Sherwood*, Cro. Eliz. 729. F. Moore, 667. Owen, 127. Yelv. 23.

(12) 4 Cruise's Dig. 100.

(13) *Cromwell v. Grunsden*, 2 Salk. 462.

(14) Dyer, 19. (a.) *Southwell v. Brown*, Cro. Eliz. 571. *Ashmore v. Rypley*, Cro. Jac. 420. *Goddard's case*, 2 Co. 5. *Green v. Cubit*, 1 Vent. 70. *Vivian v. Campion*, 1 Salk. 141. *Woodcock v. Morgan*, 6 Mod. 306.

(15) *Collins v. Prosser*, 1 B. & C. 682.

(16) *Ball v. Dunsterville*, 4 T. R. 313.

(17) *Keyme v. Goulston*, 1 Lev. 140.

(18) Co. Litt. 36. (a.) 2 Rol. Abr. Faits (K.), 24. (S.) 28.; Graunts (D.), 45.

(19) *Stanton v. Chamberlain*, Owen, 95. Cro. Eliz. 122. 1 Leon. 140. 1 Inst. 136. (a.)

If a bond appear to have been signed by the obligor, and has on it a seal, it is for the jury to determine, whether they can infer from the evidence, that all the formalities which the law requires were complied with. (1) DEBT ON BOND.

A bond may be executed by any person on behalf of the obligor, provided such person be duly authorised by deed, or the obligor subsequently recognise the agent's act; and it may be delivered to any other person as well as the obligee. (2)

The design of delivery being an absolute transfer of the power or right conferred by the deed, a delivery to a stranger will produce the usual effect (3), even although it was intended not to have operation till after a condition was performed. (4) But where a stranger receives a bond as an escrow, the peculiar nature of that mode of delivery prevents the application of the general rule. (5)

It is not necessary in any case at common law, that a proof of matter of fact should be made by more than one witness, for a single testimony of one credible witness is sufficient to prove any fact; and the authorities cited in 1 Inst. 6. (b.) (6) in support of an opinion to the contrary, do not warrant the opinion which is there founded on them. (7) One credible witness sufficient to prove any fact.

VI. The Stamp.

By stat. 55 Geo. 3. c. 184. sched. 1. tit. "Bond," bonds given as a security the payment of any "definitive and certain sum of money" are to have the following stamps:— THE STAMP.

				£	s.	d.
If not exceeding 50 <i>l.</i> (8)	-	-	-	1	0	0
If above 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	-	1	10	0
100	200	-	-	2	0	0
200	300	-	-	3	0	0
300	500	-	-	4	0	0
500 (9)	1000	-	-	5	0	0

(1) *Talbot v. Hodson*, 7 Taunt. 251. 2 Marsh. 527.

(2) *Perk. Fait*, 137. Com. Dig. *Fait*, (A. 3.).

(3) 2 Rol. Abr. *Feffment* (D.), 2.

(4) *Ibid. Faits* (L. M.), 25. 1 Lev. 152.

(5) Co. Litt. 36. (a.) 2 Rol. Abr. *Faits* (M.), 25.

(6) Co. Litt. 6. (b.)

(7) *Per Holt C. J.* in *Shatter v. Friend*, Carth. 142.

(8) Where a bond was stamped with a 20*s.* stamp, which after reciting that the defendant had sold a term of 21 years in a public-house for 1000*l.*, contained a condition, that the defendant was not to convert it into a wine vaults under a penalty of 500*l.*:— It was held to be a sufficient duty, because such a bond cannot be termed a security for a definite sum, where it is a penalty which might cover a number of breaches, and where the sum itself is payable only upon a contingent event; neither was it for the repayment of a definite sum. *Hughes v. King*, 1 Stark. 119. A bond, conditioned for payment of a sum of money to the

obligee on a day named, according to a proviso contained in a conditional surrender of even date, whereby A. (not the obligor in the bond) surrendered to the obligee certain copyhold lands for securing payment of the same sum, was held to require a 1*l.* stamp, although it bore no stamp denoting the payment of the *ad valorem* duty on the surrender, and the latter was not produced. *Quin v. King*, 1 M. & W. 42. 4 Dowl. P. C. 736. A bond and mortgage deed being given to secure the same sum, are executed at the same time, but are dated on different days, the mortgage deed bearing an *ad valorem* stamp, the bond a 1*l.* stamp:— It was held, that the bond was improperly stamped, for the words of the exempting clause are "bearing even date." *Wood v. Norton*, 9 B. & C. 885. 55 Geo. 3. c. 184. sched. tit. "Bond."

(9) A bond, conditioned to pay 1000*l.* on a day five years from the date, and to pay interest, half yearly in the meantime, only requires a stamp for the amount of the principal sum of 1000*l.* *Foreman v. Jeyes*, 5 C. & P. 419. A bond was given for 2000*l.*,

DEBT.

DEBT ON BOND.						£	s.	d.
If above 1000 <i>l.</i> and not exceeding 2000 <i>l.</i>						-	-	-
2000						6	0	0
3000						7	0	0
4000						8	0	0
4000 (1)						9	0	0
5000						12	0	0
10,000						15	0	0
15,000						20	0	0
20,000						25	0	0

Bonds given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit (2) - - - - - 25 0 0

Bonds not otherwise charged nor expressly exempted from duty (3) - - - - - 1 15 0

Where any such bond, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of - - - - - 1 5 0

Stat. 5 Geo. 4. c. 41. Stat. 5 Geo. 4. c. 41. has repealed the stamp duty on bail bonds, replevin bonds, bonds by petitioning creditors of bankrupt, and the assignment of all such bonds.

the condition of which, after reciting that A. B. had opened an account with D., E., F., and G. as bankers, and that the bankers had agreed to discount bills, and pay in advance for A. B. any sum not exceeding 1000*l.* in the whole, was that A. B. and C. should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c. together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest :—Held, that this being a bond to secure not only 1000*l.*, but a further sum for the bankers' charges for commission, &c. the stamp of 5*l.* required by stat. 55 Geo. 3. c. 184. sched. part. 1. tit. "Bond given to secure a sum exceeding 500*l.* but not exceeding 1000*l.*," was not sufficient. *Dickson v. Cass*, 1 B. & Ad. 342.

(1) A bond conditioned to secure plaintiffs to the extent of 5000*l.*, which was held to guarantee a running account which plaintiffs had with a third person, and not to be discharged by the first payment of 5000*l.*, only requires a 9*l.* stamp, and not a 25*l.* stamp as a security of an unlimited extent, under stat. 55 Geo. 3. c. 184. *Williams v. Rawlinson*, 3 Bing. 71. R. & M. 233. 11 Moore, 362., et vide *Thomson v. Cooke*, 8 ibid. 588.

(2) A bond was given, conditioned to secure a London banker, from the balance

arising from paying bills, &c. for a country banker; a stipulation was inserted in the condition, that the whole amount of moneys to be ultimately recoverable should not exceed the sum of 1000*l.* :—Held, that the bond did not require a 25*l.* stamp. *Lloyd v. Heathcote*, 1 C. & M. 336. 3 Tyrw. 309.

(3) A bond to secure damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first action, only requires a 35*s.* stamp as a bond not otherwise charged. *Lopez v. De Tastet*, 8 Taunt. 712. Where, by a bond, A., as principal, and B., as surety, were jointly and severally bound to pay to the creditors of C. 14*s.* in the pound on the amount of their debts; and by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety :—Held, that a stamp of 1*l.* 15*s.* was sufficient in amount for this instrument, and that it did not require a second stamp on account of A.'s obligation to indemnify B., the whole being one transaction. *Annandale v. Pattison*, 9 B. & C. 919. A bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the *ad valorem* stamp appropriated to the principal sum, where that stamp exceeds the 1*l.* 15*s.* which the collateral matter would require if it stood alone. *Dearden v. Binns*, 1 M. & R. 130.

DEBT ON BOND.

A bond conditioned for the production of a box containing the subscriptions of a friendly society, has been held to be within the exemption in stat. 33 Geo. 3. c. 54. s. 4., and that it need not be stamped. (1)

If a bond be conditioned for the payment on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent., a stamp covering the amount of the principal is sufficient. (2)

If several persons bind themselves in a penalty by one bond, conditioned for the performance by each and every of them, of the same matter, one stamp only is requisite (3); for it is all one transaction. A bond conditioned for the payment of an annual rent for a definite period ought to be stamped according to the aggregate amount of the whole rent secured. (4)

Where several persons are bound under one penalty for the performance of the same matter, one stamp is sufficient (5), because the bond must be considered as single.

It is sufficient if the instrument bear a proper stamp when it is produced upon the trial, although it was not stamped when it was executed, or when produced on a former occasion (6); and the adversary cannot shew that the instrument was not stamped when made (7), unless the commissioners are expressly prohibited from affixing a stamp. (8)

By stat. 55 Geo. 3. c. 184. s. 10. it is enacted, "that instruments for or upon which any stamp or stamps shall have been used, of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof."

If the stamp be insufficient, it is ground of nonsuit (9); but the objection must be taken at the trial, before the instrument is read.

Articles of agreement under seal cannot be received in evidence, being stamped with an agreement stamp of the same value, but differently formed. (10)

Number of stamps where there are several obligors.

Time of stamping.

Stat. 55 Geo. 3. c. 184. s. 10.

Effect of bond being improperly stamped.

VII. *Recital and Condition of a Bond.*

The extent of the condition of a bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. (11) But the recital will not qualify the condition, if it appear from the whole instrument, the parties did not so intend. (12)

Any words by which the intention of the parties can be discovered, are sufficient to make a condition of a bond, for if the words, though improper, should be construed void, and not a condition, then the obligation

RECITAL AND CONDITION OF A BOND.

Intention of the parties govern the construction.

(1) *Carter v. Bond*, 4 Esp. N. P. C. 253.

(2) *Dixon v. Robinson*, 1 M. & R. 115. 5 C. & P. 96.

(3) *Bowen v. Ashley*, 1 N. R. 274.

(4) *Attree v. Anscomb*, 2 M. & S. 88., vide *Collins v. Collins*, 2 Burr. 820. *Walcot v. Goulding*, 8 T. R. 126. *Willoughby v. Swinton*, 6 East, 550.

(5) *Bowen v. Ashley*, 1 N. R. 274. *Godson v. Forbes*, 1 Marsh. 531.

(6) *Rex v. Chester (Bishop of)*, Str. 624. *Rogers v. James*, 7 Taunt. 147. 2 Marsh. 485.

(7) *Robson v. Hall*, Peake's N. P. C. 173.

(8) *Roderick v. Hovil*, 3 Camp. 103.

(9) *Carter v. Bond*, 4 Esp. N. P. C. 253. *Attree v. Anscomb*, 2 M. & S. 88. *Scott v. Allsopp*, 2 Price, 20. *Hughes v. King*, 1 Stark, 119.

(10) *Farr v. Price*, 1 East, 55. *Chamberlain v. Porter*, 1 N. R. 30. *Taylor v. Hague*, 2 East, 414. *Aitcheson v. Sharland*, 1 Esp. N. P. C. 292. *Rex v. Keynsham (Inhab. of)*, 5 East, 309.

(11) *Pearsall v. Summersett*, 4 Taunt. 593.

(12) *Parker v. Wise*, 6 M. & S. 239.

DEBT ON BOND.

would be single, and of force against the obligor, though he had performed the condition of it, according to the intention of the parties, and the condition being for the benefit of the obligor will be construed favourably. Mr. Sergeant Williams in his note to *Butler v. Wigge* (1) says, "With respect to impossible or void conditions, the following distinction has been taken, — that where the condition is underwritten or indorsed, *that* is only void, and the obligation is single; but where the condition is part of the lien itself, and incorporated therewith (as in a recognisance by bail), if the condition be impossible, the obligation is void." (2)

Where the condition consists of different parts, some of which are only lawful.

When the condition of a bond is entire, and the whole is against law, it is void. But where the condition consists of several different parts, some of which are lawful, and others not, it is good for so much as is lawful, and void for the rest. If a bond be given with a condition to do a thing against an act of parliament, and also to pay a just debt, the whole bond is void, because the letter of the statute makes it void, and it is strict law.

Impossible and illegal conditions.

Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is void. Where the condition subsequently becomes impossible by the act of the obligor, or of a stranger, the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved. (3)

A bond is good, with a condition to be forfeited, if defendant shall hire C. so as to give him a parish settlement. (4)

Omission of the usual conclusion of a condition.

If there be an omission of the usual conclusion of a condition, viz. that then the obligation shall be void, yet the condition is good; and it is a good defeasance of the bond; for insensible and repugnant words shall be rejected. (5)

**BOND VOID BY
MATTER SUB-
SEQUENT.**

VIII. *Bond void by Matter subsequent.*

Condition of a bond possible at the time of making, but subsequently rendered impossible.

If the condition of a bond be possible at the time of making (as if the condition be that I. S. shall marry A. B. within a month), but before the time comes it becomes impossible, first by the act of God (as if A. B. die within the time); or secondly, by the act of the obligor himself (as if he marry her himself); or thirdly, by the act of law (as by A. B. marrying another, so that to marry I. S. would be contrary to law): in all these cases the obligation is saved and the bond void. (6)

But if, as previously observed, the condition of a bond be impossible at the time of making, as that the obligor shall go to Rome in a day, the bond is not void, but is single, that is, for the payment of money without any condition. (7)

Where condition of bond consists of two parts in the disjunctive, and one becomes impossible.

If the condition of a bond consist of two parts in the disjunctive, and both are possible at the time of the bond (as where it was that the defendant should either purchase to the use of I. S. his heirs, &c. lands of a certain value, or leave to the said I. S. by legacy, or otherwise, money to such an amount, that then, &c.), and one becomes impossible by the act of God, the obligor is not bound to perform the other part, for the condition.

(1) 1 Saund. 66.

(2) *Pullerton v. Agnew*, 1 Salk. 172.

(3) *Anon.* cit. in *Beswick v. Swindells* (in error), 5 N. & M. 378.

(4) *Whiting v. Punchard*, 3 Wils. 50.

(5) 1 Saund. 66. n. 1.

(6) Co. Litt. 206. (a, b.)

(7) *Ibid.*

is for the benefit of the obligor, and he has his option to perform either part to save his condition; and when deprived of one by the act of God, he cannot be called upon to perform the other. (1)

But where the impossibility does not proceed from the act of God, the impossibility of performing one part, will be no excuse for not performing the other. (2)

DEBT ON BOND.

Where the impossibility does not proceed from the act of God.

IX. *Effect of Penalty.*

The sum inserted in the bond as a penalty to secure the performance of the condition, is generally double the amount of the sum intended to be secured by the instrument; and as it is considered to be a compensation for the breach of the contract, the reservation of a greater sum is allowed, and it is not usurious within stat. 4 Anne, c. 16., because it is in the power of the borrower to avoid the payment of the money reserved as a penalty, by paying the principal at the day appointed. (3)

EFFECT OF PENALTY.

In some cases the penalty may be the only criterion as to the sum to be recovered: thus, where an action was brought by the trustees of a charity, instituted for the purpose of advancing money to put out apprentices to small trades, 1*l.* per cent. to be paid for the loan for the first year, and 2*l.* per cent. the following, Lord Mansfield said, "Though in common instances the debt is the substance and real demand, and the penalty only the security and the shadow, yet here, this being a regulation to secure the fund to a public charity, lending money on very kind and beneficial terms, for the encouragement of industry and advancement of young persons in trade, and by the smallness of the interest and possibility of losses, the fund being likely in its nature to fail, were it not for the incidental aid of the penalties, the penalties themselves are substance and not form, and a forfeiture of the bond subjected to the penalties, and not to payment of the mere sum only, because there are special conditions by which they received a special benefit." (4)

Where penalty is and is not the criterion, as to the sum to be demanded.

Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty. (5) If a man agree not to do an act, and enter into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such an act; but the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue. (6) If an instalment secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law. (7) A bond, conditioned for the payment of a certain sum with interest, may be put in suit without a previous demand of payment. (8)

Equitable relief.

But a bond, whereby the obligor bound himself "in the sum of 20*l.* to be paid yearly," is not like a bond with a penalty which can be forfeited, and so become a debt in law. (9)

(1) *Laughter's case*, 5 Co. 21. (b.)

(2) *Da Costa v. Davis*, 1 B. & P. 242.

(3) *Burton's case*, 5 Co. 69. *Roberts v. Trenchayne*, Cro. Jac. 509.

(4) *Anon.* Loft. 555.

(5) *White v. Sealy*, Doug. 49.

(6) *Hardy v. Martin*, 1 Cox, 26.

(7) *Judd v. Evans*, 6 T. R. 399. S. P.

Coates v. Hewit, 1 Wils. 80. *Talbot v.*

Hodson, 2 Marsh. 527. 7 Taunt. 251.

(8) *Gibbs v. Southam*, 3 N. & M. 155. 5 B. & Ad. 911.

(9) *Morant v. Gough*, 7 B. & C. 206. 1 M. & R. 41.

DEBT ON BOND.

ALTERATION IN BOND.

X. *Alteration in Bond.*

Material alteration.

If the bond be altered by the obligee, although but in an immaterial point, he vacates the deed. (1)

Where in debt on bond, the defendant on *oyer* discovered, that a material erasure had been made in the condition, and pleaded *non est factum*, and the plaintiff, perceiving the erasure to be detected, countermanded the notice of trial, the court refused to impound the deed. (2)

Immaterial alteration.

In a bond conditioned "for the payment of one hundred pounds by instalments, till the full sum of one pounds be paid," the word hundred having been omitted in the second place where it occurred in the condition: — It was held, that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument. (3)

But although this alteration did not avoid the instrument, yet it made such a variance between the *oyer* and the condition, as precluded the plaintiff from recovering. (4)

Alterations by a stranger.

An alteration by a stranger in an immaterial point will not avoid the instrument; but it is said to be otherwise, if a stranger alter it in an essential particular; for the witnesses cannot prove it to be the deed of the party where there is any material variation (5), as where the date is erased after the delivery. (6)

Removing the seal.

The act of taking one seal from a several bond, will not destroy its effects on the other persons. (7)

XI. *Simoniacal Bonds.*

SIMONIAL BOND.

Bonds whose consideration is *malum prohibitum* are, bonds given for a simoniacal consideration; bonds whose consideration is usurious; bonds given for the sale of offices; bonds given for money won at play.

SIMONY DEFINED.

Simony is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward.

It was by the common law a very grievous crime; and is so much the more odious, because, as Sir Edward Coke observes, it is ever accompanied with perjury, for the presentee is sworn to have committed no simony. However, it was not an offence punishable in a criminal way at the common law (8), it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures.

STAT. 31 ELIZ. c. 6.

By stat. 31 Eliz. c. 6. for the avoiding simony and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions,

(1) Bull. N. P. 267. *Leyfield's case*, 10 Co. 92. *Pigot's case*, 11 ibid. 27. *Adams v. Bateson*, 6 Bing. 110.

(2) *Selby v. Greene*, 6 Mod. 233.

(3) *Waugh v. Bussell*, 1 Marsh. 214. 311. 5 Taunt. 707.

(4) Ibid.

(5) *Pigot's case*, 11 Co. 27. Bull. N. P. 267. Com. Dig. Fait, 1. *Markham v. Gonaston*, Cro. Eliz. 626.

(6) *Matthewson's case*, 5 Co. 23.

(7) *Collins v. Prosser*, 1 B. & C. 682.

(8) *Oldbury v. Gregory*, F. Moore, 564.

institutions, and inductions to the same, it was enacted by sect. 5., "That if any person or persons (1), or bodies corporate, shall, for money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances of or for any money, &c. directly or indirectly present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for any such corrupt cause or consideration, every such presentation, &c. and every admission, institution, investiture and induction thereupon shall be void; and it shall be lawful for the crown (2) to present, &c. to such benefice, &c. for that one turn only; and every person, &c. that shall give or take such money, &c. or take or make any such promise, &c. or other assurance, shall forfeit double the value of one year's profit of such benefice, &c.; and the person so corruptly taking, &c. such benefice, &c. shall thenceforth be adjudged a disabled person to have the same." (3)

By sect. 6., if any person shall for money, &c. other than lawful fees, or for any promise, &c. or other assurance for money, &c. directly or indirectly admit, institute, instal, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, every such offender shall forfeit double the value of one year's profit of such benefice, &c.; and the same benefice, &c. shall be void; and the patron, &c. shall present or collate unto the same, as if the party so admitted, &c. were dead.

But no title to confer or present by lapse, will accrue upon any avoidance until six months next after notice given of such avoidance, by the ordinary to the patron. (4)

By sect. 8., if any incumbent of any benefice for cure of souls shall corruptly resign or exchange the same, or corruptly take, for the resigning or exchanging the same, directly or indirectly, any pension, money, or benefit whatsoever, that then as well the giver, as the taker thereof, shall lose double the value of the sum so given, the one moiety as well thereof, as of the forfeiture of double value of one year's profit to the crown, and the other to him that will sue for the same, by action of debt, bill, or information, in any of the superior courts of record.

Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute. As for instance in the case of simony, the stat. 31 Eliz. c. 6. only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract, yet it hath been always held that such contracts, being against law, are void. (5)

Under stat. 31 Eliz. c. 6., if the church be void, a bond given for the purchase of the presentation is simoniacal and void. (6)

Every contract prohibited by statute is a void contract, although the statute does not mention it shall be so.

Bonds given where the church is void.

(1) Usurpers, as well as persons having title to present or collate, are within this statute. 1 Inst. 120. (a.) 3 ibid. 153.

the corrupt contract, he shall not be adjudged a disabled person. 3 Inst. 154.

(4) Sect. 7.

(2) If the corrupt presentation or collation is by an usurper, then the king shall not present, but the right patron. 3 Inst. 153, 154. 1 ibid. 120. (a.)

(5) Stats. 31 Eliz. c. 6. and 12 Anne, st. 2. c. 12. Per Holt C. J. in *Bartlett v. Vinor*, Carth. 252.

(6) *Baker v. Rogers*, Cro. Eliz. 788.

(3) Where the presentee is not privy to

DEBT ON BOND.

For the next presentation, the incumbent being *in extremis*.

Sale of perpetual advowson.

Purchase of the advowson in fee, the incumbent being *in extremis*.

Bonds for payment of an annuity.

Stat. 12 Anne, st. 2. c. 12. s. 2.

Presentations during incumbency.

Father purchasing next presentation of a living as a provision for his son.

To pay money to charitable uses.

Where the condition of the bond is to enforce what it is the duty of the incumbent to perform.

If it be given for the next *presentation*, the incumbent being *in extremis*, it is simony. (1)

If a perpetual advowson be sold when the church is void, the next presentation will not pass, and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. (2)

But the purchase of the advowson in fee, the incumbent being on his death bed, and in fact dying the next morning, is not simony; for an advowson is a temporary and valuable right, and so capable of sale, and not simony, particularly where it appeared that such was not known to the person presented. (3) So the purchase of a next presentation, although the incumbent was *in extremis*, within the knowledge of both contracting parties, but without the privity of or a view to the nomination of the particular clerk who was afterwards presented, is not void. (4)

Bond for payment of an annuity in consideration of a resignation of living is simony, and void by stat. 31 Eliz. c. 61. (5)

Respecting presentations during incumbency it is enacted by stat. 12 Anne, st. 2. c. 12. s. 2., that if any person shall for money or profit, in his name or that of any other, procure the next presentation to any living ecclesiastical, and shall be presented and collated thereupon, every such presentation shall be void, and such agreement shall be deemed a simoniacal contract. But to this are certain exceptions, which, though founded on decisions previous to the statute, still are law. (6)

If a father purchase the next presentation of a living as a provision for his son, it is not simony, and this though the son was present at the making of the agreement, for a father is bound to provide for his son. (7)

Bonds given to pay money to charitable uses, or, as in *Baker v. Mounford* (8), that the person presented should pay 10*l.* yearly to the son of the late incumbent while at the university on receiving the presentation, are not simoniacal, provided the patron or his relations are not benefited, as it would be if the 10*l.* had been reserved to the patron's son; for it is essential to simony, that the person presenting does it from some corrupt motive of profit to himself.

In general, where the condition of the bond is to enforce what it is the duty of the incumbent to do, such shall be deemed "legal." As where in debt on a bond against the defendant as incumbent of Worm Hill in Derbyshire, the condition of the bond was, that he should constantly and duly reside at the curacy-house in and upon the curacy, or in default of such residence he should resign within a month after request; and that he would not commit or suffer any waste or dilapidations on the house, lands, &c. during the time he should continue curate. This condition was, on demurrer, adjudged to be good and legal, as being for the purpose of securing a performance of those duties, which by law he was bound to discharge. (9)

(1) *Winchcombe v. Winchester (Bishop of)*, Hob. 165.

(2) *Fox v. Chester (Bishop of)*, 6 Bing. 17.

(3) *Barret v. Glubb*, 2 W. Black. 1052.

(4) *Fox v. Chester (Bishop of)*, D. P. (in error), 6 Bing. 1.

(5) *Yonge (Clerk) v. Jones*, B. R. E. 22 Geo. 3. B. P. B. 190. Dampier's MSS. L. I. L. cit. Selw. N. P. 562.

(6) *Rex v. Ely (Bishop of)* 2 W. Black. 80.

(7) *Smith v. Shelbourn*, Cro. Eliz. 685.

(8) *Noy*, 142.

(9) *Bagshaw v. Bossley*, 4 T. R. 78.

General resignation bonds, or bonds conditioned to resign at the request of the patron, without expressing the object for which such resignation is intended, are illegal and void.

DEBT ON BOND.
Where general bonds of resignation are void.

Although such general bonds of resignation were formerly held to be legal upon the presumption, that they might be to enforce some duty from the incumbent, which was not contrary to law. (1)

In *Partridge v. Whiston* (2), which was debt on bond from the defendant on his presentation to a living, conditioning to resign it when the patron's son was ordained and could be presented, and the defendant relied on the agreement being simoniacal, the court, on demurrer, gave judgment for the plaintiff. But in *Fletcher v. Sondes (Lord)* (3), a special bond for resigning a living in favour of one of two brothers of the patron was holden to be void, for the first time, in the House of Lords.

Special bond for resigning a living in favour of one of two brothers.

The legislature, however, considering that persons who had been parties to such engagements, would suffer great hardship unless they were relieved from the penalties to which they had erroneously, but not wilfully, rendered themselves liable by stat. 7 & 8 Geo. 4. c. 25., enacted, that no presentation to any spiritual office made before 9th April, 1827, should be void, on account of any agreement to resign, when a person, or one of two persons specially named, became qualified to take the same. And by stat. 9 Geo. 4. c. 94., engagements entered into after 28th July, 1828, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent to be manifested in such engagement, that any one or two persons specially named, being other by blood or marriage than an uncle, son, grandson, brother, nephew, or grand nephew of patron, as mentioned in the second section, shall be presented, are good in law, and the performance of the same may also be enforced in equity.

Stat. 7 & 8 Geo. 4. c. 25.

Stat. 9 Geo. 4. c. 94.

A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of the patron, is good in law; though equity may restrain if improperly used. (4)

Bond by a schoolmaster to resign at the request of the patron.

XII. Usurious Bonds.

Stat. 37 Hen. 8. c. 9. repealed all previous enactments respecting usury, restricted the legal rate of interest to 10 *per cent. per annum*, and imposed a penalty on such as should take more.

USURIOUS BONDS.

Statutes for the repression of usury.

This statute was repealed by stat. 5 & 6 Edw. 6. c. 20., which prohibited the taking of any interest.

Stat. 13 Eliz. c. 8. repealed stat. 5 & 6 Edw. 6. c. 20., thereby reviving the first-mentioned statute, and avoiding all contracts on which more than 8 *per cent.* was reserved as usurious.

(1) *Peele v. Carlisle (Earl)*, Str. 227.
Babington v. Wood, Hutt. 111. *London (Bishop of) v. Fytche*, D. P. May 30. 1783.
Cunningham's Law of Simony, 2 Bro. P. C. 211.

(2) 4 T. R. 359.

(3) D. P. April 9. 1827.

(4) *Legh v. Lewis*, 1 East, 391.

DEBT ON BOND.

Stat. 21 Jac. 1. c. 17. reduced the rate of interest to 8 *per cent.*; stat. 12 Car. 2. c. 13. to 6 *per cent.*, and stat. 12 Anne, c. 16. to 5 *per cent.*

The foregoing statutes of Charles and Anne are essentially the same as the statute of James, which contains substantially the same provisions as the statutes of Elizabeth and Henry VIII., consequently those decisions which have occurred since the 13th of Elizabeth are applicable to the present law.

Provisions introduced in stat. 12 Anne, c. 16.

Two independent provisions are embodied in stat. 12 Anne, c. 16.:—

1. That no person upon any contract shall take, accept, or receive for the loan of money or other commodities above the rate of 5 *per cent. per annum*, under penalty of forfeiture of treble the money lent, one half to the crown, and the other moiety to him that will sue for the same.

2. That all bonds, contracts, or assurances, whereby there shall be reserved or taken above the rate of 5 *per cent. per annum*, shall be utterly void.

In order to make at once the assurance void and to incur the penalty, the contract must be for usurious interest, and usurious interest must be taken; but, on the one hand, the penalty may be incurred without avoiding the contract; and, on the other, the contract may be avoided without incurring the penalty. Thus, if a bond be given for the payment of a just debt, and it is afterwards agreed that the money secured by the bond shall remain in the hands of the obligor at usurious interest, and such interest *be taken*, the penalty is incurred, but the bond is good. (1) But if a man *contract* for usurious, yet *takes* only legal interest, the assurance is void, though the penalty is not incurred. (2)

WHAT IS AND IS NOT USURY.

Several evasions have been attempted of the usury statutes, but the courts have uniformly supported their spirit, for however disguised the agreement might be, if in fact it was usurious, it has been held to be void. (3)

To constitute usury, there must be a loan and forbearance.

To constitute usury, there must be a loan and forbearance; therefore, the acceptor of a bill which had some time to run, paying it beforehand, but deducting more than would be the legal interest for that time, was held not to be guilty of usury. (4)

Sale of goods.

Where the defendant sold to the plaintiff goods of the value of 20*l.*, and it was agreed, that the plaintiff should pay for them within six months 34*l.*, this was held to be usurious (5): so also, where the lender of money compelled the borrower to *take goods* at a price considerably above their value in the *form of a sale*, and afterwards had them repurchased at a lower price

(1) *Ferral v. Shaen*, 1 Saund. 292.

(2) *Fisher q. t. v. Beasley*, Doug. 223. 1 Saund. 295. To an action by indorsee against acceptor of a bill of exchange payable three months after date, it is no defence (since stats. 3 & 4 Will. 4. c. 98. s. 7., and 7 Will. 4. and 1 Vict. c. 80.) that defendant, being indebted to plaintiff on an account stated, it was agreed between plaintiff, drawer, and defendant, that plaintiff should forbear payment of the debt for three months; that defendant should pay to plaintiff a certain sum larger than interest at 5 *per cent. per annum* for such forbearance; that the bill should be made, accepted, and indorsed

to plaintiff as a security for payment of the debt at the end of three months; and that the said sum was in fact paid by defendant, and the bill made, accepted, and indorsed to plaintiff in pursuance of such agreement. *King v. Braddon*, 10 A. & E. 675. A loan of money at more than 5 *per cent.* upon the security of a deposit of a lease, a warrant of attorney, and a promissory note, is not protected by stat. 3 & 4 Will. 4. c. 98. s. 7. *Berrington v. Collis*, 5 Bing. N. C. 332.

(3) *Burton's case*, 5 Co. 69. (b.)

(4) *Barclay q. t. v. Walmsley*, 4 East, 55.

(5) *Peterson's case*, Cro. Eliz. 104.

whereby he reserved to himself a greater profit than 5 *per cent.*, it was adjudged to be usurious. (1)

And where illegal interest was reserved in the form of rent, it was likewise held to be usurious. (2)

But where in discounting a bill a person gives goods in part, which are charged at rather a high price, it will not be deemed usury, provided that the price is not so exorbitant, that it appears to be for the purpose of reserving exorbitant interest under its colour. (3)

If by possibility any money above legal interest *can be received*, and that appears on the face of the contract, it will be deemed usury; for uncertainty of receiving does not prevent it from being so deemed an usurious contract. (4)

But a reservation, whereby the lender of the money may obtain more in value than 5 *per cent.*, but may also receive less, so that on the face of the instrument it does not appear that he is to obtain in money a certain advantage above 5 *per cent.* will not be deemed usury. (5)

The rule is in general, that where the principal is safe, and the interest only hazarded, if that be more than legal, the contract is usurious. (6)

Therefore no contract will be deemed usurious in which the lender runs the risk of losing his principal, however large the interest reserved may be; as in the case of lending on *bottomry* or at *respondentia*, in which case, though the interest reserved far exceeds what is legal, yet is the contract good. (7)

But if it appear, on the whole of the transaction, that a loan was intended under colour of an annuity, and the mode of annuity was forced by the lender on the borrower, the court will consider it as usurious, notwithstanding a slight colourable contingency, as if the lender at the end of a given time engage to supply the borrower with money to redeem. (8)

It is upon the ground, that the principal is sunk and gone from the lender, that the grant of an annuity, at ever so great an under price, is not usury (9); and though there be a certain value for such things, and the sum given much below it, it is not usury, unless there be some secret contract to repay the principal. (10)

So also where the grant was in the form of an annuity, and there was a clause in the deed, that the borrower might repay the sum given for the annuity at a future period, the court held it not to be usury, although,

DEBT ON BOND.

Illegal interest reserved in the form of rent.

Discounting bill with money and goods.

If from the contract it appears that above legal interest can be received in money, it will vitiate the contract.

Where from the contract it does not appear that the lender is to obtain a certain advantage above 5 *per cent.*

Where the principal is safe, and the interest only hazarded.

Where the loss of principal is uncertain.

Grant of an annuity.

(1) *Lowe v. Waller*, Doug. 708.

(2) *Bedo v. Sanderson*, Cro. Jac. 440., vide etiam *Doe d. Davidson v. Barnard*, 1 Esp. N.P.C. *Maughan q. t. v. Walker*, Peake's N. P. C. 200. *Parr v. Eliason*, 1 East, 92.

(3) *Rich v. Topping*, 1 Esp. N. P. C. 176., vide etiam *Floyer v. Edwards*, Cowp. 112. *Hammet (Sir B.) v. Yea (Sir W.)*, 1 B. & P. 144.

(4) *Button v. Downham*, Cro. Eliz. 642. *Clayton's case*, 5 Co. 70. 1 Esp. N. P. 212.

(5) *Morisset v. King*, 2 Burr. 891. The members of a benefit society raised a joint stock fund, portions of which were from time to time advanced to members of the society by way of loan at 5 *per cent.* interest; the sums so advanced were put up to competition

among the members, and the member who bid highest obtained the loan. Defendant, a member of the society, bid 15*l.* 17*s.* 6*d.* for the loan of 80*l.*, the 15*l.* 17*s.* 6*d.* to be paid in addition to 5 *per cent.* interest on the 80*l.*: — It was held, that the transaction was not usurious. *Silver v. Barnes*, 6 Bing. N. C. 180.

(6) *Sayer v. Glean*, 1 Lev. 5. S. C. nom. *Soome v. Gleen*, 1 Sid. 27.

(7) *Sharpley v. Hurrell*, Cro. Jac. 208. *Chesterfield (Earl of) v. Jansen (Sir Abraham)*, 1 Wils. 286. 1 Atk. 304.

(8) *Richards q. t. v. Brown*, Cowp. 770. 1 Esp. N. P. 213. 8 Bac. Abr. Usury (C.), 321.

(9) *Per Burnet J.* in 1 Atk. 340.

(10) *Tanfield v. Finch*, Cro. Eliz. 27.

DEBT ON BOND. seemingly, the sum advanced was a loan and the annuity interest; for the repayment was casual, and depended on the borrower (the grantor) himself, so that it was not in the lender's power to have his money at all events, so that, as to him, the principal was gone. (1)

PLEADING. The offence of usury is completed in the county where the usurious interest is received, and the offence should be laid there.

To debt upon bond, the defendant may plead that the bond was given upon an usurious contract.

Statute against usury must be pleaded.

The statute against usury cannot be given in evidence on the general issue, but must be pleaded (2); for although it may appear to be usury on the condition, yet plaintiff may rectify it by his replication.

Declaration stating an absolute agreement, but proof of an alternative agreement.

It is not requisite to recite the statute in pleading usury (3), but in framing the plea, it should state "that there was a corrupt agreement" (4), and which should be particularly set forth with the *quantum* of interest agreed to be given. (5) The agreement should correspond with the evidence, as in other cases of contract; for in a case where the agreement was for the forbearance of money until one or other of two days, and the plea instead of stating it in the alternative, stated it as an absolute forbearance until one of those days, the variance was holden fatal. (6) The plea must likewise aver, that the agreement was to pay such a sum for giving day of payment: merely stating that the sum agreed to be given, for giving day of payment, exceeded the rate of legal interest, is not sufficient. (7)

EVIDENCE.

The usurious contract, like any other contract, must be proved as alleged (8), and a variance as to the *quantum* of usurious interest will be fatal.

But it is sufficient to prove the loan or forbearance, according to its substance and legal effect.

Allegation of a loan of a specific sum of money.

An allegation of a loan of a specific sum of money is satisfied by evidence of a loan to that amount, part in money and part in uncoined gold of a certain *definite* value, which the borrower agreed to take as cash. (9)

Interest taken by means of an agent.

Where usurious interest has been taken by means of an agent, it is not essential to call the agent himself. (10)

Money taken under the name of commission.

Whether the sum taken under the name of commission be a reasonable remuneration for trouble, or be but a cloak for usury, is a question of fact for the determination of a jury. (11)

Competency of witness.

The borrower of money at usurious interest is a competent witness for the plaintiff, in an action to recover penalties from the lender. (12)

A witness to prove usury in a contract between himself and the de-

(1) *Murray v. Harding*, 3 Wils. 390.

(2) Per cur. in *Humberton v. Howgil*, Hob. 72. *Whelpdale's case*, 5 Co. 119. (a.) *Geang v. Swaine*, 1 Lutw. 466.

(3) Bro. V. M. 255. cit. in Com. Dig. Pleader, 2. (W. 23.)

(4) *Nevison v. Whitley*, Cro. Car. 501.

(5) *Hinton v. Roffee*, 2 Show. 394.

(6) *Tate v. Wellings*, 3 T. R. 538.

(7) *Swales v. Bateman*, Sir W. Jones, 409.

(8) *Tate v. Wellings*, 3 T. R. 531.

(9) *Barbe q. t. v. Parker*, 1 Hen. Black. 283.

(10) 2 Stark. Ev. 861.

(11) A. by deed reciting that certain pre-

mises were worth 20l. a year, granted to B. an annuity of 20l. for 30 years charged upon the premises, which he covenanted to be of the recited value. A proviso was added, that so soon as the grantor should pay the consideration money, with legal interest and costs, the deed should be void: — It was holden, that the judge was correct in leaving to the jury the question of usury. *McCormick v. Ferrier*, 1 Hayes & Jones (Irish), 12.

(12) *Abrahams q. t. v. Bunn*, 4 Burr. 2251. *Smith q. t. v. Prager*, 7 T. R. 60. *Spenceley q. t. v. De Willott*, 7 East, 108.

defendant, cannot be cross-examined as to other contracts which he has made with other persons, in order that it may be inferred, if he answer in the affirmative, that the contract in question was of the same nature, or in order to contradict him, if he answer in the negative. (1)

DEBT ON BOND.

XIII. *Bonds for the Sale of Office.*

BONDS FOR THE SALE OF OFFICE.

By stat. 5 & 6 Edw. 6. c. 16., if any person bargain or sell any office or deputation of any office, or any part of them, or receive money or profit, or take any promise or assurance for the same, which office shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's treasure, money, rent, revenue, auditorships, or surveying any of the king's manors or lands, or the king's customs, or any administration or necessary attendance in the custom-houses, or the keeping of any of the king's fortresses, or which shall concern any clerkship in any court of record where justice is to be administered, all such bargains, agreements, bonds, and assurances shall be void: but this statute was not to extend to any estate of inheritance, office of parkership, or the keeping of any house, park, manor, garden, chase, or forest.

Stat. 5 & 6 Edw. 6. c. 16.

The object of the foregoing statute was, that public offices might be exercised by persons of skill and integrity, and that they might take only their legal fees; for those who buy their offices, will be apt to take more than their legal fees, according to what is said in the third Institute (2), "they that buy will sell."

Object of the statute.

"Where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute." (3)

The office of registrar of an archdeaconry is an office within this statute (4), because it is an office concerning the administration of justice. So is the office of auditor of Wales (5): and, as it seems, the office of under-sheriff. (6)

Where a plaintiff had procured for his brother (the defendant's testator) a place in the excise, by his interest with the commissioners, and the testator gave him a bond for the payment of 10*l.* a year during his life; but who died, having omitted payment for some years before his death; and the plaintiff put the bond in suit;—equity relieved the defendant against it, as occasioning extortion, corruption, and the sale of offices, Lord Chancellor Talbot observing, that "Bonds of this nature are highly to be discouraged; merit, industry, and fidelity, ought to recommend persons to these places, and not interest with the commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the commissioners for his interest, is altogether as bad as giving money, or a bond for money, to the commissioners

Judgment of Lord Chancellor Talbot in *Law v. Law*.

(1) *Spenceley q. t. v. De Willett*, 7 East, 108. 2 Stark. Ev. 862.

(4) *Woodward v. Foxe*, 3 Lev. 289. *Layng v. Paine*, Willes, 571.

(2) P. 148.

(5) *Godolphin v. Tudor*, 2 Salk. 468.

(3) Per cur. in *Godolphin v. Tudor*, 2 Salk. 468.

(6) *Browning v. Halford*, Freem. 19.

DEBT ON BOND.

themselves, which undoubtedly would have been relieved against. It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and though the excise was no part of the revenue at the time of making the stat. 5 & 6 Edw. 6., yet there may be good ground to construe it within the reason and mischief of the law, which is rather a remedial than a penal one." (1)

Bonds which
are not within
the statute.

Where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, and take a bond conditioned for the payment of such lesser sum, such bond is not within the statute. (2)

Uncertainty of
profit.

So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good (3); for in these cases the deputy is not to pay, unless the profits rise to so much; and though a deputy, by his constitution, is in place of his principal, yet he has no right to the fees, they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. (4)

PLEADING.

If defendant be desirous of taking advantage of stat. 5 & 6 Edw. 6. c. 16., he must plead it specially, in order that the plaintiff may have an opportunity of shewing that he is within the exceptions of the statute. (5)

GAMING
BONDS.

Stat. 9 Anne,
c. 14. s. 1.

XIV. *Gaming Bonds.*

By stat. 9 Anne, c. 14. s. 1., all notes, bills, bonds, judgments, mortgages, or other securities or conveyances, given or executed by any person when the whole or any part of the consideration of such securities shall be for money or any other valuable thing won by gaming, or by betting on such as game, or for repaying any money knowingly lent for such gaming, or lent at the time and place of such play, to any person who shall play or bet, shall be void. And when such securities shall affect lands, they shall enure to the uses of such persons as would be entitled to the lands, in case the person incumbering the same had been dead, and the security void.

Stat. 5 & 6
Will. 4. c. 41.

Stat. 5 & 6 Will. 4. c. 41. repeals the foregoing stat. of Anne, as far as respects the rendering void of bills, notes, or mortgages given for money, won by gaming, &c. and enacts, that it shall have the same effect as if it had provided that such note, bill, or mortgage should be deemed to have been made for an illegal consideration; but bonds are not mentioned.

PLEADING.

In a plea upon stat. 9 Anne, c. 14. the play or game at which the money was lost must be shewn, because it is matter of *law*. (6) And the particular game so specified must be proved. (7)

(1) *Law v. Law*, 3 P. Wms. 391. C. T. T. 140.

(2) Per cur. in *Godolphin v. Tudor*, 2 Salk. 468.

(3) Ibid. *Culliford v. De Cardonell*, ibid. 466.

(4) *Godolphin v. Tudor*, 2 Salk. 468.

(5) *Hornby v. Cornford*, Fitz-Gib. 45.

(6) *Colborne v. Stockdale*, Str. 493.

(7) *Mazzinghi v. Stephenson*, 1 Camp. 291.

XV. *Bonds in Restraint of Trade.*

The general rule is (1), that all restraints of trade, which the law so much favours, if nothing more appear, are bad; and this rule is laid down in *Mitchel v. Reynolds* (2)

BONDS IN RESTRAINT OF TRADE.

But to this general rule there are some exceptions; as first, that if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good and valid in law, notwithstanding the general rule; and this was the case of *Mitchel v. Reynolds*. (3)

“By common law, any person may carry on any trade in any place, unless there be a custom to the contrary; and if there be such a custom, then a bye-law in restraint of trade, warranted by such custom, will be good; but if there be no such custom, a bye-law in restraint of trade will be bad.” (4)

Where an obligor was to purchase certain articles, only of certain persons, it was held to be illegal. (5) So a bond generally, that he should not exercise his trade, is void; but not, if the restraint be a particular restraint, founded on a valuable consideration. (6)

It is, however, impossible to lay down any precise rule, as to the limits within which a person may restrict himself from carrying on his trade. (7)

XVI. *Bonds in Restraint of Marriage.*

BONDS IN RESTRAINT OF MARRIAGE ARE VOID.

Bonds whose conditions are in restraint of marriage are void, on the same principle of impolicy, as those in restraint of trade.

Thus, where the defendant gave to the plaintiff a promise of marriage under seal, in these words, “Hereby I promise Mrs. Catherine Lave, that I will not marry with any person beside herself: if I do, I agree to give her 1000*l.* N. PEERS.” The defendant having married another, was sued on this covenant, and the plaintiff had a verdict; but judgment was arrested, for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him; and so, being in restraint of marriage, was adjudged to be void. (8)

Bonds given to refund part of a marriage portion are void, as fraudulent on the contracting parties. (9)

Bonds given to refund part of a marriage portion.

Bonds given to each by a man and woman under a penalty, to marry after the death of the father of one of the parties, are void, for it is a partial

Bonds given by a man and wo-

(1) *Antè*, 1111—1116.

(2) 1 P. Wms. 181.

(3) *Per* Willes C. J. in *Gunmakers (Master of) v. Fell*, Willes, 388., vide etiam *Gale v. Reed*, 8 East, 86.(4) *Per* Bayley J. in *Clark v. Le Cren*, 9 B. & C. 58. 1 Stephens's Corporation Acts, 418—428.(5) *Thompson v. Harvey*, 1 Show. 2. Comb. 121.(6) *Mitchel v. Reynolds*, 10 Mod. 130.*Chesman v. Nainby*, Str. 739. 2 Ld. Raym.1456. *Hayward v. Young*, 2 Chitt. 407.*Clerke v. Comer*, C. T. H. 53. S. C. nom.*Colmer v. Clark*, 7 Mod. 290.(7) *Ibid. et antè*, 1111—1116.(8) *Lowe v. Peers*, 4 Burr. 2225.(9) *Turton v. Benson*, Str. 240.

DEBT ON BOND.

man to marry
after the death
of one of their
parents.

MARRIAGE
BROKAGE
BONDS
ARE VOID.

restraint, and fraud on the parent, and tends to encourage the disobedience of children. (1)

Bonds given to *procure a marriage with any person* are void, for in general all marriage brokage bonds are void. (2)

So where the plaintiff undertook by bond, that in consideration of the defendant's giving his consent that his ward should marry the plaintiff, he would release all sums due by the defendant to his ward's estate, this bond was deemed to be void. (3)

XVII. Bonds abridging the Rights or Powers annexed to any Office by Law.

BONDS ABRIDG-
ING THE RIGHTS
OR POWERS
ANNEXED TO
ANY OFFICE BY
LAW.

Where particular powers or rights are by law annexed to any office, bonds limiting or abridging the exercise of those powers are void, as where the plaintiff, who was sheriff of Hampshire, on his appointing a person as under-sheriff, took a bond from him and the defendant as his surety; one condition of which was, "that the under-sheriff should not execute any extent, *liberate, elegit*, or other process of execution, for any sum above 20*l.* without first acquainting the plaintiff (the sheriff) of the same, and getting his special warrant for the execution." To debt on this bond the defendant demurred, when it was resolved, that the office of under-sheriff is of long use, and as deputy to the sheriff he is invested with all the rights of office of the sheriff himself, such as executing process, executions, &c.; that the sheriff, therefore, cannot make an under-sheriff without giving him those powers, neither can he abridge him of any part of them; that this condition, therefore, being to deprive the under-sheriff of one of the rights annexed by law to his office, was illegal and void. (4)

**IMMORAL
BONDS.**

Obligor to kill
A. B.

To live in a
state of forni-
cation.

Where consi-
deration is *præ-*
mium pudoris.

Principles by
which courts of
equity construe
immoral bonds.

XVIII. Immoral Bonds.

If a man be bound in an obligation, the condition of which is, that he shall kill A. B., the bond is void. (5)

If the consideration of a bond be immoral, the bond will be illegal and void. Thus, where defendant's intestate gave to the plaintiff a bond, the condition of which was, that the plaintiff should live with him in a state of fornication, and that he should leave her an annuity of 60*l. per annum*, it was held to be a void bond. (6)

But if a man *debauch a woman*, and give her a bond as a recompense, or as a provision for her future support, it is *præmium pudoris*, and good in law. (7)

Courts of equity are influenced by similar principles: thus, if a common strumpet obtain a bond from an inexperienced person, equity will set it aside. But where a man debauches a woman and gives her a bond, it is *præmium pudicitiae*, and the injury a sufficient consideration; and where

(1) *Woodhouse v. Shepley*, 2 Atk. 535.

(2) *Hall v. Potter*, 3 Lev. 411.

(3) *Hamilton (Duke of) v. Mohun (Lord)*,
1 P. Wms. 118. 1 Esp. N. P. 218.

(4) *Norton (Sir Daniel) v. Simmes*, Hob. 12.

(5) Co. Litt. 206. (b.)

(6) *Walker v. Perkins*, 3 Burr. 1568. 1

W. Black. 517.

(7) *Turner v. Vaughan*, 2 Wils. 399. Nye

v. Moseley, 6 B & C. 133.

such a bond was given, and the obligor by deed agreed that the sum should be laid out in an annuity for the woman, the execution of the bond not being proved, the party failed at law, but equity relieved the woman to its extent from the recital in the deed. (1)

DEBT ON BOND.

XIX. Bonds given for the withholding of Evidence.

Bonds given for the withholding of evidence are illegal and void: thus, where the defendant and others being indicted for perjury by one Rudge, the plaintiff gave his note to Rudge for a sum of money to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. Rudge did not prosecute; and the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose (the compromising the prosecution), and the bond given to repay and secure the sum paid on the account of it, the bond was illegal and void. (2)

BONDS GIVEN
FOR THE WITH-
HOLDING OF
EVIDENCE,
ARE ILLEGAL
AND VOID.

XX. The Declaration.

THE DECLARATION.

The venue is transitory.

Where a party with whom a bond, simple contract, or other mere *personal* contract was made, has assigned his interest therein to a third person, the latter cannot in general sue in his own name; the interest in, and remedy upon, *personal* contracts being *choses in action*, which are not, in general, assignable in law, so as to give the assignee a right of action in his own name, but he must proceed in that of the assignor, or, if he be dead, in the name of his personal representative. (3)

VENUE.
PARTIES.
Assignee of
bond, when he
must sue.

The crown is an exception to this rule, for it can always either grant or receive a *chose in action* by assignment. (4)

If, however, an express promise or contract to pay the debts, or perform the contract, be made to the assignee of the *chose in action* in consideration of forbearance, or in respect of any other *new* consideration, such assignee may proceed in his own name, declaring upon such promise and new consideration. (5)

Where assignee
of bond may
sue.

If a person enter into a bond or deed by a wrong name, he should be sued by such name, and it will not be correct to declare against him in his *real name*, although there be an averment that he executed the instrument by the untrue description. (6) The mis-spelling of a name is not, however, material, if the two names be of the same sound. (7) The reversing or transposing the order of Christian names, as "Richard John," instead of

Description of
parties.

(1) *Annandale (Marchioness of) v. Harris*, 2 P. Wms. 432.

(2) *Mason v. Watkins*, 2 Vent. 109. *Colliers v. Blantern*, 2 Wils. 344.

(3) *Forth v. Stanton*, 1 Saund. 210. *Splidt v. Bowles*, 10 East, 281. *Doe d. Duroure v. Jones*, 4 T. R. 310. *Johnson v. Collings*, 1 East, 104. *Eldon v. Haig*, 1 Chitt. 15.

(4) *Dyer*, 30. (b.) pl. 208.

(5) 1 Saund. 210. n. 1. *Innes v. Dunlop*

(Bart.), 8 T. R. 595. *Price v. Seaman*, 4 B. & C. 525.

(6) *Gould v. Barnes*, 3 Taunt. 504. *Mayelston v. Palmerston (Lord)* 2 C. & P. 474. 1 M. & M. 6. *Bonner v. Wilkinson*, 5 B. & A. 682.

(7) *Rex v. Shakespeare*, 10 East, 83. *Dickinson v. Bowes*, 16 ibid. 110. *Ahitbol v. Benedetto*, 2 Taunt. 401.

DEBT ON BOND.

"John Richard," was considered a misnomer, and might have been pleaded in abatement before stat. 3 & 4 Will. 4. c. 42. s. 11., which abolished pleas of misnomer in abatement, and gave a defendant a remedy by summons to compel the plaintiff to state the correct name in his declaration. (1)

STATEMENT OF CAUSE OF ACTION.

The declaration upon a bond does not state the inducement or statement of the consideration upon which the contract was founded: thus, in debt upon a bond the declaration states, "that the defendant, on &c. by his certain writing obligatory, sealed with his seal, and now shewn to the court here, acknowledged himself to be held and firmly bound to the plaintiff in the sum of ——l., to be paid to the plaintiff," and then assigns as a breach the non payment of that sum.

Immaterial allegations.

The breach of the condition of a bond, otherwise well assigned, is not vitiated by the super-addition of immaterial allegations. (2)

Embezzlement of money.

If the condition of the bond be, "that A. shall not embezzle any money that shall come to his hands on account of his master," it is necessary, in an action against the obligor, to state in the breach, what particular sum of money was embezzled, and how or from whom it was received. (3)

Not requisite to aver the death of a person, at whose decease the principal was to become payable.

Where the obligor of a *post-obit* bond craved *oyer*, and set out the condition, it was holden, that it was not necessary for the obligee to aver the death of the person at whose decease the money secured by the bond was to become payable. (4)

Alternative parts of a condition.

In debt upon bond for the penalty, where there are alternative parts of the condition, the plaintiff must confine himself to a particular breach. (5)

THE PLEADINGS.**1. The Pleadings.****If breaches are assigned in declaration, defendant can take issue upon them.**

If breaches are assigned in the declaration, the defendant may take issue upon them, and the subsequent proceedings are then the same as in ordinary cases. (6)

Reg. Gen. H. T. 4 Will. 4. *non est factum*.

By Reg. Gen. Hilary Term, 4 Will. 4., the plea of *non est factum* only operates as a denial of the execution of the bond in point of fact: all other defences must be specially pleaded, including matters which make the bond absolutely void, as well as those which render it voidable.

Satisfaction or license.

In debt upon an obligation without any condition, accord and satisfaction must be pleaded to have been by deed. (7)

PERFORMANCE.**Where act to be performed by the obligor is in its nature transitory.**

If the act to be done by the obligor is in its nature *transitory*, and no time is limited for that purpose, it ought to be performed in a convenient time, and a request is not necessary. But if the condition be for the performance of an act that is local, and to which both the concurrence of the obligor and obligee is necessary, and no time is mentioned for that purpose, the obligor hath during his life to perform it, unless hastened by request. (8)

For the performance of a

If a bond be conditioned for the payment of money, or for the performance of a collateral act *on demand*, a demand is necessary before the obligee

(1) *Jones v. Macquillin*, 5 T. R. 195.

(2) *Stothert v. Goodfellow*, 1 N. & M. 202.

(3) *Jones v. Williams*, Doug. 214.

(4) *Murray v. Stair (Earl)*, 3 D. & R. 278. 2 B. & C. 82.

(5) *Cornwallis v. Savery*, 2 Burr. 772. 2 Ld. Ken. 492.

(6) *Quin v. King*, 1 Gale, 407.

(7) *Preston v. Christmas*, 2 Wils. 86

Sellers v. Bickford, 1 Moore, 460.

(8) Co. Litt. 208. (b.)

can put the bond in suit; but if there be a duty to pay the money or perform the act, bringing the action will be a sufficient demand. (1)

Performance must be according to the terms of the condition (2); but a literal compliance with the terms of the condition is not sufficient, unless the performance be in accordance with the intent of the parties. (3)

If a *particular* day be named for the payment of money, or the performance of any other act, it will be a compliance with the condition, if the money be paid, or the act be performed, *on* or *before* the day mentioned in the condition, but the payment or performance must be pleaded to have been *on* the day. (4) And evidence of payment *before* the day will sustain such a plea, because, if the plea state a payment before the day and issue be taken thereon and found for the plaintiff, he cannot have judgment, for the issue is immaterial, since, notwithstanding this verdict, payment might have been made *on* the day; but if the issue had been found for the defendant, it would probably be cured by the verdict. (5)

When a bond is conditioned for payment of money *on* or *before* a certain day, the defendant may plead payment *before* the day, if the fact be so; and the plaintiff may reply, that it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day*. (6)

But if to a bond so conditioned, payment on the day be pleaded, and *issue joined thereon*, it would be an immaterial issue; and upon a verdict for the plaintiff, a repleader would be awarded, because the money might have been paid before the day, which would have been a performance of the condition. (7)

The bond being forfeited by the non payment of the money on the day mentioned in the condition, a payment *after* the day could not be pleaded at the common law; but by stat. 4 Anne, c. 16. s. 12., "where an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same upon payment of a lesser sum, at a day or place certain, if the obligor, his heirs, executors or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place, according to the condition or defeasance, and had been so pleaded."

This enactment is confined to an actual payment; therefore a *tender* and refusal of principal and interest *after* the day cannot be pleaded. (8)

The form of plea under this statute is, that the defendant, after the day mentioned in the condition, and before the commencement of the plaintiff's

DEBT ON BOND.

collateral act on demand.

Performance must be according to the terms of the condition.

SOLVIT AD DIEM.

Performance before a particular day, equivalent to performance on that day.

Immaterial issue.

SOLVIT POST DIEM.

Stat. 4 Anne, c. 16. s. 12

Tender and refusal after day of payment cannot be pleaded.

Form of plea

(1) *Gibbs v. Southam*, 5 B. & Ad. 911. *Carter v. Ring*, 3 Camp. 450. Leigh, N. P. 770.

(2) *Collins v. Gwynne*, 9 Bing. 544. *Taylor v. Bird*, 1 Wils. 280. *Irish Society v. Needham*, 1 T. R. 482. *Haydon v. Wilshire*, 3 ibid. 372.

(3) *Sherman v. Lyly*, Cro. Car. 597. *Bache v. Proctor*, Doug. 382. *Edwards v. Brown*, 1 C. & J. 307.

(4) 2 Saund. 48. (a.) n. 1. Co. Litt. 212.

(b.) *Bigland v. Shelton*, 12 East, 436. *Hodgson v. Bell*, 7 T. R. 97. *Sturdy v. Arnaud*, 3 ibid. 601. *Everett v. Eyre*, 2 Bing. 166.

(5) 2 Saund. 48. (a.) n. 1.

(6) Ibid. *Fletcher v. Hennington*, 2 Burr. 944. 1 W. Black. 210. Willes, 587. n. (a.)

(7) *Tryon v. Carter*, Str. 994.

(8) *Underhill v. Matthews*, Bull. N. P. 171. (a.) *Dixon v. Parkes*, 1 Esp. N. P. C. 110. 2 Saund. 48. (a.) n. 1.

DEBT ON BOND.
of *solvit post diem*.

Reg. Gen. H.
T. 4 Will. 4.

action, paid the money mentioned in the condition with interest, according to the form of the statute, &c.

By Reg. Gen. Hilary Term, 4 Will. 4., pleas founded on one and the same principal matter, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.* pleas of *solvit ad diem* and of *solvit post diem* are both pleas of payment, varied in the circumstances of time only, and are not to be allowed. But pleas of payment, and of accord and satisfaction or of release, are distinct, and are to be allowed.

A plea of payment of part of the sum mentioned in the condition after the day, is bad on demurrer. (1)

In debt on bond, the defendant cannot plead as to part, the receipt of certain bills of exchange, and, as to the residue, payment of certain moneys in satisfaction. (2)

LIMITATION
AND PRESUMP-
TION OF PAY-
MENT.

Stat. 9 Geo. 4.
c. 14. s. 3.

To prove the payment of interest, or a part of the principal, an indorsement made by the obligee upon the bond, within twenty years, was formerly allowed to be evidence; but an indorsement made after the presumption had taken place, was not admissible (3); and now, by stat. 9 Geo. 4. c. 14. s. 3., no indorsement or memorandum of any payment written or made after the time appointed for that act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the acts therein recited.

A specialty security is not waved by a promissory note, taken for the balance of the account of interest. (4)

Where a bond creditor, by agreement with a debtor, takes interest on his debt by anticipation, a court of equity will restrain an action on the bond, whether brought against the principal or his surety. (5)

Indorsements in the handwriting of the obligee, acknowledging the receipt of interest and of part of principal, are not evidence that the bond was unsatisfied, unless it can be shewn that such indorsements were on the bond at, or recently after, the time they bear date, and that they were written at a period when they operated against the writer's interest. (6)

NON DAMNIFI-
CATUS.

Non damnificatus cannot be pleaded to debt on bond conditioned for the payment of a sum of money at a certain day (7), although it appear by the condition, that the bond was given by way of indemnity: thus a plea, that, after the execution of the bond, the plaintiff took from the defendant more than legal interest, was held bad. (8)

Pleading mat-
ter which shews
the bond to be
void.

Though it is a general rule, that matter inconsistent with, or contrary to, the deed cannot be pleaded in an action thereon, yet the obligor may plead any matter which shews that the bond is void, though inconsistent with the terms of the condition. (9)

OYER.

In order to take advantage of a defect not apparent on the face of the

(1) *Ashbee v. Pidduck*, 1 M. & W. 564.
(2) *Worthington v. Wigley*, 5 Dowl. P. C. 504.

(3) *Gleadow v. Atkin*, 1 C. & M. 410. 3 Tyrw. 289. *Smith v. Battens*, 1 M. & Rob. 341.

(4) *Curtis v. Rush*, 2 Ves. & B. 416.

(5) *Blake v. White*, 1 Y. & C. 420.

(6) *Rose v. Bryant*, 2 Camp. 321.

(7) *Holmes v. Rhodes*, 1 B. & P. 638.

(8) *Nichols v. Lee*, 3 Anst. 940., vide etiam *Mean v. Mean*, Cowp. 7.

(9) *Paxton v. Popham*, 9 East, 421. *Collins v. Blantern*, 2 Wils. 347.

declaration, the defendant must crave oyer of the bond and condition, or either of them. (1)

DEBT ON BOND.

But if oyer of the bond only be craved, the defendant is not entitled to oyer of the condition, unless he crave that also, for the obligation and condition are distinct instruments. (2)

When the defendant pleads matter of excuse, which admits a non performance, it is sufficient if the plaintiff deny the plea, and he need not assign a breach in his replication; but it is otherwise, where the defendant has pleaded performance, or in other words, where the plea does not put in issue any particular fact or breach; in the latter case, to a plea of general performance of the condition of the bond, the replication must state the breach with particularity, and should conclude with a verification, in order that the defendant may have an opportunity of answering it. (3)

REPLICATION.

Where plaintiff need not assign a breach in his replication.

But where to debt on bond, the defendant craved oyer, and after reciting a mortgage deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture, and for the performance of the covenants therein, pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified according to the effect thereof, and performed all the covenants and provisoes in the indenture on his part to be performed; and the plaintiff in his replication took issue generally on the non payment of the money, and concluded to the country: on special demurrer, assigning for causes, that it should have concluded with a verification, and that no breach of the condition was assigned, according to stat. 8 & 9 Will. 3. c. 11. s. 8., it was held, that such replication was good, as the only point in issue was the payment of the money, and the plaintiff had therein denied the whole substance of the defendant's plea. (4)

Stat. 3 & 4 Will. 4. c. 42. s. 5. gives a special replication of a written acknowledgment or part payment to a plea of the Statute of Limitations to debt on an indenture, specialty, or recognisance, under the third section.

Stat. 3 & 4
Will. 4. c. 42.
s. 5.

A plea (to a declaration on a bond conditioned, amongst other things, for the payment of 3000*l.*), that all the sums of money which became due on the bond were paid, may be replied to generally by a general denial of the words of the plea, without assigning any specific breach. (5)

If to debt on a bastardy or indemnity bond, the defendant plead *non damnificatus*, the plaintiff must reply specially, setting forth how he was damaged.

Upon a bond conditioned, that a collector of poor's rates shall render an account of moneys received, after general performance pleaded, it is necessary to reply, that he received moneys to be accounted for. (6)

In debt on bond, the defendant, after craving oyer of the bond and con-

Debt on bond

(1) *Colton v. Goodridge*, 2 W. Black. 1108. *Samuel v. Evans*, 2 T. R. 575.

(2) 1 Saund. 9. (b.) n. 1.

(3) *Cornwallis v. Savery*, 2 Burr. 774. 1 Saund. 101, 102. Com. Dig. Pleader (F.), 14, 15. 1 Chitt. Pl. 585.

(4) *Darbishire v. Butler*, 5 Moore, 198.

(5) *Turner v. M'Namara*, 2 Chitt. 697.

(6) *Serra v. Wright*, 6 Taunt. 45., *semble*, overruling *Willcocks v. Nicholls*, 1 Price, 109., et vide *Jones v. Williams*, Doug. 214. Sums received need not be specially mentioned, &c. As to replication, rejoinder, surrejoinder, &c. vide *Calvert v. Gordon*, 7 B. & C. 809.

DEBT ON BOND.
for not account-
ing.

dition, which was, that A. B. should faithfully account for all moneys received by him as collecting clerk, pleaded that A. B. did account: replication, that A. B. received divers sums amounting to 2000*l.*, for which he did not account: rejoinder, that the sums mentioned in the replication were three sums of 1000*l.*, 500*l.*, and 500*l.*, received by A. B. of C. D., and F. and G., and that A. B. accounted for those sums: surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by A. B., and concluding to the country:—the court held upon special demurrer, that the surrejoinder was good. (1)

2. *Limitation of Action—Payment of Money into Court—Damages.*

**LIMITATION OF
ACTION —
PAYMENT OF
MONEY INTO
COURT — DA-
MAGES.**

Payment of
money into
court in action
on bond.

Stat. 4 Anne,
c. 16. s. 13.

By stat. 3 & 4 Will. 4. c. 42. s. 3., “all actions of debt, upon any bond or other specialty, shall be commenced and sued within ten years after the end of this present session [August 29. 1833], or within twenty years after the cause of such action or suit.”

By stat. 4 Anne, c. 16. s. 13., if at any time, pending an action upon any bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits of law or equity on such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.

DAMAGES.
Stat. 8 & 9
Will. 3. c. 11.

In debt on bond, where breaches are assigned in the replication under stat. 8 & 9 Will. 3. c. 11., the jury may assess damages without a special *venire*. (2)

In *Warre v. Calvert* (3) it appeared, that by agreement between the plaintiff and S., S. was to perform certain works for the plaintiff for a certain sum, and to receive from time to time three fourths of the cost of the part completed; the first payment to be made after one eighth was completed, the remaining fourth part to be paid one month after the whole was performed; that if S. should fail to perform the work, the plaintiff might employ others to perform it, and deduct the expense from the sum payable to S. The defendant entered into a bond conditioned for performance of the agreement by S., S. after performing part of the works abandoned the contract. The plaintiff at the request of S., and upon new security given by him, had advanced to S. for assisting him in performing the works a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. The plaintiff had the works completed at an expense which, added to the cost of the part performed by S., was less than the whole contract price agreed on with S., but which, added to the sum actually advanced to S., exceeded that contract price.

(1) *Calvert v. Gordon*, 7 B. & C. 809. 1 M. & R. 497.

(2) *Scott v. Staley*, 4 Bing. N. C. 724.

(3) 7 A. & E. 143.

The plaintiff brought an action of debt on the bond, suggesting as a breach, S.'s non performance, and plaintiff's loss thereby; the defendant pleaded *non est factum*:—It was held, that the plaintiff was entitled to nominal damages only, the loss having arisen, not from the non performance of S.'s contract, but from the plaintiff having advanced more than the contract required, especially as the sum advanced exceeded, not only the three fourths, but the whole of the work completed; and from the advances having been made on a fresh negotiation with and security taken from S. It was also holden, that this answer could not be pleaded by defendant, but was properly set up under *non est factum* to meet plaintiff's evidence of damages.

DEBT ON BOND:

8. DEBT ON BOND OF ANCESTOR AGAINST HEIR.

Debt will lie at common law on the specialty of the ancestor against the heir, if named in the deed (1); by stat. 3 & 4 Will. & M. c. 14. against devisees; and against covenantors, by stat. 11 Geo. 4. and 1 Will. 4. c. 47.

DEBT ON BOND
OF ANCESTOR
AGAINST HEIR.

GENERALLY.

Stats. 3 & 4
W. & M. c. 14.
and 11 Geo. 4.
& 1 W. 4. c. 47.

"In an action against the heir at law for a debt of his ancestor upon specialty, the ground of the charge is, that he is bound as well as the ancestor, and therefore it is in the *debet* and *detinet* as it would have been against the ancestor; and the law gives him liberty to discharge himself by pleading nothing by descent, or but so much, which plea, if found false, he is charged as a person bound for the whole debt, if he had but one acre, which is not the case of an executor, who is charged only for so much as comes to his hand, notwithstanding such plea be found false." (2)

If the obligor have heirs and lands on the part of his father and on the part of his mother, both heirs can be equally charged. (3)

In debt on bond against the defendant (4) as brother and heir to J. S., the defendant pleaded *riens per descent* from his brother. A special verdict was found that the obligor was seised in fee, had issue, and died seised, and the issue died without issue, whereupon the lands descended to the defendant as heir to the son of his brother:—It was holden, that the issue was found against the plaintiff, for the defendant had nothing as immediate heir to his brother, but took by descent from the son of his brother; and although the defendant was chargeable as heir upon this bond, yet being collateral heir only, the plaintiff ought to have declared specially. But this rule, as to stating the mesne descents in the declaration, applies only to descents from persons seised in fee simple in possession.

Statement of
mesne descents.

The plaintiff being presumed a stranger to the defendant's pedigree (5), it is not necessary for him to state in the declaration how the defendant is heir.

Though the ancestor devise the estate to his heir, yet if he take the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate becomes assets

When the heir
is seised by
descent, and
the estate be-
come assets in
his hands.

(1) Co. Litt. 209. (a.)

(2) Per Lord Hardwicke in 1 Ves. sen. 212.

(3) 11 Hen. 7. 12. (b.)

(4) Jenk's case, Cro. Car. 151.

(5) Denham v. Stephenson, 1 Salk. 355.

DEBT ON BOND. in his hands (1); so, where the land is devised, charged with the payment of a sum of money (2), or of debts. (3)

Stat. 29 Car. 2. c. 3. s. 12. By stat. 29 Car. 2. c. 3. s. 12., an estate *pur autre vie*, which comes to the heir as special occupant, is made assets by descent; lands which descend in tail are not assets. (4)

What is not assets. A copyhold in fee is not assets (5); neither are lands which descend in tail (6); and a reversion expectant on an estate tail is not assets upon the general issue of *riens per descent*. (7)

LIABILITY OF HEIR UNDER STAT. 11 GEO. 4. AND 1 WILL. 4. c. 47. s. 6. By stat. 11 Geo. 4. and 1 Will. 4. c. 47. s. 6., the heir is rendered liable in an action of debt or covenant, to *the value of the land aliened* before action brought or process sued out against him; and such execution can be taken out upon any judgment obtained against such heir *to the value* of the said land, as if the same were his own debt, but not beyond (8): but land *bond fide* aliened before action brought, is specially exempted from such execution.

Where an action of debt is brought against the heir, he may plead *riens per descent*. By sect. 7. "where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply (9), that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if upon the issue joined thereupon, it be found for the plaintiff, the jury (10) shall inquire of the value of the lands, tenements, or hereditaments so descended; and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended."

Heir cannot plead assets in the hands of the executors. The heir cannot plead assets in the hands of the executors (11), for it is at the election of the obligee to sue either the heir or the executors. A plea by the heir (12), that he claims to retain a certain sum of money laid out in repairs, cannot be maintained, if he do not state them to be necessary repairs of the tenements descended.

It is sufficient in the declaration to charge the defendant as *heir generally*, without stating *how* heir; and the plaintiff may shew his title as heir in evidence. (13)

Where lands have descended from the obligor to another, who has died seised, and from him to the defendant, the descent must be stated specially, as that the defendant was the heir of A. who died last seised, who was the heir of the obligor; and so it must be, when there have been several intermediate descents: for if the declaration be against the defendant.

(1) 2 Saund. 8. (d.) n. *Reading v. Royston*, 1 Salk. 242.

(2) *Clerk v. Smith*, 1 Salk. 241.

(3) *Allan v. Heber*, Str. 1270.

(4) 1 Rol. Abr. Assets (C.), 269.

(5) 4 Co. 22. (a.)

(6) 1 Rol. Abr. Assets (C.), 269.

(7) *Mildmay's case*, 6 Co. 42. (a.) *Kellow v. Rowden*, Carth. 129., *sed vide* 12 Vin. 186. as to the necessity of its being specially pleaded.

(8) *Brown v. Shaker*, 2 C. & J. 311. 1 Tyrw. 400.

(9) As to form of replication, vide *Redshaw v. Hesther*, Carth. 353. 5 Mod. 119.

(10) "The jury" means the jury who tried the cause. *Jeffry v. Barrow*, 10 Mod. 18.

(11) *Per Vavasour* J. C. B. 10 Hen. 7. 8.

(b.) *Cape's case*, 1 And. 7.

(12) *Shetelworth v. Neville*, 1 T. R. 454.

(13) *Denham v. Stephenson*, 1 Salk. 355.

ant, as heir of the obligor, and it appear in evidence on the plea of *riens per descent* from the obligor, that the defendant is *heir of the heir* of the obligor, is a fatal variance. (1)

The defendant can, not only, plead any matter which might have been pleaded by the ancestor or devisee, but may likewise deny the character in which he is sued, or, admitting it, may plead that he has nothing by descent or devise, either generally (2) or specially, viz. that he has nothing but a reversion after an estate for life or years, or that he has paid debts of an equal or superior degree to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to third persons. (3)

The language of the plea being, that the defendant had not any lands by descent at the time of the original writ brought or bill filed against him, it is evident, that the defendant cannot avail himself of an alienation, *pending* the suit, and that the lands so aliened will remain charged. (4)

By stat. 11 Geo. 4. and 1 Will. 4. c. 47. s. 7., where any action of debt or covenant upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or bill filed against him, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire the value of the lands, tenements, and hereditaments, so descended, and thereupon judgment shall be given, and execution shall be awarded, &c.

In debt against heir on the bond of his ancestor, to a plea of parol demurrer, the plaintiff may deny or confess the plea (5); and to plea of *riens per descent* the plaintiff may reply, either that the defendant had such assets at the time of the commencement of the suit (6), or that he had them between that time and the death of his ancestor (7); or if, *rien præter*, a reversion be pleaded, the plaintiff may take judgment, &c. *cum acciderint*. (8)

In order that creditors should not be defrauded by a devise, or by alienation, it was enacted by stat. 11 Geo. 4. and 1 Will. 4. c. 47. s. 2., "that all wills and testamentary limitations, dispositions or appointments, made previously to July 16. 1830, by persons now in being, or hereafter to be made by any person concerning any manors, messuages, lands, tenements, hereditaments, or any rent, profit, term, or charge out of the same, whereof any person at the time of his decease shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by will, shall be deemed (only as against such person, and his heirs, successors, executors, &c. with whom the person making such will, &c. shall have entered into any bond, covenant, or other specialty binding his heirs), to be fraudulent and void. And by sect. 3. every such creditor may maintain debt or *covenant* upon the bonds, covenants, and specialties, against the heirs and devisees, or devisees of such first mentioned devisee or devisees jointly; and such devisees shall

DEBT ON BOND.

PLEADINGS.

REPLICATION.

Stat. 11 Geo. 4.
& 1 Will. 4. c. 47.
s. 7.Where debt is
brought against
the heir, he may
plead *riens per
descent*.Replication to
a plea of parol
demurrer, or
riens per descent.LIABILITY OF
DEVISEE UNDER
STAT. 11 GEO.
4. AND 1 WILL.
4. C. 47. SS. 2, 3,
4, 5, 8, & 9.

(1) 2 Saund. 7. (d.) n. 4. *Jenk's case*,
Cro. Car. 151.

(2) 2 Saund. 7. (d.) n. 4. Com. Dig.
Pleader, 2. (E. 3.)

(3) Com. Dig. Pleader, 2 (E. 3.). 1
Chitt. Pl. 490.

(4) 1 Inst. 102. (a, b.)

(5) Com. Dig. Pleader, 2. (E. 4.)

(6) Ibid.

(7) Ibid.

(8) Ibid. 1 Chitt. Pl. 590.

DEBT ON BOND. be chargeable for a false plea in the same manner as the heir is, or for not confessing the lands or tenements descended.

Sect. 4. By sect. 4., if there be not any heir at law, the creditor can bring debt or covenant against the devisee.

Sect. 5. By sect. 5., the statute is not to affect limitations for just debts or portions for children, other than the heir at law, in pursuance of any marriage contract *bond fide* made before marriage.

Sect. 8. By sect. 8., "every devisee made liable by this act shall be chargeable in the same manner as the heir at law by force of this act," "notwithstanding the lands, &c. to him devised shall be aliened before action brought." (1)

Sect. 9. And by sect. 9., "traders' estates shall be assets to be administered in courts of equity, provided that creditors by specialty, in which heirs are bound, shall be paid before creditors by simple contract or specialty, in which heirs are not bound."

EVIDENCE The evidence against heirs and devisees, depends on the plea and issue.

AGAINST HEIRS The plea of *riens per descent* does not admit the heirship, which must be
AND DEVISEES. proved. (2)

Effect of plea of The seisin of the ancestor may be proved by shewing, that he was in
riens per descent. possession of the lands, or in the receipt of the rents and profits.

Proof of the The seisin of the obligor must have been a seisin in fact. The possession
seisin of the of a tenant for years being a rightful possession, is considered in law as the
ancestor. possession of the heir, and therefore gives him a seisin in fact. (3)

Seisin of the Where issue is joined to the replication under stat. 11 Geo. 4. and 1 Will. 4.
obligor. c. 47. s. 7. (which may, it seems, be pleaded, though the heir has *not*

aliened the lands (4)), the plaintiff, in addition to the usual proofs under the plea of *riens per descent*, must be prepared with evidence of the gross, not the annual, value of the lands descended, for if the jury neglect to find the value, the court will award a *venire de novo*. (5)

Where proof of Upon issue joined on the plea of *riens per descent*, the execution of the
assets by de- bond or other specialty being admitted by the plea, the plaintiff must prove
scend required. the assets by descent; and if assets be averred in a certain county, plaintiff may prove them in any other county. (6)

If the defendant plead *riens per descent*, and the jury find that he has something, however small it may be, but insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt. (7) It is consequently not requisite to prove the value of the assets descended. (8)

JUDGMENT. If the heir confess the action, and declare with certainty the assets which he has by descent, the judgment will be, that the plaintiff do recover his debt and damages, to be levied of the assets descended. (9)

When entitled Under this judgment the plaintiff is entitled to have all the land de-
to all the land scended. (10)
descended.

(1) Sect. 6.

(2) 2 Saund. 7. (d.) n. 4. *Jenks v. —*,
Cro. Car. 151.

(3) *Bushby v. Dixon*, 3 B. & C. 298.

(4) 2 Saund. 8. (c, d.) n. 4.

(5) *Jeffry v. Barrow*, 10 Mod. 18. *Brown*
v. Shaker, 1 C. & J. 583.

(6) Bull. N. P. 175.

(7) 2 Saund. 7. (a.) n. 4.

(8) Bull. N. P. 176.

(9) *Davy v. Pepys*, Plowd. 440., recog.
per Holt C. J. in *Smith v. Angel*, 7 Mod.
44.

(10) *Harbert's case (Sir William)*, 3 Co.
12. (a.)

If there be a mortgage *for years*, the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cesset executio*; but where there is a mortgage in fee, the equity of redemption is not legal assets. (1)

DEBT ON BOND.

Reversion in fee when assets.

A reversion after an estate for life is *quasi* assets, but it ought to be pleaded specially by the heir, and the plaintiff may take judgment *quando acciderit*. (2)

Reversion after an estate for life.

If the heir plead *riens per descent* (3), or payment by a co-obligor (4), and it be found against him, the judgment will be general, that is, to recover the debt and damages.

When judgment will be general.

The execution in debt against an heir, upon *riens per descent* pleaded and found against him (5), is general; and the plaintiff may, if he think proper, have a writ of execution by writ of *elegit*, of a moiety of all the lands of the heir, as well as those which the heir has by purchase, as of those which he hath by descent. (6) If the heir suffer judgment to go by default, and does not shew with certainty the assets descended, the judgment will be general, and the execution may be awarded against the heir as for his own debt, by *capias ad satisfaciendum* against his person (7), or *fieri facias* against his goods and chattels. (8) If judgment be given against the heir on demurrer, or if the heir be condemned on any plea whatever (9), the body may be taken in execution. (10)

EXECUTION.

9. DEBT ON BAIL BOND UNDER STAT. 23 HEN. VI. C. 10., AND ASSIGNMENT OF BAIL BOND UNDER STAT. 4 ANNE, C. 16.

DEBT ON BAIL BOND UNDER STAT. 23 HEN. 6. C. 10. AND ASSIGNMENT OF BAIL BOND UNDER STAT. 4 ANNE, C. 16.

At common law the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of mainprise.

By stat. 23 Hen. 6. c. 10. it is enacted, "that sheriffs, under-sheriffs, bailiffs of franchises and other bailiffs, shall let out of prison all manner of persons by them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills, or warrants shall require; persons in ward by condemnation, execution, *capias utlagatum* or *excommunicatum*, surety of the peace, or by special commandment of any justice of the peace, excepted. And no sheriff, &c. shall take, or cause to be taken or make, any obligation for any cause aforesaid, or by colour of their office, but only to themselves,

At common law sheriff not bound to take bail from a defendant.

Stat. 23 Hen. 6. c. 10.

(1) 2 Saund. 8. (e.) n. 4. *Plunket v. Pen-son*, 2 Atk. 290.

(2) Dyer, 373. (b.)

(3) 21 Edw. 3. 9. (b.) pl. 28. 2 Rol. Abr. Heire (C.), 71. *Alleyn v. Holden*, Sty. 287.

(4) *Brandlin v. Millbank*, Carth. 93.

(5) 21 Edw. 3. 9. (b.) pl. 28. *Hinde v. Lyons (Sir John)*, 2 Leon. 11.

(6) 2 Rol. Abr. Heire (C.), 70.

(7) *Barker v. Borne*, F. Moore, 522. Cro. Eliz. 692. *Trewiniard's case*, Plowd. 440.

(8) Selw. N. P. 600. cit. *Poxon v. Smart*, C. B. H. T. 4 Geo. 2. MSS.

(9) *Per* Plowden J. in *Davey v. Pepys*, Plowd. 440. (b) *Per* Holt C. J. in *Smith v. Angell*, 2 Ld. Raym. 783.

(10) *Grenesmith v. Brackhole*, cit. in Plowd. 440. (b.)

DEBT ON BOND. of any person ; nor by any person which shall be in their ward by course of law, but by the name of their office, and upon condition written that the prisoners shall appear at the day and place contained in the writ, &c.; and if any sheriffs, &c. take any obligation in other form by colour of their office, it shall be void." (1)

Undertaking for appearance must be by bond. The undertaking for the appearance of the defendant must be by bond (2), and a simple contract undertaking is void. (3)

Bond must be "with sureties." The bond must be "with sureties;" and where the bond was only by the defendant, it was held to be bad. (4) But in *Drury's case* (5) it was held, that as the indemnity was for the protection of the sheriff, he might waive the benefit, and take a bond with one surety only. But the court do not favour it, and they will not set aside an attachment against the sheriff at his instance, in a case where he has taken a bail bond with one surety only (6), although they will at the instance of the bail. (7)

Bail must be made to the sheriff by his "name of office." The bond must be made to the sheriff by his "name of office" (8); but the court have held, that though such ought to be the form, yet that in this case the bonds being laid *solvend. eidem vicecomiti et assignatis*, was sufficient. (9)

Condition must be to appear at the return of the writ. The condition must be to appear at the return of the writ in the court out of which the process issued (10), in eight days from the arrest (11), to answer the plaintiff in a certain action (12); and where the sheriff took a bail bond for the appearance of the defendant at a day different from that in the writ, it was held to be void. (13) So where the condition of the bond was for the defendant to appear on the morrow of All Souls (3d of November), and the date of the bond was the 4th of November, it was adjudged to be void. (14)

Exact words of the writ need not be set out. But if the substance of the return appear in the bond, the very words of the writ need not be set out: thus, where the writ was returnable *coram domino rege ubicunque tunc fuerit in Angliá*, and the bail bond was without the words *ubicunque*, &c. it was nevertheless held good. (15)

Statute extends only to cases on mesne process. The statute extends only to cases on mesne process, and all other obligations made to the sheriff are void: thus, where the bond was given to the under-sheriff for a sum for fees of executing an extent, it was adjudged to be void under stat. 23 Hen. 6. c. 10., for one view of the statute was to prevent extortion by confining the obligation only to the condition of appearing (16); but wherever the non payment of money creates a civil right, an attachment issued to enforce that right, must be considered in the nature of a mesne process. (17)

(1) 1 Saund. 161. (b.), vide *Lovell v. Plomer*, 15 East, 320.

(2) *Rogers v. Reeves*, 1 T. R. 418.

(3) Ibid. *Fuller v. Prest*, 7 ibid. 109. *Sedgworth v. Spicer*, 4 East, 568. *Lewis v. Knight*, 1 Dowl. P. C. 261.

(4) *Scryven v. Dyther*, Cro. Eliz. 672.

(5) 10 Co. 100. (b.) 101. (a.), recog. in *Cotton v. Wale*, Cro. Eliz. 862.

(6) *Rex v. London (Sheriff of)*, 2 Bing. 227.

(7) *Rex v. Middlesex (Sheriff of)*, 2 Dowl. P. C. 140.

(8) *Noel v. Cooper*, Palm. 378.

(9) *Symes v. Oakes*, Str. 893.

(10) *Jones v. Stordy*, 9 East, 55. *Renaldi v. Smith*, 6 Taunt. 551. 2 Saund. 60. (b.)

(11) *Evans q. t. v. Moseley*, 2 Dowl. P. C. 364.

(12) Archb. C. Att. Pract. 168.

(13) *Bennet v. Filkins*, 1 Saund. 20.

(14) *Samuel v. Evans*, 2 T. R. 569.

(15) *Shuttleworth v. Pilkington*, Str. 1156.

(16) *Clyfton (Sir George) v. Web*, Cro. Eliz. 808. *Empson v. Bathurst*, Hutt. 52.

(17) *Lewis v. Morland*, 2 B. & A. 65.

It must be founded on good and legal process, for where it was taken on a writ which appeared to be returnable on a day out of term, the writ being void, the bail bond was likewise held to be void.

The special matter which brings the case within this statute must appear upon the record; if it be shewn on the declaration, it need not be pleaded. (1)

So if it appear on craving oyer of the bond, the defendant may demur without pleading the special matter. (2)

If the defendant do not appear at the return of the process, and put in and perfect bail, the bail bond is forfeited, and the plaintiff can take an assignment of it. (3)

Though under the foregoing statute if the defendant did not appear, the bond was forfeited, yet the plaintiff was delayed in his suit, for remedy of which, and to expedite the proceedings, it was enacted by stat. 4 Anne, c. 16. s. 20., "that if any person or persons shall be arrested by any writ, bill, or process issuing out of any of her majesty's courts of record at Westminster, at the suit of any common person, and the sheriff or other officer taketh bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail bond, or other security taken from such bail, by endorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so endorsed be duly stamped before any action be brought thereupon; and if the said bail bond, or assignment, or other security taken for bail be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name; and the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason, and that such rule or rules of the said court shall have the nature and effect of a defeasance to such bail bond, or other security for bail."

The sheriff may assign the bail bond in any county, and the plaintiff has his election to bring his action either in the county where the assignment was made, or in the county to the sheriff of which, the writ was directed. (4)

The sheriff or under-sheriff may make the assignment of the bail bond, and they only can make it; for where the assignment was proved to have been made by the under-sheriff's clerk, it was adjudged to be bad. (5)

The action on the bail bond must only be brought by the assignee in that court where the bail was given, or otherwise the proceedings will be stayed, for the writ gives jurisdiction to that court only. (6)

But under Reg. Gen. Hilary Term, 2 Will. 4., "an action may be brought on a bail bond by the sheriff himself in any court."

DEBT ON BOND.

Must be founded on legal process.

PLEADING.

Special matter which brings the case within this statute must be shewn.

Where not requisite.

ASSIGNMENT OF BAIL BOND UNDER STAT.

4 ANNE, c. 16.

Sect. 20.

Bail bond taken by sheriff, &c. may be assigned to plaintiff.

Sheriff can assign the bail bond in any county.

The sheriff or under-sheriff, are the only persons who can make the assignment.

Sheriff may sue on bail bond in any court.

The action can only be brought by the assignee.

(1) *Samuel v. Evans*, 2 T. R. 569.

(2) *Per Buller J.* in *ibid.*

(3) *Harrison v. Davies*, 5 Burr. 2683.

(4) *Gregson v. Heather*, Str. 727.

(5) *Kitson v. Fagg*, *ibid.* 60.

(6) *Walton v. Bent*, 3 Burr. 1923. *Morris v. Rees*, 3 Wils. 348.

DEBT ON BOND.

Bail to the sheriff liable for plaintiff's whole debt.

Effect of defendant being discharged out of custody upon the bail bond being given.

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to), and costs to the extent of the penalty of the bail bond. (1)

After a defendant has been discharged out of custody upon the bail bond being given (2), it is neither in the power of the bail to render him, or of the party to surrender himself again into the custody of the sheriff, before the return of the writ, without the consent of the latter. But the sheriff may if he please accept the surrender of the party who is willing to return into his custody before the return of the writ; and if the sheriff consent to do so, and by virtue of such surrender has the defendant in his custody at the return of the writ (the party will not be considered as legally in the custody of the sheriff from the mere circumstance of the sheriff having received notice of the surrender, there must be an assent on the part of the sheriff to the surrender) (3), the court will then consider it as if no bail bond had been given; and consequently, under these circumstances, an action cannot be maintained against the sheriff for not assigning the bail bond (4), nor can he be proceeded against for not bringing in the body, although upon being ruled to return the writ he returned *cepi corpus*. (5)

DECLARATION.
VENUE.

The venue may be laid in the county in which the assignment is stated to have been made, agreeably to the rule, that where matter in one county is dependent on matter in another county, the plaintiff may lay his action in either. (6)

COMMENCEMENT OF ACTION.

The bond is forfeited, if the defendant do not put in bail on or before the eighth day from the time of the arrest, the day of the arrest being reckoned inclusive (7), at any time after which, and before bail is actually put in, an action on the bond may be commenced (8); or if bail have been put in on or before the eighth day, and the plaintiff except to them, and the defendant fail to justify, within the time limited for that purpose by the practice of the court, the bond is then forfeited, and the sheriff or his assignee may thereupon commence an action upon such instrument. (9)

PARTIES.

It is requisite that the person's name against whom the writ was issued should be correctly described (10); but no advantage can be taken at the trial of the misnomer of the plaintiff (11); and who may be described under an alias. (12)

If the action be by an assignee of the sheriff, it must be brought in the court which issued the process in which the bail was taken (13); but if brought by the sheriff himself, it may be commenced in any court. (14)

The bond being joint and several, a joint action may be brought against all the parties, or separate actions against each; and it seems to have been

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| (1) <i>Stevenson v. Cameron</i> , 8 T. R. 28. | <i>v. Mitford</i> , 2 W. Black. 1009. <i>Wright v. Walker</i> , 3 B. & P. 564. Archb. C. Att. Pract. 169. |
| (2) <i>Hamilton v. Wilson</i> , 1 East, 383. | (10) <i>Large v. Attwood</i> , 1 D. & R. 551. |
| (3) Ibid. | (11) <i>Moody v. Aslatt</i> , 1 C. M. & R. 771. |
| (4) <i>Stamper v. Milbourne</i> , 7 T. R. 122. | (12) Ibid. |
| (5) <i>Jones v. Lander</i> , 6 ibid. 753. | (13) <i>Chesterton v. Middlehurst</i> , 1 Burr. 642. <i>Walton v. Bent</i> , ibid. 3 ibid. 1923. |
| (6) <i>Gregson v. Heather</i> , Str. 727. 2 Ld. Raym. 1455. | <i>Morris v. Rees</i> , 3 Wils. 348. 2 Saund. 61. (a.) |
| (7) Stat. 2 Will. 4. c. 39. sched. 4. | (14) Reg. Gen. H. T. 2 Will. 4. s. 28. |
| (8) Ibid. <i>Hillary v. Rowles</i> , 5 B. & Ad. 460. 2 Dowl. P. C. 201. | |
| (9) <i>Bond v. Evans</i> , 4 B. & C. 864. <i>Bellis</i> | |

decided, that a joint action may be brought against two out of three of such parties. (1) DEBT ON BOND.

It is sufficient for the plaintiff to state in his declaration (2), that the sheriff assigned the bond to him according to the form of the statute, without adding, that "the assignment was under the hand and seal of the sheriff;" and the defendant may plead that he did not assign, &c. according to the form of the statute; and the plaintiff may tender an issue thereon in those words, on which he must prove, that the assignment was according to the statute, under the hand and seal of the sheriff. Statement of assignment.

Although the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, yet it does not require the names of the witnesses to be set forth in the declaration; and, if they are omitted, the omission will be holden immaterial. (3) Names of the witnesses need not be set forth.

If it be averred in the declaration, that the sheriff assigned the bail bond by indorsement upon the said writing obligatory, and attested it under his hand and seal, in the presence of two credible witnesses (4); or if it be averred, that the assignment was made in the presence of two credible witnesses (5), it is sufficient, without averring that the indorsement was attested by two credible witnesses. A *profert in curia* of the assignment is not necessary, because the assignment is not by deed. (6) The assignment is good (7), though the sheriff be out of office; the act does not say it shall be done during the shrievalty.

It is not necessary to state in the declaration, that the defendant in the original action was arrested (8); nor, if stated, is it traversable. (9) Not requisite to state that defendant in the original action was arrested.

Neither is it requisite to state, that the debt was sworn to by the plaintiff, or that the sum sworn to was indorsed on the writ, such omissions having been sanctioned by a number of precedents. (10) Amount of debt sworn to.

Non est factum may be pleaded to an action of debt by the assignees of the sheriff upon a bail bond; under which plea, the plaintiff need only prove the execution of the bail bond by the defendant. PLEADINGS.

Where in debt on a bail bond, given upon an arrest in an inferior court, the defendant pleaded, that before the day of appearance mentioned in the condition, he was rendered to the gaoler there, and continued till a *supersedeas* came; upon demurrer, the plea was holden good. (11) *Non est factum.*

The defendant can plead, that no process issued against the principal since the commencement of the action (12); that the bond was not assigned according to the statute (13); or that no affidavit of debt was made. (14) Where no process has issued against the principal; illegal assignment; no affidavit filed.

But a plea that no affidavit of debt was filed (15), or that no proper affidavit had been made, is bad. (16)

The defendant cannot plead that the cause was out of court for want of Cause out of

(1) *Knowles v. Johnson*, 2 Dowl. P. C. 653. Archb. C. Att. Pract. 170., *sed vide*, as to costs, *Key v. Hill*, 2 B. & A. 598. *Johnson v. Macdonald*, 2 Dowl. P. C. 44.

(2) *Dawes v. Papworth*, Willes, 408.

(3) *Robinson v. Taylor*, Fortesc. 366.

(4) *Lease v. Box*, 1 Wils. 121

(5) *Rollison v. Taylor*, T. T. 13 Geo. 1. *cit. in Lease v. Box*, 1 Wils. 122.

(6) *Lease v. Box*, 1 Wils. 121.

(7) *Hays v. Manning*, B. R. E. 8 Geo. 1. Serjt. Hill's MSS. vol. xxix. p. 68. *cit. Selw. N. P. 585.*

(8) *Watkins v. Parry*, Str. 444.

(9) *Haley v. Fitzgerald*, *ibid.* 643.

(10) *Whishard v. Wilder*, 1 Burr. 330.

(11) *Pawling v. Ludlow*, 2 Show. 443. 3 Mod. 87.

(12) 3 Chitt. Pl. 866.

(13) 2 Saund. 61. *Dawes v. Papworth*, Willes, 408.

(14) *Knowles v. Stevens*, 1 C. M. & R. 26. *nom. Snow v. Stevens*, 2 Dowl. P. C. 664.

(15) *Ibid.*

(16) *Hume v. Liversidge*, 1 C. & M. 332.

DEBT ON BOND.

court before
assignment; de-
fence in equity;
action brought
for benefit of
sheriff's officer.
Mode of taking
advantage of
irregularities in
practice.

Appearance not
entered of re-
cord.

Nul tiel record.

Where record
is of another
court.

Bail above per-
fected in due
time.

Reg. Gen. H.
T. 2 Will. 4.
s. 29.

Signing
judgment.

a declaration before the assignment of the bond was taken (1); nor can matters of defence in equity, or merely founded on the discretion of the court, be pleaded (2); or that the action was brought for the benefit of, or as trustees for, the sheriff's officer. (3)

The mode of taking advantage of irregularities in practice is by application to the court, or by plea in abatement; therefore the practice of the court, unless it goes to the merits of the defence, cannot be pleaded. (4)

In debt on bail bond, the defendant having craved oyer of the condition, may plead an appearance at the day therein mentioned, according to the form and effect of the condition, concluding with "and this he is ready to certify, by the record of the appearance;" for the appearance being entered of record, is not triable by jury, but by the record. (5)

If the appearance be not entered of record, the bond is forfeited. (6)

To the plea of *comperuit ad diem*, the plaintiff may reply *nul tiel record*; and when the record is of the *same* court, this replication ought to conclude with giving a day to the defendant (7); and if the record be not produced at the day, the plaintiff may sign judgment. (8)

Where the record is of *another court* (9), the replication ought to conclude with a verification and a prayer of judgment (10); the defendant thereupon rejoins, "there is such a record;" and the court gives him a day to bring it in. If the record be not brought into court on the day, judgment of failure of record is given. (11)

The defendant may plead that bail above was perfected in due time, according to the conditions of the bond. Before the Uniformity of Process Act it was a good plea, that the principal appeared, according to the condition of the bond or exigency of the writ, which was technically termed *comperuit ad diem*. (12) But the render of the principal, or his return into custody within the eight days, will not now discharge the bond, the condition of which is, that bail should be put in above. It is a good plea, that the bond was taken for ease and favour, after the time limited for putting in special bail: and to this plea, if the action be put in at the suit of the plaintiff, he should pray an enrolment of the bond, and, after setting it out, state that he was sheriff, the defendant's arrest, that the bond was made to him as sheriff, and traverse the ease and favour. (13) If the action be at the suit of the assignee, the replication should state that the bond was duly executed, and denying the ease and favour, conclude to the country. (14)

By Reg. Gen. Hilary Term, 2 Will. 4. s. 29., "in all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it." By s. 30., "proceedings may be stayed on pay-

(1) *Carmichael v. Troutbeck*, cit. in *Sampson v. Brown*, 2 East, 442. 3 Chitt. Pl. 869.

(2) *O'Kelly v. Sparkes*, 10 East, 377.

(3) *Scholey v. Mearns*, 7 *ibid.* 148.

(4) *Ball v. Swan*, 1 B. & A. 393. *Warmley v. Macey*, 5 Moore, 168.

(5) *Bret v. Sheppard*, 1 Leon. 90.

(6) *Corbet v. Cook*, Cro. Eliz. 466.

(7) *Cremer v. Wicket*, 1 Ld. Raym. 550. Carth. 517. recog. in *Jackson v. Wickes*, 7 Taunt. 30.

(8) *Tipping v. Johnson*, 2 B. & P. 308.

(9) Vide *Sandford v. Rogers*, 2 Wils. 118. *Hedges v. Sandon*, 2 T. R. 443., *antè*, tit. Debt on Judgment, 1223—1235.

(10) Vide Form, 1 Saund. 92.

(11) *Ibid.* n. 3.

(12) 3 Chitt. Pl. 867.

(13) *Abney v. White*, Carth. 301. 2 Saund. 60. (a.)

(14) *Lenthall v. Cooke*, 1 Lev. 254. 1 Saund. 663. (d.)

ment of costs in one action, unless sufficient reason be shewn for proceeding in more." (1)

Where regular proceedings on a bail bond are stayed, and the bail bond is directed to stand as a security, it is deemed an implied condition also that the defendant, in afterwards pleading to the original action, shall plead to the merits only; if he plead any other plea, such as bankruptcy or the like, the court will set aside the plea, unless it appears that the application to set aside the proceedings on the bail bond were without the defendant's concurrence; and even if that do appear, although the court in that case cannot set aside the plea, they will rescind the rule for setting aside the proceedings on the bail bond. (2)

Staying proceedings.

Where regular proceedings are stayed, the defendant is confined in his subsequent pleading to the merits.

10. DEBT ON BOND, WITH CONDITION TO PERFORM COVENANTS— ASSIGNING BREACHES UNDER STAT. 8 & 9 WILL. 3. c. 11. s. 8.

DEBT ON BOND, WITH CONDITION TO PERFORM COVENANTS—ASSIGNING BREACHES UNDER STAT. 8 & 9 WILL. 3. c. 11. s. 8.

At common law, the judgment for the plaintiff in debt on bond was, that he should recover his debt: thus, in cases where the bond was given for the doing of some collateral act, was frequently not only inconvenient but unjust; to remedy which, it was enacted by stat. 8 & 9 Will. 3. c. 11. s. 8., "that in actions upon bonds or on any penal sum, for non performance of any covenants or agreements in any indenture, DEED, or writing contained, the plaintiff *may* assign as many breaches as he shall think fit, and the jury upon trial of such action, shall assess not only such damages and costs as have been heretofore usually done in such cases, but also damages for such of the assigned breaches as the plaintiff upon the trial shall prove to have been broken; and that the like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions."

Stat. 8 & 9 Will. 3. c. 11. s. 8.

Plaintiff may assign as many breaches as he pleases.

The defendant is accountable only to the extent of the penalty, and as soon as that is recovered, or if the defendant choose to pay it into court, the plaintiff can proceed no further, but on the contrary, may be compelled to enter satisfaction on the record (3)

Defendant accountable only to the extent of the penalty.

The stat. 8 & 9 Will. 3. c. 11. was made in favour of defendants, and receives a liberal construction. (4) The statute is obligatory, and although it enacts that the plaintiff "may" assign, "may" suggest, &c. yet the word "may" is compulsory, and the plaintiff *must* assign or suggest the breaches, otherwise the proceedings will be erroneous. (5) The statute is confined only to actions of debt (6); and it does not apply to cases at the suit of the crown. (7)

Construction of stat. 8 & 9 Will. 3. c. 11.

Stat. 8 & 9 Will. 3. c. 11. does not extend to a bond conditioned for the payment of a sum certain at a day certain; or to a *post obit* bond (8); common money bond (9); warrant of attorney to enter up judgment payable

Cases to which stat. 8 & 9 Will. 3. c. 11. does not extend.

(1) Where proceedings have been stayed, vide *Key v. Hill*, 2 B. & A. 598.

(2) *Dowson v. Levi*, 4 *ibid.* 249. Archb. C. Att. Pract. 175.

(3) 1 Saund. 58. (a.) n. 1. *Brangwin v. Perrot*, 2 W. Black. 1190. *Wilde v. Clarkson*, 6 T. R. 303. *Shutt v. Proctor*, 2 Marsh. 327. *Lonsdale (Lord) v. Church*, 2 T. R. 388.

(4) *Hardy v. Bern*, 5 T. R. 637.

(5) *Ibid.* 636. *Roles v. Rosewell*, *ibid.*

538. 540. *Drage v. Brand*, 2 Wils. 377. *Goodwin v. Crowle*, 1 Cowp. 359.

(6) 1 Saund. 58. (b.) n. 1.

(7) Archb. by Chitt. 759.

(8) *Murray v. Stair (Earl of)*, 2 B. & C. 82. 89. 3 D. & R. 278. *Wardell v. Fermor*, 2 Camp. 285.

(9) Stat. 4 Anne, c. 16. s. 13. 1 Saund. 58. (c.) n. 1. *James v. Thomas*, 2 N. & M. 663.

DEBT ON BOND. by instalments (1), although accompanied by a bond (2); bail bond (3); petitioning creditor's bond (4); or to a replevin bond (5).

Cases to which it does extend. But bonds for the payment of money by instalments (6), or of annuities, or for the performance of an award, are within the statute. (7)

Although a bond be on the face of it a common money bond, yet if there be a concurrent instrument, shewing that it is in substance a bond intended to secure the performance of covenants, &c. within the meaning of the statute, it is necessary to suggest or assign breaches in pursuance of the act, although the bond does not refer to the instrument which explains it. (8)

A breach must be assigned in the replication, if general performance be pleaded.

If the defendant plead any plea which makes it necessary for the plaintiff at common law to assign a breach in the replication, as for instance, general performance, the plaintiff must still assign the breach in the replication, with this difference, that he may now assign several breaches under the statute, whereas at common law he could only assign one. If only one breach be assigned in the replication, it is not necessary to state, that it is assigned "according to the form of the statute;" and it is doubtful, whether that allegation be necessary in any case. (9)

If issue be joined on *non est factum* and plea of fraud, and there be no suggestion of breaches, the judge will try the issues, but refuse immediate execution, and leave the plaintiff to suggest breaches, &c. (10)

Superaddition of immaterial breaches.

The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial breaches. (11)

EVIDENCE.

After proof of the bond, the plaintiff proves the breaches assigned, where, from the nature of the case, the burden of proof is not thrown on the defendant to prove the affirmative; as where the condition is to pay money by instalments, or the payment of rent.

The plaintiff in cases where breaches are assigned under the statute, must give evidence of the amount of his damages. (12)

Stat. 8 & 9 Will. 3. c. 11. s. 8.

If judgment be given for the plaintiff on demurrer or by confession, or *nihil dicit*, then stat 8 & 9 Will. 3. c. 11. s. 8. directs, "that the plaintiff upon the roll (13) may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ (14) to the sheriff of that county, where the action shall be brought, to summon a jury to appear before the justices or justice of assize or *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded

Where judgment is given for the plaintiff on demurrer, or by confession, or *nihil dicit*.

(1) *Cox v. Rodbard*, 3 Taunt. 74. 264. *Tilby v. Best*, 16 East, 164. *Shaw v. Worcester (Marquis of)*, 6 Bing. 985. *Hurst v. Jennings*, 5 B. & C. 656.

(2) *Austerbury v. Morgan*, 2 Taunt. 195.

(3) *Moody v. Pheasant*, 2 B. & P. 446.

(4) *Smithey v. Emonson*, 3 East, 22. *Smith v. Broomhead*, 7 T. R. 300.

(5) *Middleton v. Bryan*, 3 M. & S. 155.

(6) *Willoughby v. Swinton*, 6 East, 550. *D'Aranda v. Houston*, 6 C. & P. 511.

(7) *Walcot v. Goulding*, 8 T. R. 126. *Willoughby v. Swinton*, 6 East, 550. *Welch v. Ireland*, *ibid.* 613. 2 Saund. 188. *Middleton v. Bryan*, 3 M. & S. 156.

(8) *Hurst v. Jennings*, 5 B. & C. 650. 8 D. & R. 424.

(9) *Tombs v. Painter*, 13 East, 1. 2 Saund. 187. (a.) n. 2.

(10) *D'Aranda v. Houston*, 6 C. & P. 512. 514.

(11) *Stothert v. Goodfellow*, 1 N. & M. 202.

(12) 2 Saund. 187. (a.) n. 2. *De La Rue v. Stewart*, 2 N. R. 362.

(13) No suggestion is necessary on a judgment by warrant of attorney. *Kinnarsley v. Mussen*, 5 Taunt. 264.

(14) *Vide* Form of this writ, 2 Saund. 187. (c.) n. 2.

to the said justices, that they shall make a return (1) thereof to the court whence the same shall issue, at the time in such writ mentioned; and in case the defendant, after such judgment entered, and before any execution executed, shall pay unto court where the action shall be brought, to the use of the plaintiff, his executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied, all such damages, with costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain as a further security to answer to the plaintiff, and his executors or administrators, such damages as shall be sustained for further breach of any covenant in the same indenture, deed, or writing; upon which the plaintiff may have a *scire facias* (2) upon the said judgment against the defendant or against his heir, terre tenant, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be had upon the said judgment; upon which there shall be the like proceeding, as was in the action of debt upon the said bond for assessing damages upon trial of issue joined upon such breaches, or inquiry thereof, upon a writ to be awarded as aforesaid; and upon payment or satisfaction as aforesaid of such future damages, costs, and charges, all further proceedings are again to be stayed; and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

DEBT ON BOND.
Defendant paying damages, execution may be stayed,

but judgment to remain to answer any further breach;

and plaintiff may have a *scire facias* against the defendant.

The verdict for the plaintiff is the same as in ordinary cases, but the jury must also assess damages for the breaches. **VERDICT.**

The judgment for the plaintiff is, that he recover the debt and damages for the detention thereof, together with 40s. costs, and the costs of increase, the latter of course including the costs of the trial. (3) **JUDGMENT.**

Where there is *no plea* to the declaration, and consequently no *issue* to be tried, judgment, either upon demurrer or by default, is to be signed for the penalty as at common law, and the plaintiff suggests breaches on the roll, of which a copy should be given to the defendant. A writ of inquiry is then executed (4), but the defendant is not allowed to answer such breaches.

Where there is no plea to the declaration.

The judgment when entered up for the debt stands as a security for any further breaches, and if afterwards there be breaches, the plaintiff may have a *scire facias* on the judgment and suggest them, and damages will be assessed thereupon by writ of inquiry (5), which must be executed before the sheriff, and directed to him. (6) **Entry of judgment.**

(1) *Vide* Form of *postea* returned by justices of assize, 2 Saund. 187. (c.) n. 2.

(2) *Vide* Form of this writ against defendant, Tidd's Forms, 430. If the plaintiff proceed to execution without a *scire facias*, the court will set aside the execution and order the money levied under it to be restored. *Willoughby v. Swinton*, 6 East, 550. In cases

within this statute, although new breaches take place within a year after judgment recovered, yet the plaintiff is bound to sue out a *scire facias*. *Ibid*.

(3) 1 Saund. 58. (b.) n. 1.

(4) Tidd. 585.

(5) Stat. 8 & 9 Will. 3. c. 11. s. 8.

(6) Stat. 3 & 4 Will. 4. c. 42. s. 16.

DEBT ON BOND.
EXECUTION.

In debt on bond for performance of covenants, &c. where breaches are suggested, &c. under stat. 8 & 9 Will. 3. c. 11. s. 8., although the writ of execution must be for the entire penalty, damages and costs, yet it should be indorsed to levy only the damages assessed upon the breaches, the costs found by the jury, the costs of increase, and the costs of the execution; but if the damages assessed and charges of execution exceed the penalty of the bond, the execution can only be for the amount of the penalty, and the costs of increase. (1) The writ in this case must be entered on the roll. (2)

**ARREST FOR
DEBT — STAT.
1 & 2 VICT.
c. 110.
Sect. 1.**

11. ARREST FOR DEBT—STAT. 1 & 2 VICT. c. 110.

Stat. 1 & 2 Vict. c. 110. s. 1., after reciting that the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed, enacts, that after October 1. 1838, no person shall be arrested on mesne process in any civil action in any inferior court whatsoever, or in any superior court.

**Sect. 3. A
judge of a su-
perior court can
order defendant
to be arrested
in certain cases.**

There are, however, some exceptions to this enactment, the third section having enacted, that "if a plaintiff in any action in any of her majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall, by the affidavit of himself or of some other person, shew, to the satisfaction of a judge of one of the said superior courts that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge by a special order to direct, that such defendant or defendants so about to quit England shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued; provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Lancaster or his deputy there, or to the chancellor of the county palatine of Durham, or his deputy there." (3)

**Sect. 5. Order
may be made
at any stage of
the proceedings
before final
judgment.**

By stat. 1 & 2 Vict. c. 110. s. 5., "any such special order may be made, and the defendant arrested in pursuance thereof at any time after the commencement of such action, and before final judgment shall have been obtained therein, and that a defendant in custody upon any such arrest, and not

(1) 1 Saund. 58. (b.) n. 1.

(2) Archb. by Chitt. 559.

(3) Where the defendant has been arrested under this section upon insufficient affidavits,

the application for his discharge should be by motion to set aside the order, not the *capias*.
Hopkinson v. Salembier, 7 Dowl. P. C. 493.

previously served with a copy of the writ of summons, may be lawfully served therewith."

ARREST FOR
DEBT.

In respect of clearness or certainty, the language of the affidavit is tested by the same rules as a declaration which is specially demurred to (1); and if upon any construction of it, the arrest appears to be unlawful, the affidavit will be defective. (2)

Construction of
language in af-
fidavit.

The cause of action stated in the affidavit must be the same for which the plaintiff declares, otherwise the order will be rescinded, or the defendant or bail discharged, according as the *capias* issues before or after declaration. But it is no objection, that the declaration contains other causes of action besides those, for which the defendant is held to bail. (3)

Statement of
cause of action.

The first part of the affidavit may be in the common form of an affidavit to hold to bail, or of an affidavit to obtain a judge's order to hold to bail, heretofore usually adopted according to the cause of action; but it need not be entitled in the cause, if made before the writ of summons be sued out. (4) If the action be actually depending at the time the application is made, the affidavit should, it seems, be intituled in the court and cause. (5)

Commence-
ment of affida-
vit.

The affidavit should state facts, from which it may fairly be presumed to be the intention of the defendant to quit the country; and the defendant must then add that, "he verily believes that the said J. S. is about to quit England, unless he be forthwith apprehended and holden to bail for the cause of action aforesaid." It will be insufficient, it should seem, merely to state the deponent's belief as to the defendant being about to quit the country, without also stating the facts on which such belief is founded (6); mere suspicion will not do. (7)

Statement of
the intention of
the defendant
to quit Eng-
land.

It is not requisite for the applicant to suggest the object, or how long the defendant intends to be absent.

An officer going to join his regiment in Ireland is liable to an arrest. (8)

While every case of a person about to leave England is not within the act, as the captain of a packet between Dover and Calais, yet, as observed by Mr. Baron Alderson in *Larchin v. Willan* (9), "if a party is going abroad for such a period, that the suit is thereby necessarily delayed, and he is not ready to be apprehended at the time that execution would take place in the ordinary progress of a cause, that is such an absence as was meant to be prevented by the provisions of the third section."

Every case of a
person about to
leave England
not within the
act.

To support a rule by a defendant to rescind (under sect. 6.) a judge's order made under stat. 1 & 2 Vict. c. 110. s. 3., he must swear positively that "he is not about to leave England." (10)

What defendant
must swear to
discharge the
order.

By stat. 1 & 2 Vict. c. 110. s. 6., "it shall be lawful for any person arrested upon any such writ of *capias*, to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to shew cause why the person arrested should not

Stat. 1 & 2
Vict. c. 110. s. 6.
Defendant may
apply for his
discharge forth-
with.

(1) *Balmanno v. May*, 6 Dowl. P. C. 306.

(2) *Luttreille v. Hoepner*, 2 *ibid.* 758. *Lush. Pr.* 598.

(3) *Taylor v. Wilkinson*, 6 A. & E. 534. *Lush. Pr.* 591.

(4) *Schelleter v. Cohen*, 9 Dowl. P. C. 277.

(5) *Ibid.*

(6) Archb. C. Att. Pract. 690. *Bateman v. Dunn*, 7 Dowl. P. C. 105.

(7) *Harvey v. O'Meara*, 7 Dowl. P. C. 725.

(8) *Larchin v. Willan*, *ibid.* 11.

(9) *Ibid.*

(10) *Robinson v. Gardner*, *ibid.* 716.

**ARREST FOR
DEBT.**

Judge may discharge defendant or not.

Ordering bail bond to be delivered up to be cancelled.

Stat. 1 & 2
Vict. c. 110. s. 4.
Sheriff may proceed to arrest defendant.

Defendant to remain in custody until he finds bail, or makes a deposit.

**DELIVERY OF
COPY OF WRIT.**

Copy differing from writ.

be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit; provided, that any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order."

It is probable also that, in cases where a defendant, instead of remaining in custody until this application shall be made, gives a bail bond and is discharged, the court or a judge would order the bail bond to be delivered up to be cancelled, upon the same grounds that they would have ordered him to be discharged, if he had remained in custody. The case, though not within the words, is clearly within the equity of the statute. (1)

By stat. 1 & 2 Vict. c. 110. s. 4., "the sheriff or other officer to whom such writ of *capias* shall be directed shall, within one calendar month after the date thereof, including the day of such date but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall remain in custody, until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior courts; and all subsequent proceedings, as to the putting in and perfecting special bail, or of making deposit and payment of money into court, instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit."

To render the arrest legal, the officer must, as directed by the writ "on the execution thereof, deliver a copy thereof" to the defendant. The body of the act is silent as to this; but there seems no doubt that the practice will be the same as was required by the Uniformity of Process Act, under which it was holden, with reference to a writ of *capias* issued thereunder, that a delay of ten hours before delivering the copy was not a compliance with the direction. (2)

If the copy so given differ in any material respect, that is, if by reason of the omission of, or variance from, a word in the original, the sense is altered, the arrest will be illegal, and the defendant entitled to be discharged.

Where the *capias* described the defendant as a "gentleman," and the copy omitted the word, though the description was unnecessary, the bail bond was ordered to be cancelled; and the omission of the word "London" in the indorsement on the copy of the *capias*, has been held sufficient cause for setting aside a copy. (3) But the omission of a letter, or even a word, when the sense or the description is not altered, will not vitiate. (4)

(1) Archb. C. Att. Pract. 692. Where a defendant who has been arrested by a judge's order, pursuant to stat. 1 & 2 Vict. c. 110. s. 3., seeks to obtain his discharge under sect. 6. of that statute, on the ground of a substantial objection to his arrest, he is not bound to apply before the expiration of the time for putting in bail. *Walker v. Lamb*, 9 Dowl. P. C. 131. It seems, that if the defendant give a satisfactory explanation of

the facts which have led to his arrest, the plaintiff ought, in answer to his application for discharge, to disprove the explanation.

(2) *Shearman v. M'Knight*, 5 Dowl. P. C. 572. Lush. Pr. 601.

(3) *Cooke v. Vaughan*, 4 M. & W. 69., vide *Smith v. Pennell*, 2 Dowl. P. C. 654.

(4) *Forbes v. Mason*, 3 Dowl. P. C. 104. *Sutton v. Burgess*, *ibid.* 489. *Cooper v. Wheale*, 4 *ibid.* 281.

DECEIT.

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Deceit is grounded on the breach of the warranty of one party to a contract either express or implied — Selling the property of another — Scienter must be proven — Distinctions between an express promise and an implied warranty — When a thing is of a certain value, and that is only known to the seller — Every deceit comprehends a lie coupled with some dealing — Affirming the rent of a house to be more than it really is — IN EVERY CONTRACT TO FURNISH GOODS, HOWEVER LOW THE PRICE, IT IS IMPLIED THAT THE GOODS SHALL BE MERCHANTABLE — What is not laches in acquainting vendor of his breach of warranty — Goods sold by specimen — Sale of pictures — Encouraging vendee in a delusion respecting a picture — Putting the name of an old artist in a catalogue — Constitutional unsoundness existing in sheep at the time of sale — Disclosure of latent defects — Where sale by sample does not raise an implied warranty that the commodity should be merchantable — Adopting the particular mark of a manufacturer.

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WHERE IT LIES
UPON AN IM-
PLIED OR EX-
PRESS WAR-
RANTY.

Deceit is
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of one party to

1. WHERE IT LIES UPON AN IMPLIED OR EXPRESS WARRANTY.

All contracts which are infected with fraud, are void both at law and in equity, for the basis of all dealings ought to be good faith.

It is on the breach of the warranty of one party, to a contract either implied or express, that the action of deceit is grounded, and it lies wherever a person has, by a false affirmation or otherwise, imposed upon another to his damage, who has placed a reasonable confidence in him:

thus, where a merchant sells cloth to another *knowing* it to be badly fulled, deceit will lie, because, upon the foregoing principle, it is a warranty in law; but there is no authority to shew, that the same rule holds if the commodity sold have a latent *defect* unknown to the seller. (1) If a person in possession of a lottery ticket (2) falsely sell it to another for his own, deceit will lie; for possession of a personal chattel is a colour of title, and therefore it was but a reasonable confidence which the buyer placed in him, when he affirmed it to be his own. (3)

WHERE IT LIES UPON AN IMPLIED OR EXPRESS WARRANTY.

a contract either implied or express.

Selling the property of another.

Scienter must be proven.

It is incumbent on the plaintiff in such case to prove the defendant knew it not to be his own at the time of the sale (for the declaration must be, that he did it fraudulently, knowing it not to be his own) for if the defendant had a reasonable ground to believe it to be his property (as if he bought it *bond fide*), no action will lie against him; but the defendant cannot plead such matter, but must give it in evidence. (4)

Distinctions exist between an action on the case for breach of an express promise, and one in nature of deceit on an implied warranty; in the latter the deceit is the *gravamen*, and the *scienter* the gist of the action; and in the former, the breach of the warranty is the *gravamen*; therefore, where plaintiff declares in tort for such breach, it is not necessary to allege the *scienter*, nor if alleged to prove it. (5)

Distinctions between an express promise and an implied warranty.

Where a thing is of a certain value, and that is known to the seller, but cannot be so to the buyer, if there be any deceit in affirming the value to be different from what it is, this action lies. (6) And a purchaser may recover against a vendor for a false affirmation of rent, though he inquired what the estate let for, and did not depend on the statement. (7)

Where a thing is of a certain value, and that is known to the seller.

Every deceit comprehends a lie, but yet it is more than a lie, from the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion and does occasion to another. And so it is in all cases where the purchaser may easily discover the true value, or where the thing may be of more value to one man than to another, as jewels, pictures, &c. (8)

Every deceit comprehends a lie, coupled with some dealing.

If the seller affirm the rent of a house to be more than it really is, whereby the purchaser is induced to give more than it is worth, an action will lie for the deceit; for the value of the rent is matter which lies in the private knowledge of the landlord and tenant, and must be the same to all.

Affirming the rent of a house to be more than it really is.

In *Pilmore v. Hood* (9) the defendant being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month: B. having to the knowledge of the defendant communicated this representation to plaintiff, who became the purchaser instead of B.:—It was held, that an action lay against defendant at the suit of plaintiff.

(1) *Parkinson v. Lee*, 2 East, 323., *et vide* 1 Rol. Abr. Action sur Case (P.), 90. Bull. N. P. 30. (a.)

(2) *Medina v. Stoughton*, 1 Salk. 210. 1 Ld. Raym. 593.

(3) Bull. N. P. 30. (a.)

(4) *Medina v. Stoughton*, 1 Salk. 210. 1 Ld. Raym. 593.

(5) *Williamson v. Allison*, 2 East, 446. Bull. N. P. 30. (a.) *n. a.*

(6) 1 Esp. N. P. 629. *Jendwine v. Slade*, 2 Esp. N. P. C. 572. *Philips v. Hunter*, 2 Hen. Black. 415.

(7) 1 Sug. V. & P. 5., *vide etiam Pasley v. Freeman*, 3 T. R. 51.

(8) *Ibid.* *Leakins v. Chissel*, 1 Sid. 146., *et vide Elkins v. Tresham*, 1 Lev. 102. S. C. nom. *Elkins v. Tresham*, Bull. N. P. 31. (a.)

(9) 5 Bing. N. C. 97. 7 Dowl. P. C. 136.

WHERE IT LIES
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What is not
laches in ac-
quainting
vendor of his
breach of war-
ranty.

Goods sold by
specimen.

Sale of pictures.

But if the seller only affirm that A. B. would have given so much for it whereas A. B. had never offered so to do, no action will lie, for such affirmation cannot deceive in the value. (1) So if he only affirm it was worth so much, for the purchaser might inform himself of the value. (2)

If an article be sold for a particular purpose, and at the usual market price, and it be defective, an action is maintainable against the seller, though there was no warranty at the time of the sale (3); because, where a person manufactures an article and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose; therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the jury found that the decay was by some intrinsic defect in the quality: — It was held, that the plaintiff was entitled to recover damages in an action on the case in the nature of deceit, although no fraud was imputed to the defendant; for as he manufactured the copper, and knew the purpose for which it was to be applied, and said "he would supply the plaintiff well," it amounted to a warranty that it should be fit for the purpose. (4)

Where a party bought a ship under a representation that she was copper fastened, but ascertained in the course of a few days that she was not, and did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned: — It was held, that this delay would not prevent his recovering in an action for the misrepresentation, provided the action was in other respects maintainable. (5)

If, before or at the time of sale, a specimen of the goods be exhibited to the buyer, and if there be a written contract which merely describe the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract. (6)

A. sold to B. for 95*l*. two pictures, representing them as "a couple of Poussin's;" they were, in fact, no originals, but very excellent copies; B. did not offer to return them: — It was held, that if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but that as he kept them, he was liable to pay whatever sum the jury might consider to be the value. (7)

Where A. sold a picture to B. as a Rembrandt; but there was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation, and the picture was kept: — It was holden, that, if the jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture. (8)

(1) *Risney v. Selby*, 1 Salk. 211. S. C. 108. 4 Camp. 169., vide etiam *Jones v. nom. Lysney v. Selby*, 2 Ld. Raym. 1118. *Bowden*, 4 Taunt. 847.

Leakins v. Chissel, 1 Sid. 146.

(2) *Harvey v. Young*, Yelv. 20.

(3) *Gray v. Cox*, 6 D. & R. 200. 4 B. & C. 108. 1 C. & P. 184., et vide S. C. 8 D. & R. 220. 5 B. & C. 458.

(4) *Jones v. Bright*, 3 M. & P. 155. 5 Bing. 533. *Laing v. Fidgeon*, 6 Taunt.

(5) *Freeman v. Baker*, 2 N. & M. 446. 5 C. & P. 475.

(6) *Gardiner v. Gray*, 4 Camp. 144.

(7) *Lomi v. Tucker*, 4 C. & P. 15.

(8) *De Senhamberg v. Buchanan*, 5 ibid.

If the agent of a vendor of a picture, knowing the vendee labours under a delusion with respect to the picture, which materially influences his judgment, permit him to make the purchase without removing that delusion, the sale is void (1)

WHERE IT LIES UPON AN IMPLIED OR EXPRESS WARRANTY.

But the mere putting down the name of an old artist in a catalogue as the painter of a particular picture, is not such a warranty as will subject the seller to an action. (2)

Encouraging vendee in a delusion respecting a picture.

Certain sheep, apparently healthy and sound in every respect, were sold warranted sound; and two months afterwards a great part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was in the opinion of farmers and breeders an hereditary disease called the "goggles," and incapable of discovery until its fatal appearance:—It was held, that the disease was an unsoundness existing at the time of the sale, the jury being of opinion, that "it existed in the constitution of the sheep at that time." (3)

Putting the name of an old artist in a catalogue.

Constitutional unsoundness existing in sheep at the time of sale.

A seller of a ship "with all faults" is not liable for latent defects (4): because the very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. But although a ship be sold "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. (5)

Ship sold "with all faults."

Disclosure of latent defects.

Upon a sale of hops by sample, with a warranty, that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable. (6)

Where sale by sample does not raise an implied warranty, that the commodity should be merchantable.

Where a manufacturer had adopted a particular mark for his goods, in order to denote that they were manufactured by him, it was held, that an action on the case was maintainable by him against another person, who adopted the same mark for the purpose of denoting that his goods were manufactured by the plaintiff, and who sold the goods so marked as and for goods manufactured by the plaintiff. (7)

Adopting the particular mark of a manufacturer.

2. WHERE IT DOES NOT LIE.

WHERE IT DOES NOT LIE.

Although it is a rule as to an express warranty, that if a person by a false assertion has induced another to place a confidence in him, and has thereby deceived and injured him, this action lies, yet where the affirm-

Where the affirmation is merely a nude assertion.

(1) *Hill v. Gray*, 1 Stark. 434.

(5) *Ibid. Schneider v. Heath*, 3 Camp. 506.

(2) *Jendwine v. Slade*, 2 Esp. N. P. C. 572.

Mellish v. Motteux, Peake's N. P. C. 156.

(3) *Joliff v. Bendell*, R. & M. 136.

(6) *Parkinson v. Lee*, 2 East, 314.

(4) *Baglehole v. Walters*, 3 Camp. 154.

(7) *Sykes v. Sykes*, 3 B. & C. 541.

WHERE IT DOES
NOT LIE.

ation is merely a nude assertion or matter of opinion, leaving the party open to exercise his own judgment, or make his own inquiries, it is his fault if he be deceived, and an action cannot be maintained (1); thus, where A., being in possession of a term (2), offers to sell it to B., saying, that a stranger would have given a certain sum for it, whereas, in truth, nothing had been offered for it, this is not such an affirmation, as will maintain the action.

An action on the case for deceit cannot be maintained by the seller of his share in a trade against the buyer, who has persuaded him to sell it at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more, although in truth they had authorised the defendant to purchase it, doing the best he could, and although the defendant charged them with a higher price than he gave. (3)

Party making
an untrue re-
presentation,
but believing it
to be accurate.

Deceit will not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue. (4)

Seller out of
possession of
the chattel at
the time of the
sale.

If the seller were out of possession of the personal chattel at the time of the sale, no action will lie against him, though it be not his own, without an express warranty, for then there was room to question his title. (5)

Representation
made before
sale, with full
opportunity for
purchaser to
examine the
truth of the
representation.

If a representation be made before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for deceit lies against the vendor, on the ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not. (6)

Breach of war-
ranty an answer
to an action for
the price of
goods.

In an action on a bill given for the price of goods sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand, if the defendant have tendered back the goods, although the plaintiff did not accept them. (7)

3. THE DECLARATION AND PLEADINGS.

THE DECLARA-
TION AND
PLEADINGS.

Where case the
proper form of
action.

Case is necessarily the form of action to be adopted for deceitfully representing a person to be fit to be trusted, or other deceit, independently of and without relation to any contract between the parties. (8) And for fraudulent representations not introduced into a written contract between the parties, respecting the subject-matter of the representations, case is the proper remedy if any. (9)

If goods be obtained upon credit through a fraudulent contract, the

(1) *Bayly v. Merrel*, Cro. Jac. 386. 3 Bulst. 94. Bull. N. P. 30. (a.) *Vernon v. Keys*, 12 East, 632.

(2) 1 Rol. Abr. Action sur Case (G.), 101.

(3) *Vernon v. Keys*, 4 Taunt. 488.

(4) *Freeman v. Baker*, 5 B. & Ad. 797.

(5) *Medina v. Stoughton*, 1 Salk. 210.

(6) *Pickering v. Dowson*, 4 Taunt. 779.

(7) *Lewis v. Cosgrave*, 2 ibid. 2.

(8) *Haycraft v. Creasy*, 2 East, 92. *Pasley v. Freeman*, 3 T. R. 51. *Adamson v. Jarvis* 4 Bing. 73. Stat. 9 Geo. 4. c. 14.

(9) *Meyer v. Everth*, 4 Camp. 22.

proper remedy is case or trover, at least before the expiration of the credit, for if before that time he sue in *assumpsit* for goods sold, he will recognise or affirm the contract, and may be successfully met by the objection, that the credit has not expired. (1)

THE DECLARATION AND PLEADINGS.

Where case or trover can be maintained.

Where case or *assumpsit* lies.

Case or *assumpsit* may be supported for a false warranty on the sale of goods (2); but for breach of an express or implied contract of warranty, it is usual and perhaps better to declare in *assumpsit*, in order that the count for money had and received to recover back the consideration paid, may be included in the declaration: and where the defendant said, "the horse is sound, but mind I do not warrant him," and it was proved that he knew it was unsound, Lord Tenterden held, that he was properly sued in *assumpsit*, on his promise that he was sound. (3)

Assumpsit will not lie, when the contract is such, that the law will not under the circumstances imply a contract. (4)

Where *assumpsit* for deceit does not lie.

Assumpsit is not the proper remedy for a deceitful representation, not embodied in, or noticed on the face of a written contract between the parties, but the remedy should be case for the fraud. (5)

The purchaser of a warranted but worthless watch, is entitled to maintain an action for deceit, although it be stipulated, that, if he dislike the watch, the vendor shall exchange it for one of equal value; Lord Ellenborough in *Wallace v. Jarman* (6) being of opinion, that such an agreement "was collateral to the warranty, and that the plaintiff was not bound to take another watch in exchange; he might go on to the end of the chapter, if he were obliged to take bad for bad."

An action on the case will lie for a breach of warranty upon the sale of a chattel, although the purchaser may not have paid for it. (7)

PARTIES.

In an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor if charged need it be proved (8); thus, where the plaintiff, an auctioneer, was employed by the defendant, who had goods in his possession, but was not the owner, to sell them, which the plaintiff did, and was afterwards compelled by the real owner to make satisfaction to him for the proceeds:—It was held after verdict, that a count in case for representing that the defendant was entitled to sell the goods, and thereby deceiving him, was maintainable, although the declaration did not charge, that the defendant knew that he was not the owner of the goods at the time the representation was made. (9)

STATEMENT OF CAUSE OF ACTION.

Where the declaration stated, that, in consideration that the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook and promised that they were sound, and the plaintiff proved the price to be 54*l.* 12*s.* 6*d.*:—It was held, that the variance was fatal, where the sum was not laid under a *videlicet*. (10)

If a ship in an advertisement for sale be described as copper-fastened,

(1) *Ferguson v. Carrington*, 9 B. & C. 59.

(2) *Stuart v. Wilkins*, Doug. 21. *Williamson v. Allison*, 2 East, 446.

(3) 1 Chitt. Pl. 137.

(4) *Symonds v. Carr*, 1 Camp. 360. *Birch v. Wright*, 1 T. R. 386.

(5) *Meyer v. Everth*, 4 Camp. 22. 144. 169. *Powell v. Edmunds*, 12 East, 11.

(6) 2 Stark. 162.

(7) *Per cur.* 9 Hen. 7. 21. (b.) Bro. Abr. Deceit, pl. 24.

(8) *Williamson v. Allison*, 2 East, 446.

(9) *Adamson v. Jarvis*, 4 Bing. 66.

(10) *Durston v. Tuthan*, 3 T. R. 67. n.

THE DECLARATION AND PLEADINGS.

which advertisement is accompanied by a list containing an enumeration of masts, &c. headed "inventory;" and the contract for the sale of the ship refers to the "inventory;" such reference will not have the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though it may be usual to designate the whole advertisement by the name of "inventory." (1)

THE PLEADINGS.

A false representation must be specially pleaded.

A defendant in an action for goods bargained and sold at a specific price, will not be allowed to shew, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless it be specially pleaded. Where timber was sold, warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view of shewing that in the timber trade the word "sound," had a technical and conventional meaning. (2)

Plea of fraud, where not supported.

In an action on an agreement, in which fraud is pleaded, the plea is not supported, unless wilful misrepresentations have been made. (3)

EVIDENCE.

4. EVIDENCE.

What the plaintiff must prove generally.

The plaintiff must in the first place prove fraud; *in fact*, he must shew that the representation was not only *falsely*, but that it was *fraudulently* made, with intent to deceive the plaintiff, for the fraud or the deceit is the foundation of the action. Thus, in all cases of deceit in the sale of personal chattels, in respect of the quality, soundness, or goodness of the subject-matter, the plaintiff must prove, not only the *falsity* of the representation, but also the *scienter*, the knowledge of the defect on the part of the defendant. (4)

If the vendor affirm that the goods are the goods of a stranger his friend, and that he had an authority from him to sell them, whereas in truth they are the goods of another, and he had no such authority, an action will lie against him; and in such case it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so; for it need not be averred in the declaration, for the deceit is in his falsely affirming he had an authority to sell them; the plaintiff must therefore prove he had no such authority, and doubtless, proving them to be the goods of another would be evidence, *prima facie*, that he had no authority, and sufficient to put him upon proving that he had. (5)

If the substantive part of a warranty be proved, it is sufficient.

If the substantive part of a warranty be proved, it is sufficient, and it is a very different thing whether the plaintiff truly state those parts of a contract, the breach of which he complains, though other parts, not material to the question, be not stated, or whether he state any part of it untruly, for then it appears to be a different contract: thus, in *Miles v. Sheward* (6) Mr. Justice Le Blanc said, that "Where the plaintiff states the consideration for the promise of the defendant, he must state the whole consider-

(1) *Freeman v. Baker*, 2 N. & M. 446.
5 C. & P. 475.

(2) *Woodhouse v. Swift*, 7 C. & P. 310.

(3) *Stevens v. Webb*, *ibid.* 60.

(4) 2 Stark. Ev. 266.

(5) Bull. N. P. 30. (b.) cit. *Warner v. Tallard*, 1 Danv. Abr. 176. pl. 7. (a.)

(6) 8 East, 9.

ation, otherwise the contract is not truly stated. But where he states *the consideration* truly, and then states those parts of the defendant's, the breach of which he complains of, and states them truly, that is sufficient, without shewing other parts of the promise irrelevant to the breach complained of."

If by false and fraudulent representations, a party be induced to enter into a written agreement, and be thereby damnified, he may maintain case for the deceit, and give parol evidence of the representations, although not noticed in the written contract. (1)

Parol evidence of representations not noticed in written contract.

The description in the invoice of goods is sufficient proof of a warranty, that they should be of that particular description. (2)

Invoice of goods.

Upon a sale of pictures, a bill of parcels of "four pictures, views in Venice, Canaletti, 160*l*," is evidence from which a jury will be at liberty to infer a warranty, that the pictures were the production of that artist. (3)

Where warranty can be inferred that pictures are the productions of particular artists.

If in an action on a warranty of pictures, it appear that, before the sale, the vendor stated to the vendee that they were the works of a particular master, it will be for the jury to consider, whether the vendor made this representation as a part of the contract of sale, or whether the defendant made the representation as matter of opinion only. If in such an action, the defendant plead *non-assumpsit* only, the genuineness of the pictures is not in issue, and the jury only need consider it with a view to the amount of damages. (4)

It will be a good defence to an action of *assumpsit* for the price of goods sold under a warranty, that such goods were not of the same description as those warranted. (5) Thus, by a contract for the sale of *cinqfoin* seed, the vendor warranted it to be good new growing seed; soon after the sale, the buyer was told that it did not correspond with the warranty, and he afterwards sowed part, and sold the residue:—It was held, that in answer to an action by the seller to recover the price of the seed, it was competent for the buyer to shew, that it did not correspond with the warranty. (6)

Where goods do not correspond with the warranty.

In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that the defendant represented the returns to amount to a sum certain is material, and must be precisely proved, notwithstanding it be laid under a *videlicet*. (7)

False and deceitful representations of annual returns of business.

If the declaration state, that the defendant falsely represented that in his public-house "his returns had averaged, and then averaged, 300*l*. a month," this allegation is proved by evidence, that he said, he was "doing 300*l*. a month in the house;" the fact that he named his brewer, and kept a pass-book of his beer and spirits, and that the plaintiff neither inquired of the brewer, nor asked for the pass-book, do not go in bar of the action, but are fit matter for the consideration of the jury, on the question, whether the defendant practised a fraud and deceit on the plaintiff. (8)

(1) *Dobell v. Stevens*, 5 D. & R. 490. 3 B. & C. 623.

(2) *Bridge v. Wain*, 1 Stark. 504.

(3) *Power v. Barham*, 6 N. & M. 62. 7 C. & P. 356. 1 H. & W. 683.

(4) *Ibid*.

(5) *Poulton v. Lattimore*, 4 M. & R. 208. 9 B. & C. 259.

(6) *Ibid*.

(7) *Gilbert v. Stanislaus*, 3 Price, 54.

(8) *Bowring v. Stevens*, 2 C. & P. 337.

5. DAMAGES.

DAMAGES.

If A. falsely represent to B. the circumstances of C., in consequence of which B. sells to C. goods upon credit from time to time, A. is liable to B. although C. pays for the goods first supplied, on the purchasing of which, the representation is made. (1) He continues, it is said, to be liable within a reasonable time, and to a reasonable amount (2); in other words, the liability depends so much on the peculiar circumstances of each case, that the law cannot define generally the limits, either as to time, or as to amount. (3)

For fraudulent misrepresentation of business, the actual value of the premises can be shewn.

Damages and costs of a former action.

In case, against the vendor of a public-house, for fraudulent misrepresentation of the business of the house, evidence of the actual value of the premises is admissible in reduction of damages, but not as a bar to the action. (4)

A. sold a picture to B., warranting it a Claude; B. sold it to J., and warranted it a Claude to him; the picture was not a Claude, and J. brought an action against B. on the warranty; B. defended the action, and J. recovered damages and costs against him; B. then brought an action against A. upon the first warranty:—It was held, that B. was in this action entitled to recover against A. the amount of the damages and costs that B. had paid to J., and also the costs incurred by B. in defending the first action; but that, if the jury should be of opinion, that the sale from B. to J. was not a real sale of the picture in the ordinary course of business, but merely a colourable sale, on the usurious discount of a bill, they ought to disallow these sums. (5)

Vendor guaranteeing the net profit of business concerns.

The vendor of a trading concern guaranteed the net profit of the business sold, and of another business in which the purchasers were also engaged at a certain specific sum:—It was held, that this guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers, for the purpose of carrying on the concerns. (6)

Untrue representation of a "ship taken with all faults."

Where the vendor of a ship represented her to have been built in 1816, when in fact she had been launched a year before:—It was adjudged, that the vendee was entitled to recover damages in an action on the case, as it was a false representation, although it was agreed that the ship should be taken with all faults. (7)

WARRANTY
ON SALE OF
HORSES.

6. WARRANTY ON SALE OF HORSES.

I. *Contract of Warranty.*CONTRACT OF
WARRANTY.

A horse being more the subject of speculative dealing, than almost any chattel, and being more liable to secret maladies than any other animal,

(1) *Hutchinson v. Bell*, 1 Taunt. 558. !

(2) *Ibid.*

(3) 2 Stark. Ev. 269.

(4) *Pearson v. Wheeler*, R. & M. 303.

(5) *Pennell v. Woodburn*, 7 C. & P. 117.

(6) *Kirby v. Wright*, 2 M. & K. 131.

(7) *Fletcher v. Bowsher*, 2 Stark. 561.,
vide etiam *Shepherd v. Kain*, 5 B. & A. 240.

(which maladies are frequently not discernable either on inspection, or a mere trial), it has become usual, and a practice of prudence, to require from the seller a warranty of soundness, to guard against latent defects.

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HORSES.

If an express warranty be given, the seller will be liable for every latent defect, but if there be no such warranty, and the seller dispose of the thing such as he believes it to be, the law will not imply he had sold it on any other terms than what passed; in fact, it is the fault of the buyer if he do not insist on a warranty. (1)

Where vendor
liable for latent
defects.

It was long a prevalent idea, that a *sound price* given for a horse was tantamount to a warranty of soundness; but in the foregoing case of *Parkinson v. Lee*, Mr. Justice Grose observed, that Lord Mansfield had rejected this doctrine as loose and unsatisfactory, and he laid it down as a rule, that "there must either be an express warranty of soundness, or fraud in the seller, to maintain this action;" which express warranty he held to extend to all sorts of soundness, whether known or unknown to the seller.

There must
either be
an express
warranty of
soundness, or
fraud in the
seller to main-
tain the action.

A warranty on the sale of a personal chattel, as to the *right* thereto, is in general *implied*. (2)

Right of pro-
perty.

The warranty must be *upon the sale*, for if it be made *after*, and not at the time of sale, it is a void warranty, for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor.

Warranty must
be upon the
sale.

The warranty only applies to things *in esse* at the time of the warranty made, and not to things *in futuro*, as, that a horse is sound at the buying of him, not that he will be sound two years hence. (3)

Can only reach
to things in
being at the
time of the
warranty made.

To constitute a warranty, no particular language is required; and it may be stated as a general principle, that whatever the vendor represents at the time of the sale is a warranty.

No particular
language re-
quisite to con-
stitute a war-
ranty.

A verbal representation of the seller to the buyer of a horse in the course of dealing, that he "may depend upon it the horse is perfectly quiet and free from vice," is a warranty. (4) Where a horse was warranted "a thorough-broke horse for a gig," and the purchaser had no opportunity of using him in a gig for two months, but other persons had done so, and he had always answered the warranty, but after that time the purchaser himself drove him, when he kicked and broke the gig, &c. but it appeared that he was an unskilful driver:—It was holden, that the horse answered the warranty at the time he was sold, and that his bad conduct was owing to unskilful driving. (5)

"May depend
upon it, the
horse is per-
fectly quiet and
free from vice."
"A thorough-
broke horse for
a gig."

If a seller warrant a horse, he does so at his own peril (6); and if the warranty be false, the purchaser can maintain an action thereon, or, in some instances, can rescind the contract, and recover the money paid, under the count for money had and received. (7)

Liability of
vendor when
warranting a
horse.

Where a horse has been sold under a warranty of soundness, the seller is liable to an action, if the horse be not sound at the time of sale, though the

(1) *Parkinson v. Lee*, 2 East, 323.

(2) 2 Black. Com. 451. *Pasley v. Freeman*, 3 T. R. 57. *Dunlop v. Waugh*, Peake's N. P. C. 94.

(3) Finch's Law, 198. Dyer, 76. (a.) F. N. B. 98. (K.) *Southerne v. Howe*, 2 Rol. 5. 3 Black. Com. 166. Comyn on Contracts, 117., sed vide *Eden v. Parkinson*,

Doug. 735., where Lord Mansfield is reported to have said, "There is no doubt but you may warrant a future event."

(4) *Cave v. Coleman*, 3 M. & R. 2.

(5) *Geddes v. Pennington*, 5 Dow, 164.

(6) *Anon.* Lofft. 146.

(7) *Towers v. Barrett*, 1 T. R. 133.

**WARRANTY
ON SALE OF
HORSES.**

General warranty will not extend to guard against palpable defects.

Warranty not applying to the time of sale, but to a subsequent period.

Where discernment of defects is a matter of skill.

Where warranty only applies to soundness.

horse be returned, and though the buyer suffer a considerable time to elapse before he complains of the unsoundness, or offers to return the horse. (1)

A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses: thus, if a horse have manifest and visible defects at the time of sale, they are not included in a general warranty. Where therefore, on the sale of a race-horse, the seller told the purchaser that the horse was a crib-biter, and he also had a splint, which was apparent:—It was held, that a warranty of the horse being sound, wind and limb, at the time of sale, did not extend to those defects. (2)

Where the seller informed the buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the end of a fortnight sound, and free from blemish, and, at the expiration of that time, the horses were delivered, but one had a cough, and the other a swelled leg, which was apparent at the time of the sale, and the buyer brought an action to recover the price, and a verdict was found for the seller; the court of Common Pleas refused to disturb it, or grant a new trial, as the warranty did not apply to the time of the sale, but to a subsequent period. (3)

If a horse be warranted sound, but wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently a matter of skill, it has been holden, that an action on the case lieth, to recover damages for this imposition. (4)

Where the plaintiff brought an action to recover the price of a horse, sold under the following warranty, viz. "to be sold, a black gelding, five years old; has been constantly driven in the plough; warranted:"—It was held, that such warranty applied to soundness only, although some ambiguity might be occasioned by the particular structure of the sentence. (5)

If a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that it shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. (6) Therefore, where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale, and was then offered to the seller, who refused to take him, it was holden that an action might be maintained by the buyer against the seller, and his right to recover was not affected by his having sold the horse after offering him to the defendant (7); Lord Kenyon observing, "The condition of sale must be confined solely to the circumstance of *unsoundness*. There is good sense in making such a condition at public sales, because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited; but the circumstance of the age of the horse is not open to the same difficulty."

In an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller:—"Received of

(1) *Pateshall v. Tranter*, 4 N. & M. 649. 3 A. & E. 103.

(2) *Margetson v. Wright*, 5 M. & P. 606. 1 M. & Sc. 622. 7 Bing. 603. 8 *ibid.* 454.

(3) *Liddard v. Kain*, 9 Moore, 356. 2 Bing. 183.

(4) *Finch's Law*, 189. 3 Black. Com. 166.

(5) *Richardson v. Brown*, 8 Moore, 338. 1 Bing. 344.

(6) *Buchanan v. Parnshaw*, 2 T. R. 745.

(7) *Ibid.*

A. B. (the purchaser) 10*l.* for a grey four year old colt, warranted sound in every respect :—It was decided, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description. (1)

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ON SALE OF
HORSES.

In *Budd v. Fairmaner* (2) the plaintiff declared, that, in consideration that he, at the request of the defendant, would deliver to the defendant a horse of the plaintiff in exchange for a mare of the defendant's and 10*l.*, the defendant undertook that his mare was sound. Breach, that she was not sound. The defendant produced a receipt to the following effect, signed by the plaintiff (a horse-dealer and illiterate man) with his mark :—“Received of the defendant 10*l.* for a colt, warranted sound in every respect.” This receipt was given at the suggestion of the defendants' coachman, on the day following the bargain for the exchange, when the defendant sent him to pay the plaintiff 10*l.* :—It was held, that the receipt was not conclusive to shew, that the plaintiff had warranted his horse, and that it was properly left to the jury to say, whether he had done so or not at the time of the original bargain for the exchange, or whether the warranty of the horse had not been introduced into the receipt by an after-thought of the defendant's coachman ; and the jury having found a verdict for the plaintiff, the court refused to grant a new trial, which was applied for on the ground of a variance, between the terms of the receipt and the consideration for the exchange of the horse and mare, as laid in the declaration.

Receipt not
conclusive evi-
dence of war-
ranty.

There is no implied warranty upon an exchange of goods ; and to support an action, direct fraud must be proved. (3)

No implied
warranty upon
an exchange of
goods.

In *Bywater v. Richardson* (4) the plaintiff bought a horse, warranted sound, by private contract, at a repository. At the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was, that a warranty of soundness there given, should remain in force until noon of the day following, when the sale should become complete, and the seller's responsibility terminated, unless a notice and surgeon's certificate of unsoundness were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made till after twelve on the following day. The unsoundness was of a nature likely not to be immediately discovered ; some evidence was given to shew that the defendant knew of it ; and the horse was shewn at the sale under circumstances favourable for concealing it. After verdict for the plaintiff it was held, that there was sufficient proof of the plaintiff having had notice of the rules at the time of the sale to render them binding on him. Also, that the rule in question was such as a seller might reasonably impose, and that the facts did not shew such fraud or artifice in him as would render the condition inoperative ; Mr. Justice Littledale observing, “The warranty here was as if the vendor had said, ‘after twenty-four hours I do not warrant ;’ such a stipulation is not unreasonable.”

Warranty to
remain in force
for only a li-
mited period.

After a warranty of a horse as sound, the vendor, in a subsequent conversation, said that if the horse were unsound (which he denied) he would

Waver of war-
ranty.

(1) *Budd v. Fairmaner*, 1 M. & Sc. 74.
8 Bing. 48. 5 C. & P. 78. S. C. nom.
Fairmaner v. Budd, 5 M. & P. 534. 7 Bing.
574.

(2) *Ibid.*
(3) *La Neuville v. Nourse*, 3 Camp. 351.
(4) 1 A. & E. 508. 3 N. & M. 748.

**WARRANTY
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take it again and return the money: this is no abandonment of the original contract, which still remains open; and though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain *assumpsit* for money had and received to recover back the price after a tender of the horse. (1)

In an action for a breach of a warranty of a horse, the plaintiff failed to prove a warranty at the time of sale; and it appeared that he had returned the horse to the defendant, who stated that he would keep it without prejudice, but afterwards used and offered to sell it to a third person:—It was held, that by so doing he rescinded the original contract of sale; and the jury having found a verdict for the plaintiff for the sum paid for the horse, the court refused to disturb it. (2)

If the owner of a horse, sold by a stable-keeper with a warranty, go to the buyer and request to have the horse back, stating that he did not authorise the warranty of soundness, and the buyer refuse to give it up, saying, "I know nothing of you, I bought the horse of Mr. O.," such refusal is not a waiver of the warranty. (3)

What is not a warranty of a pedigree.

It is not a warranty to sell a horse as of the age stated in a written pedigree, if at the time the seller declared that he knew nothing of the horse's age but what he learnt from the written pedigree (4), because the seller must be understood as speaking to his belief only.

Effect of fraud.

If a horse be sold with a warranty, any fraud at the time of the sale will avoid it, although it does not amount to a breach of the warranty. (5)

Where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from whence he was brought, if the horse answered the warranty at the time of the sale, the misrepresentation as to the place from whence he came, would not invalidate the contract. (6)

**WARRANTY BY
SERVANT.**

Where principal bound.

II. Warranty by Servant.

A servant employed to sell a horse and receive the price, seems to have an implied authority to warrant the horse to be sound; and in an action upon the warranty it is enough to prove, that it was given by the servant, without calling him, or shewing that he had any special authority for that purpose. (7) And even though the servant have express directions not to warrant, but does warrant, the master it is said is bound, "because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." (8)

If a horse-dealer send his servant to market with a horse but desire him not to warrant it, yet the master is bound if he do so, because, he was acting within the general scope of his employment; but authorities exist, that if another person (not a horse-dealer) employ his servant or an agent to sell

(1) *Payne v. Whale*, 7 East, 274. 3 Smith, 130.

(2) *Long v. Preston*, 2 M. & P. 262.

(3) *Best v. Osborne*, 2 C. & P. 74. 1 ibid. 632. R. & M. 290.

(4) *Dunlop v. Waugh*, Peake's N. P. C. 167.

(5) *Steward v. Coesvelt*, 1 C. & P. 23.

(6) *Goddes v. Pennington*, 5 Dow. 164.

(7) *Alexander v. Gibson*, 2 Camp. 555.

(8) Per Bayley J. in *Pickering v. Bush*, 15 East, 45. *Helyear v. Hawke*, 5 Esp. N. P. C. 75.

his horse, and desire him not to warrant, and such servant or agent do so, the master will not be bound, because, the servant was not acting within the scope of his employment; but an action against the servant can be maintained. (1)

WARRANTY
ON SALE OF
HORSES.

What is said by the servant at the time of the sale is evidence, but an acknowledgment at another time is not so, and the servant must be called. (2)

Although a warranty given by a person entrusted to sell, *prima facie* binds the principal, the warranty of a person entrusted merely to deliver the thing sold, is not *prima facie* binding on the principal, but an express authority must be shewn; and therefore, where a horse had been sold by A. to B., and A.'s servant, on delivering the horse to B., made certain statements, and signed a receipt for the price of the horse, containing a warranty: — It was held, in an action on the warranty, that A. was not bound by the statements or receipt of the servant, as no express authority to give the warranty was shewn. (3)

Where not
bound.

So likewise, where, on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant, who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, warranted sound "to the regiment: " — It was held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. (4)

III. *What is and is not Unsoundness.*

In an action on a warranty of a horse, the plaintiff must positively prove that the horse was unsound. (5)

WHAT IS AND
IS NOT UN-
SOUNDNESS.

There must be
positive proof
of unsoundness.

The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict from a preponderance of contrary evidence. (6)

Roaring constitutes unsoundness in a horse, if he be thereby rendered less serviceable for a permanency. (7) But roaring is not unsoundness in a horse, unless it be shewn to proceed from some disease or organic defect. (8)

Roaring.

Bone spavin in the hock is unsoundness in a horse, and therefore is a breach of a warranty of soundness, whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years after. (9)

Bone spavin in
the hock.

Being chest foundered (10) is an unsoundness.

Chest foundered.

Some splints cause lameness, others do not; a splint, therefore, is not one of those latent defects against which a warranty is inoperative. The defendant therefore, having warranted a horse sound at the time of the

Splints.

(1) *Scotland (Bank of) v. Watson*, 1 Dow, 45., et vide *Fenn v. Harrison*, 3 T. R. 760. *Anon. case*, cit. in *Whitehead v. Tuckett*, 15 East, 407.

(2) *Helyear v. Hawke*, 5 Esp. N. P. C. 75.

(3) *Woodin v. Burford*, 2 C. & M. 391. 4 Tyrw. 264.

(4) *Strode v. Dyson*, 1 Smith, 400.

(5) *Eaves v. Dixon*, 2 Taunt. 343. S. P. *Lewis v. Cosgrave*, 2 ibid. 2.

(6) *Lewis v. Peake*, 7 ibid. 153. 2 Marsh. 431.

(7) *Onslow v. Eames*, 2 Stark. 81.

(8) *Bassett v. Collis*, 2 Camp. 523.

(9) *Watson v. Denton*, 7 C. & P. 85.

(10) *Atterbury v. Fairmanner*, 8 Moore, 32.

**WARRANTY
ON SALE OF
HORSES.**

Nerved horse.

Temporary
cough, lame-
ness, or injury.

Judgment of
Mr. Baron
Parke in *Coates*
v. *Stephens*.

contract, and the horse having afterwards become lame from the effects of splint visible when the defendant sold him, it was held, that the defendant was liable on his warranty. (1)

A nerved horse is unsound. (2)

Upon the question, whether a temporary cough, lameness, or injury, creates an unsoundness, conflicting decisions exist. (3)

In *Coates v. Stephens* (4) it was held, that a cough at the time of a sale of a horse warranted sound, is an unsoundness and breach of the warranty, though it be afterwards cured without any permanent injury to the horse; Mr. Baron Parke observing, "I have always considered that a man who buys a horse warranted sound, must be taken as buying for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description; or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is unsound. If the cough actually existed at the time of the sale, as a disease, so as actually to diminish the natural usefulness of the horse at that time, and to make him then less capable of immediate work, he was then unsound; or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed on the moment on a new subject, it is the result of a full previous consideration."

Judgment of
Lord Ellen-
borough in
Elton v.
Brogden.

In *Elton v. Brogden* (5) it was likewise held, that a temporary lameness, rendering a horse less fit for present service, was a breach of a warranty of soundness; Lord Ellenborough stating, "I have always held, and now hold, that a warranty of soundness is broken if the animal at the time of the sale had any infirmity upon him, which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of the sale, when he was warranted to be sound, his condition subsequently is no defence to the action."

Judgment of
Chief Justice
Eyre in *Gar-*
ment v. Barra.

In *Garment v. Barra* (6) it was decided, that a warranty of a horse being sound is not false, because the horse labours under a temporary injury from an accident: thus, Chief Justice Eyre said, "A horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made that such a horse is sound, it is made without any view to such injury; nor

(1) *Margetson v. Wright*, 8 Bing. 454. 1 M. & Sc. 622. 5 M. & P. 606. 7 Bing. 603.

(2) *Best v. Osborne*, R. & M. 290. 2 C. & P. 74. 1 *ibid.* 632.

(3) *Elton v. Brogden*, 4 Camp. 281. *Liddard v. Kain*, 9 Moore, 356. *Shillitoe v.*

Claridge, 2 Chitt. 425. *Garment v. Barra*, 2 Esp. N. P. C. 673. *Bolden v. Brogden*, 2 M. & Rob. 113. *Jones v. Cowley*, 4 B. & C.

448. (4) 2 M. & Rob. 157.

(5) 4 Camp. 281.

(6) 2 Esp. N. P. C. 673.

is a horse so circumstanced an unsound horse within the meaning of the warranty. I am of opinion, that to make the exception such as ought to have been stated in the declaration, as a qualification of the general warranty, so as to make a fatal variance between the warranty really made and that stated in the declaration, the injury the horse had sustained, or the malady under which he laboured, ought to be of a permanent nature, and not such as arose from a temporary injury or accident."

WARRANTY
ON SALE OF
HORSES.

This view of the case was adopted by Mr. Justice Coleridge in *Bolden v. Brogden* (1), where it was held, that a slight disorder on a horse at the time of a sale, not calculated permanently to diminish his usefulness, and from which he ultimately recovers, is not an unsoundness constituting a breach of warranty; Mr. Justice Coleridge in summing up the case to the jury stating, "that the question which they had to decide was, whether the horse at the time of the sale, had upon him any disease which was calculated permanently to render him unfit for use, or permanently to diminish his usefulness? or whether the disorder which the horse then had, was a mere cold, of such a nature, that, with ordinary care, it would soon have been cured, and so cured as to leave in the animal no tendency to any recurrence of the disorder in its after life? A mere slight cold no more constituted unsoundness in a horse than it did in a human creature; neither was a horse lame, within the meaning of a warranty, because, at the time of the sale, he might have a thorn in his foot, and so limp, if it were clear that the limping would be cured by simply extracting the thorn. The point to consider was, the effect on the constitution of the animal. If the jury thought that, in the present instance, the only ailment of the horse at the time of the sale was a mere cold, such a cold as might reasonably be expected to give way to slight medical treatment, and to leave behind no seed of future disease, he recommended them to find their verdict for the defendant. If, on the other hand, they thought that the horse had, at the time of the sale, such a disease on him (though in its early stage) as would permanently damage its constitution, or leave it more liable to such attacks in future, they should find for the plaintiff."

Judgment of
Mr. Justice
Coleridge in
Bolden v.
Brogden.

Mere badness of shape, though rendering the horse incapable of work, has been held not to be an unsoundness (2); Mr. Justice Alderson observing, "The horse could not be considered unsound in law, merely from badness of shape; as long as he was uninjured, he must be considered sound. When the injury is produced by the badness of his action, that injury constitutes the unsoundness."

WHAT IS NOT
UNSOUNDNESS.
Badness of
shape.

Crib-biting is no such unsoundness in a horse, as to entitle a purchaser, who has bought under a general warranty, to maintain an action for the breach of it upon this fault only. (3)

Crib-biting.

Where, in an action on the warranty of a horse, the plaintiff obtains a verdict, the court will not grant a new trial on the grounds, that there was no known disease to constitute such an unsoundness as set up by the plaintiff, or that the defendant was taken by surprise, although the plaintiff on application had refused to inform him of the cause or nature of the unsoundness. (4)

New trial will
not be granted,
although there
was no known
disease to con-
stitute the un-
soundness set
up by plaintiff.

(1) 2 M. & Rob. 114.

(2) *Dickinson v. Follett*, 1 ibid. 299.

(3) *Broennenburgh v. Haycock*, Holt's N. P. C. 630.

(4) *Atterbury v. Fairmanner*, 8 Moore, 32.

WARRANTY
ON SALE OF
HORSES.

RETURN OF
ARTICLE.

If a horse be warranted sound, but is unsound at the time of sale, the seller is liable to an action without the horse being returned, or notice given of unsoundness.

Purchasers of a specific chattel having once accepted it, cannot return it, or resist an action for its price.

Judgment of Mr. Baron Parke in *Hilliard v. Orbell*.

Vendee rendering horse less valuable by medicines.

Where horse should be returned to the seller.

IV. *Return of Article.*

Where a horse has been sold warranted sound, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned, or notice given of the unsoundness: thus, in *Fielder v. Starkin* (1) Lord Loughborough said, "If a horse which is warranted sound at the time of sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given, though the not giving notice will be a strong presumption against the buyer, that the horse, at the time of the sale, had not the defect complained of."

It seems, that the purchaser of a specific chattel, under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorising the return, or consent of the vendor. But where the contract is executory only, when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose, the vendee may rescind the contract, if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as by selling them. (2)

If a person, purchase a horse warranted sound, sell it again, and then repurchase it, he cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he, by reason of the unsoundness, resist an action by such vendor for the price; but he may prove the breach of warranty in reduction of damages. (3)

In *Hilliard v. Orbell* (4) Mr. Baron Parke said, "When a horse is warranted sound, and turns out otherwise, the purchaser has no right to return him unless the warranty was *fraudulent*; his only remedy is an action on the warranty: this has been lately settled, but the general impression formerly among the profession, and now amongst all others, is, that the purchaser is to return the horse."

In an action for the recovery of the price of a horse, it is no defence that the warranty was not true, if the defendant did not return him after being apprised of the defect, but rendered the horse less valuable by the application of medicines. The vendee's remedy is an action against the seller for a defect in the warranty. (5)

If on the sale of a horse there be an express warranty by the seller that the horse is sound, free from vice, &c. yet if it be accompanied with an undertaking on the part of the seller to take the horse again, and pay back the purchase money, if on trial he shall be found to have any of the

(1) 1 Hen. Black. 17.

(2) *Street v. Blay*, 2 B. & Ad. 456.

(3) *Ibid.*, vide etiam *Gompertz v. Denton*, 1 C. & M. 207. *Edwards v. Chapman*, 1 M. & W. 231.

(4) Sitt. Exch. "The Times," June 11. 1834, cit. 2 Chitt. Pl. 171.

(5) *Curtis v. Hannay*, 3 Esp. N. P. C. 82.

defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. (1)

WARRANTY
ON SALE OF
HORSES.

V. The Declaration.

THE DECLARATION.

If there be no warranty, but only a false representation, not connected with the contract, the declaration should be in case for the deceit.

False representation, not connected with the contract.

A vendor may repudiate a contract on the ground of fraud, but to entitle him so to do, the vendee must be put in *statu quo*. Therefore, if the vendor have derived any benefit from the contract, he should sue for the deceit; and, in such case, he cannot, in an action for the price of the thing sold, &c. resist the action on account of fraud. (2)

Assumpsit is a proper form of action, when there has been an express warranty. (3)

Where *assumpsit* proper form of action.

The purchaser of a horse can recover for breach of a warranty in an action for damages only, and cannot sue on the *indebitatus* counts, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract, or unless the case be one of fraud. (4)

Vendee can recover for breach of a warranty in an action for damages only.

If two persons severally employ a dealer to sell their horses, and he sell both to one purchaser at an entire price, and warrant them sound: — the purchaser cannot divide the contract, and bring an action on the warranty against one of the sellers in respect of the unsoundness of his horse (5), because the contract concerning the two horses was entire.

Where contract not divisible.

If money and a horse are given in exchange for another horse warranted sound, which was unsound at the time, an action for money had and received is not a proper action to try the warranty; nor will trover lie for the horse given in exchange, because the property is altered. (6)

Where neither money had and received, or trover will lie.

The contract should be precisely stated, and be co-extensive with the breach complained of. If any conditional or exceptional terms be used, they must be followed in setting out the contract.

STATEMENT OF CONTRACT.

If the action be for the unsoundness of a horse, the particular species of unsoundness need not be stated, because a breach may in general be assigned in the negative words of the contract. (7)

If the whole consideration of a promise be truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken; thus, where the plaintiff declared that, in consideration of his re-delivery to

Only requisite to state the whole consideration of a promise, and such parts of the promise itself,

(1) *Adam v. Richards*, 2 Hen. Black. 573. In such case the term "trial" means a reasonable trial. Ibid.

(2) 2 Chitt. Pl. 480.

(3) *Stuart v. Wilkins*, Doug. 18.

(4) *Gompertz v. Denton*, 1 C. & M. 207. 1 Dowl. P. C. 623. 3 Tyrw. 233.

(5) *Symonds v. Carr*, 1 Camp. 361.

(6) *Power v. Wells*, Cowp. 818. Doug. 24. n., et vide *Cooke v. Munstone*, 1 N. R. 351.

(7) 2 Saund. 181. (b.)

**WARRANTY
ON SALE OF
HORSES.**

the breach of
which is com-
plained of.

Qualified war-
ranty of sound-
ness.

Where allega-
tion of un-
quietness un-
necessary.

**STATEMENT OF
PRICE.**

Receipt ad-
mitting the
taking of a
mare as money.

Buyer to give
"100 guineas
and 10*l.* more,
if the horse
suited him."

Horse sold for
55*l.*, vendor
agreeing to give
1*l.* back, if the
horse did not
bring plaintiff
4*l.* or 5*l.*

the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l.*, and be a young horse, and then alleged a breach in both those respects: — It was held sufficient, though the proof was not only of a promise that the second horse should be worth 80*l.* (which it was not), and be a young horse, but also of a warranty that it was sound and had never been in harness. (1)

Where it was averred, that defendant warranted a horse to be sound: but it was proved, that defendant warranted the horse to be sound everywhere, except a kick on the leg; — this was adjudged to be a qualified warranty, and to constitute a fatal variance between the declaration and the evidence. (2)

Where the warranty was "sound in the eye, &c. except a slight snap, which will be well in a few days:" — It was held, that the exception was material, and should be stated in the declaration, although, if the exception had not been made, it might not have been an unsoundness under the general warranty. (3)

In an action on the case for a breach of an express warranty, that a horse was quiet, if the declaration allege, that the defendant knew him to be unquiet, this is an unnecessary averment, and need not be proved. (4)

Where a plaintiff declared on a warranty of a horse bought with money, and produced a receipt for the sum containing the warranty, and it appeared, that in fact he had given a mare in exchange at a certain valuation: — It was held, that there was no variance, as the defendant admitted by the receipt, that he had taken the mare as money. (5)

Proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff for 31*l.* 10*s.*, and at the same time agreed, that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only, that, in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.*, the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31*l.* 10*s.* (6)

Where the declaration averred the consideration for the purchase of a horse to be, "that the buyer should give a large price, to wit, 100 guineas:" and it was proved, that the buyer was to give "100 guineas, and 10*l.* more if the horse suited him:" — It was held to be no variance. (7)

In *Blyth v. Bampton* (8) it appeared, that the plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring plaintiff 4*l.* or 5*l.* The averment in the declaration was, that, in consideration that the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound: which was held to be a variance; Chief Justice Best observing, that it was clearly a conditional agreement, but it had been stated in the

(1) *Miles v. Sheward*, 8 East, 7.

(2) *Jones v. Cowley*, 6 D. & R. 533. 4 B. & C. 445., et vide *Garment v. Barrs*, 2 Esp. N. P. C. 673.

(3) *Morris v. Littlegoe*, 2 Smith, 394.

(4) *Gresham v. Postan*, 2 C. & P. 540.

(5) *Brown v. Fry*, cit. Selw. N. P. 663.

(6) *Hands v. Burton*, 9 East, 349.

(7) *Cave v. Coleman*, 3 M. & R. 2.

(8) 3 Bing. 472. 11 Moore, 387.

declaration as an unqualified agreement; and that there was no case which went the length of deciding, that a conditional contract could be declared on as absolute.

WARRANTY
ON SALE OF
HORSES.

VI. *The Pleadings.*

THE PLEAD-
INGS.

By Reg. Gen. Hilary Term, 4 Will. 4., "In an action on a warranty, the plea of *non assumpsit* will operate as a denial of the fact of warranty having been given upon the alleged consideration, but not of the breach."

Reg. Gen. H.
T. 4 Will. 4.

In an action on the case for a deceitful warranty of soundness, the plea of "not guilty" puts in issue both the warranty and the unsoundness. (1)

What the plea
of "not guilty"
puts in issue.

Infancy is a good defence to an action on the warranty of a horse. (2)

Infancy.

VII. *Evidence.*

EVIDENCE.

The breach of warranty must be proved according to the allegations in the declaration.

PROOF OF
WARRANTY.

A high price is not, as previously stated, equivalent to an express warranty (3); if the breach be denied, the plaintiff must give positive proof that the horse was unsound, &c. at the time of the sale; a suspicion that the horse was unsound is not sufficient. (4)

Breach must
support the
allegations in
the declaration.

In an action on the warranty of a horse, it appeared that the plaintiff wrote to the defendant, "you well remember that you represented the horse to me as a five-year old," &c.; to which the defendant answered, "the horse is as I represented it;" such letters were held to be sufficient evidence from which the jury might infer, that a warranty was given at the time of sale; and that it was not necessary to give other proof of what actually passed, when the contract was made. (5)

Warranty in-
ferred from
letters.

In *assumpsit* on a warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*; but the consideration, as proved, was, that the plaintiff would pay that sum, and, if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse:—It was held no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting in point of law to a promise. (6)

Where condi-
tional promise
too vague to be
enforced.

If a general warranty of a horse be proved by parol (the written contract for the sale not being forthcoming), the fact that the witnesses who proved it, saw a notice-board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action; but it will be left to the jury, for them to say, whether this formed any part of the original contract. (7)

Notice re-
quiring the
return of an
unsound horse
within six days.

(1) *Spencer v. Dawson*, 1 M. & Rob. 552.
(2) *Howlett v. Haswell*, 4 Camp. 118.
Green v. Greenbank, 2 Marsh. 485.
(3) *Parkinson v. Lee*, 2 East, 322.
(4) *Eaves v. Dixon*, 2 Taunt. 343.

(5) *Salmon v. Ward*, 2 C. & P. 211.
(6) *Guthing v. Lynn*, 2 B. & Ad. 232.
(7) *Best v. Osborn*, 2 C. & P. 74. 1 *ibid.*
632. R. & M. 290.

WARRANTY
ON SALE OF
HORSES.

Where parol
testimony inad-
missible.

Evidence must
correspond
with the declar-
ation respecting
the consider-
ation, and war-
ranty.

Receipt for
price, embody-
ing a warranty,
may be read
without an
agreement
stamp.

COMPETENCY
OF WITNESS.

Prior vendor
of a horse, not
competent to
prove sound-
ness for his
vendee.

Where a horse was sold under a written warranty, which was contained in a receipt for the purchase money, and given to the buyer's servant; but the son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself), got the receipt back from the servant by a fraudulent representation:—It was held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness; the son, being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—It was adjudged, that this fact did not vary the case, so as to let in the parol testimony. (1)

In a declaration of *assumpsit* for breach of a warranty of soundness of the defendant's mare, the plaintiff in his declaration alleged, that, in consideration that he would deliver a horse of his to the defendant, and also pay him a certain sum in exchange for a mare of the defendant, he undertook that she was sound. In order to prove the warranty of the defendant's mare, the plaintiff produced a receipt written by the defendant, and given on the payment of the money, in which it was stated that both the horse and mare were warranted sound:—It was decided, that the declaration could not be supported, as it did not set out the whole of the consideration, the plaintiff not having alleged, that he had warranted his horse to be sound. (2)

Proof that a horse is "a good drawer" only, will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." (3)

A receipt for the price of a horse containing a warranty of soundness, may be read in evidence to prove the warranty, without an agreement stamp. (4)

But a receipt containing a warranty given after the bargain, is not *conclusive* evidence of the contract. (5)

In *Briggs v. Crick* (6) it was held, that a prior vendor of a horse, who himself sold with a warranty, is a good witness in an action against a subsequent seller to prove its soundness; but in *Biss v. Mountain* (7) it was decided, that the first vendor of a horse warranted sound, is not competent to prove soundness for his vendee, in an action brought against him on a subsequent sale with warranty; Mr. Justice Alderson observing, "that, as the effect of a verdict for the defendant would be to relieve the witness from an action at the suit of the latter, he was incompetent."

It seems, however, that upon matters merely *collateral* to the witness's personal liability, the witness would not have been incompetent—such as disproving the warranty by the defendant.

(1) *Best v. Osborn*, 1 C. & P. 632. 2
ibid. 74. R. & M. 290.

(2) *Cross v. Bartlett*, 3 M. & P. 537.

(3) *Coltherd v. Puncheon*, 2 D. & R. 10.

(4) *Shrine v. Elmore*, 2 Camp. 407.

(5) *Fairmaner v. Budd*, 7 Bing. 574.

(6) 5 Esp. N. P. C. 99., vide etiam *Baldwin v. Dixon*, 1 M. & Rob. 59.

(7) 1 M. & Rob. 302., vide stat. 3 & 4
Will. 4. c. 42. ss. 26, 27.

VIII. *Damages.*

WARRANTY
ON SALE OF
HORSES.

DAMAGES.

Plaintiff entitled to recover for all losses which have resulted from the breach of warranty.

Where horse is returned.

Where retained.

Judgment of Lord Eldon in *Curtis v. Han-
nay*.

Price of keep.

Especial damages for the loss of a bargain for resale of the horse cannot be recovered.

The plaintiff is in general entitled to recover in respect of all losses which have resulted immediately from the breach of warranty. (1)

Upon the breach of the warranty of a horse, if the horse be returned, the measure of damages is the price paid for him : if the horse be not returned, the measure of damages is the difference between his real value and the price given : but if the horse be not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep. (2) Thus, in *Curtis v. Han-
nay (Bart.)* (3) Lord Eldon C. J. said, "I take it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty ; or he might return the horse, and bring an action to recover the full money paid ; but in the latter case the seller has a right to expect, that the horse should be returned in the same state he was when sold, and not by any means diminished in value."

Where a horse, warranted sound, turns out to be unsound, and is, after notice to the seller, resold by the purchaser, the latter may recover not only he difference of price between the first and second sales, but also for the keep of the horse for a reasonable time, till he can fairly sell it. (4)

But, whether the horse has been kept an unreasonable time before the resale, is a question for the jury ; and if the seller rest his defence on the soundness of the horse, and do not request the judge to put the question of time to the jury, the court will not, upon motion for a new trial, look into the evidence upon this point. (5)

In an action for breach of warranty of a horse, the plaintiff cannot recover as especial damage the loss of a bargain for resale of the horse, though the contract of resale, at a profit, had been actually completed before the unsoundness was discovered. In *Clare v. Maynard* (6) the plaintiff bought a horse at 45*l.*, which he resold at 55*l.*, but was obliged to take back the horse in consequence of unsoundness, and ultimately to sell him at 17*l.* : upon such facts it is doubtful, whether the measure of damages should be the difference between the price given by the plaintiff, and that ultimately obtained by him, or between the last mentioned price and the actual value of the horse, if he had been sound at the time of the last resale ; and whether the advance of price on the first resale by the plaintiff may be left to the jury, as a measure of such value ?

(1) *Bridge v. Wain*, 1 Stark. 504.

(2) *Caswell v. Coare*, 1 Taunt. 566. 2 Camp. 82.

(3) 3 Esp. N. P. C. 82.

(4) *Chesterman v. Lamb*, 4 N. & M. 195. 2 A. & E. 129.

(5) Ibid. *Ellis v. Chinnoek*, 7 C. & P. 169. *M'Kenzie v. Hancock*, R. & M. 436. *King v. Price*, 2 Chitt. 416.

(6) 6 A. & E. 519. *Quære*, Whether the plaintiff may recover in respect of such advance of price as the produce of his care and expense bestowed on the horse between the times of the purchase and of the first resale? He cannot so recover on a declaration alleging merely that he bought the horse at 45*l.*, sold him for 55*l.*, and by reason of the unsoundness was obliged to refund

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In *Cox v. Walker* (1) the plaintiff bought a horse from the defendant for 100*l.*, and had been offered 140*l.* for him, but the horse proving unsound, the plaintiff had been obliged to give up the bargain and to sell him for 49*l.* 7*s.*; upon which, Lord Denman C. J. held, that the plaintiff was entitled to recover the difference between the price at which he had sold, and the actual value of the horse if he had been sound at the time of such sale; and he left to the consideration of the jury as a measure of the value, the price offered for the horse while in the plaintiff's hands.

Costs of action. Where A. sells and warrants a horse to B., which B. a few days afterwards sells to C., and the horse proves unsound, and C. recovers the price from B. in an action of which A. has notice, B. is entitled to recover from A. not only the price of the horse, but the costs of the action by C. (2)

**FRAUDULENT
REPRESENTA-
TIONS BY PER-
SONS NOT PAR-
TIES TO THE
CONTRACT.**

Fraud and falsehood the foundation of the action.

7. FRAUDULENT REPRESENTATIONS BY PERSONS NOT PARTIES TO THE CONTRACT.

Haycraft v. Creasy (3) established, that the foundation of this action is fraud and falsehood in the defendant, and a damage to the plaintiff by the occasion of such fraud and falsehood. Thus, in *Ashlin v. White* (4) Chief Justice Gibbs said, "Fraud and falsehood must concur to support this action."

Fraud defined. *Fraud* has received a variety of definitions. Thus, Mr. Justice Le Blanc (5) is reported to have said, "By fraud, I understand an intention to deceive, whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial." Mr. Justice Chambre (6), "Fraud may consist as well in the suppression of what is true, as in the representation of what is false." Chief Justice Tindal (7), "It is fraud in law, if a party makes representations which he knows to be false, although the motive from which the representations proceeded, may not have been bad."

Making a false representation whereby injury accrues.

Formerly the cases were confined to fraudulent assertions by the contracting parties only, and did not extend to the wilful misrepresentations of strangers to the contract; and they proceeded upon the breach of a *promise* either *express* or *implied*, that the thing misrepresented was true: but a different doctrine arose from *Pasley v. Freeman* (8), in which it was held, that where a man with a design to deceive and to defraud another, who makes inquiry of him, falsely represents the matter inquired of, whereby an injury arises, this action will lie against the party making such false representation, though he be a stranger to the original contract.

Stat. 9 Geo. 4.
c. 14. s. 6.

By stat. 9 Geo. 4. c. 14. s. 6., "no action shall be brought, whereby to charge any person upon, or by reason of any representation or assurance made or

the 55*l.* and resell the horse at 17*l.*, whereby he lost the profit which would have accrued to him from selling the horse if sound.

(1) 6 A. & E. 523. n. cit. Roscoe's Ev. 256.

(2) *Lewis v. Peat*, 2 Marsh. 431. S. C. nom. *Lewis v. Peake*, 7 Taunt. 153., vide etiam *Green v. Greenbank*, 2 Marsh. 485.

(3) 2 East, 92.

(4) Holt's N. P. C. 389.

(5) *Haycraft v. Creasy*, 2 East, 92.

(6) *Tapp v. Lee*, 3 B. & P. 871.

(7) *Foster v. Charles*, 7 Bing. 107.

(8) 3 T. R. 51.

given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [sic], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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This section was discussed in *Lyde v. Barnard* (1), in which the judges were equally divided; upon which occasion the following judgment was delivered by Mr. Baron Alderson, and in which Mr. Baron Parke coincided:—

Judgment of
Mr. Baron
Alderson in
*Lyde v. Bar-
nard*.

"The question raised in this case depends on the construction to be put by the court on the sixth section of Lord Tenterden's Act, 9 Geo. 4. c. 14.

"Now the facts of the case seem to me to be in substance these:—the plaintiff Lyde was about to advance a sum of money to Lord Edward Thynne on the purchase of an annuity. The annuity was to be secured (in addition to his personal responsibility) by the assignment of Lord Edward Thynne's interest in a certain fund, settled at the time of his marriage, and of which the defendant, with some other persons, was a trustee.

"This fund was charged at the time with three annuities, payable to Mr. Mellish, and was also liable to a mortgage of 20,000*l.*, then vested in the Marquis of Bath.

"The defendant was applied to on the part of Lyde to inform him as to the existing state of, and charges upon, this fund; and the plaintiff contends that on that occasion he wilfully and fraudulently made him a false representation of the amount of the charges upon it. For this false representation the action was brought.

"It appeared at the trial that the representation (if ever made at all) was at all events made by parol; whereupon the Lord Chief Baron on that ground directed a nonsuit.

"According to the view I take of this case, I think the nonsuit was wrong, and that the facts ought to go to the jury.

"The question is, whether this was a representation concerning or relating to the ability of Lord Edward Thynne, so as to fall within Lord Tenterden's Act.

"If we refer to the cases which had occurred before the legislative provision, I think it will be found, that the decisions in that class of cases commencing with *Pasley v. Freeman* (2), had raised a well founded complaint in the profession, as having in fact virtually repealed the Statute of Frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view, was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle; for, a guarantee increases the ability of the third person who is about to be trusted, by adding to the value of his personal responsibility that of the person making the guarantee. And, in like manner, as the false and fraudulent representation as to the third person's ability equally adds, in the opinion of the person trusting to it, to the value of the third person's responsibility, it ought justly to have,

(1) 1 M. & W. 101.

(2) 3 T. R. 51.

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and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantee of the third person's solvency. I think, therefore, that we should take this as the key to the true construction of Lord Tenterden's Act; and if we do so, it seems to me to follow from it, that a representation to be within the act must be one by which the value of the personal responsibility of the third person is increased in the judgment of the individual from whom he is about to obtain credit, money, or goods; and this receives confirmation, I think, from the other words of the act.

"The other representations are as to character, conduct, credit, trade, and dealings; all these look as if directed to general character for solvency, general conduct in pecuniary affairs, general credit on the exchange, general mode of conducting trade or business.

"The representation may no doubt, and most commonly will, be made as to particular incidents in character, conduct, and the like; but all these representations necessarily affect the general character, conduct, credit, trade, and dealings; and consequently there can be no ambiguity or difficulty in construing the act in cases of this description. For, the third person's personal responsibility is necessarily involved in the result of such an inquiry, and the answer to it,—if money, goods, or credit, be obtained in consequence thereof. But when we take the word *ability* (by which is of course meant pecuniary ability), the case becomes somewhat ambiguous. For, though a man's pecuniary ability depends on the value of the whole, and of every part of his property, yet a representation confined wholly to the value of a particular portion of his property in possession, remainder, or expectation, may or may not relate to his pecuniary ability, and increase the value of his personal responsibility to the person making the inquiry, according to the circumstances under which it is made.

"If the querist is about to trust to his intended debtor's personal responsibility, and the object of the question is to ascertain how far he will be safe in so doing, there can be no doubt that such a representation does relate to the third person's ability, and is within the act; but, if he be only about to take an assignment of the property itself, and the object is to ascertain the value of that property, then it is, I think, as manifest, that the pecuniary ability of the person about to assign has nothing to do with it. The party taking the assignment only looks to the property itself, and does not in that case trust the intended contractor at all. If we were to hold such a representation to be within the act, I do not see how we are to stop short of saying, that all representations relating to contracts between third persons must be in writing, if such contracts relate to credit, or to the obtaining of money, or even to the sale or pledge of the goods. The assignment of a mortgage, or the sale of an estate, or the sale or pledge of any goods, would be within it; and a fraudulent and false representation of the value of, or charges upon, the estate mortgaged or sold, or the goods to be delivered or pledged, would be without danger if by parol. Indeed, the case of a party lending money on mortgage, who always has a double claim, first, on the property mortgaged, secondly, on the personal responsibility of the mortgagor by express covenant, seems to me not easily distinguishable from the present; and consequently, a representation as to the value of the estate would be within the act, if this case be so. I do not say that it would be a very good

law if it were so, but I am not prepared to go so far in the construction of this act.

“The concluding words of the section plainly, as it seems to me, point to the same construction. The representation must be ‘to the intent that the third person may obtain credit, money, or goods upon;’ which appear to me to show, that the object of the act was confined to cases in which the third person’s responsibility is trusted.

“According to the view which I take of the act, the representation, in order to be within it, must, therefore, be of the third person’s trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, and must be one whereby, if true, that trustworthiness is increased. If, indeed, the real clause as drawn by Lord Tenterden stood thus, ‘To the intent that such third person might obtain money or goods upon credit,’ which is highly probable, this conclusion would be strengthened. But I do not rely upon that which is, after all, only matter of probable conjecture from the ungrammatical state of the sentence as it now stands.

“I proceed, then, to apply the above principles to the present case. Here the representation to the plaintiff is one which it is admitted relates solely to that portion of Lord Edward Thynne’s property of which the plaintiff was about to take an absolute assignment; and I think the question put, had only reference to that assignment.

“The plaintiff did not, as it appears to me, apply to the defendant for any assurance as to Lord Edward Thynne’s trustworthiness; all that he wished to know, was the value of a particular fund about to be absolutely assigned to him; and, although the personal responsibility of Lord Edward Thynne was also to be taken, and therefore a representation as to the value of a portion of his property might, if unexplained, have reference to that also, yet I think the peculiar circumstances of this case, so far as it had gone when the nonsuit took place, negative that supposition here; and then, that this representation (if made at all by the defendant) was one relating solely to the value of the property to be assigned, and having no reference at all to the trustworthiness of Lord Edward Thynne, whose ability, according to the view I take of this act of parliament, would in this case depend, not on the property assigned, but on the residue of his property alone, respecting which no inquiry was made.”

Lord Abinger and Mr. Baron Gurney thought the case within the statute, conceiving the true construction to be, that the representation or assurance thereby required to be in writing, should concern or relate to the ability of the third person effectually to perform and satisfy an engagement of a pecuniary nature into which he has proposed to enter, and on the faith of which he is to obtain money, credit, or goods; and conceiving that the representation in this case, did concern the ability of Lord Edward Thynne, to perform an engagement of a pecuniary nature, on the faith of which he was to obtain money, since it concerned his ability to give the plaintiff a sufficient security to repay him, by way of a life annuity, the money he was about to advance. “The ability of a man consists in the sources from which it is derived. He may have a landed estate unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his bankers’ hands. Upon all or any one of these his general ability may depend. Can it be said,

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and Mr. Baron
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that a representation of any one of these sources of ability has no relation to his general ability?" To this it may be added, that it is in the nature of things impossible that one man should be cognisant of another's general ability, in any other way than by knowing a number of particular facts of this description, for a man's general ability consists of his property, minus his debts. With the amount of his property, a third person may be certain that he is, at least, to a certain extent, acquainted, by knowing the items that compose it. But how can any one be certain that he knows the amount of another's debts? Yet, if these debts exceed his property, he is insolvent, and his general ability amounts to nothing. It is true that, the larger his property, the more numerous and valuable its items, the smaller is the likelihood that his liabilities should exceed it; which plainly shows that, to arrive at any estimate of a man's general ability, the items of his property are mainly to be taken into consideration. (1)

False statement unaccompanied with an intention to injure the plaintiff.

Actual fraud is a sordid regard to self interest; but it is not essentially requisite, that the false statement of the defendant be accompanied with an intention to injure the plaintiff (2), because, the *legal* fraud, which is sufficient to sustain the action, is complete, when the intention to mislead is followed by actual injury: thus, in *Foster v. Charles*, Chief Justice Tindal said, "It is fraud in law if a party make representations which he knows to be false, and injury ensues; although the motive from which the representations proceeded may not have been bad, the person who makes such representations is responsible for the consequences." (3)

Not requisite that defendant should himself derive an advantage from the deceit.

It is not necessary that the defendant should either himself derive an advantage from the deceit, or collude with the person who did derive a benefit; for if there be fraud, *i. e.* an intention to deceive, this action will lie, but not otherwise; therefore, where a man incautiously represented circumstances to be within his own knowledge, which he could not have known, but had good reason to believe, it was held by Grose, Lawrence, and Le Blanc Js., *contra* Kenyon C. J., that this action was not maintainable. (4)

Fraud will be inferred, if statement be false within defendant's knowledge.

In *Corbett v. Brown* (5) the plaintiff being about to furnish defendant's son with goods on credit, inquired of the defendant, by letter, whether his son had, as he asserted, 300*l.* of his own property; the defendant answered that he had, the fact being, that the defendant had lent his son 300*l.* on his promissory note, payable with interest on demand, and had received interest on the note. The son having afterwards become insolvent, it was holden, that this was a misrepresentation for which the defendant was liable in damages, for the statement being false within the defendant's knowledge, fraud might be inferred; Mr. Justice Bosanquet observing, "A party who sets up in business on borrowed capital, is in a very different position in point of credit from a party who sets up unembarrassed with debt." And Mr. Justice Alderson said, "The question is, whether from the statements being false within the defendant's knowledge, the court must not infer fraud."

The making a representation, which a party knows to be untrue, and

(1) 1 Smith's Leading Cases, 80.

(2) *Foster v. Charles*, 7 Bing. 105.

(3) *Ibid.*

(4) *Haycraft v. Creasy*, 2 East, 92.

(5) 8 Bing. 33.

which is calculated from the mode in which it is made to induce another to act on the faith of it, so that he may incur damage, is a fraud in law.

Hence, where a bill was presented for acceptance at the office of the drawee, when he was absent, and A. who lived in the same house with the drawee, being assured by one of the payees, that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procurement of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the drawee. But the bill was dishonoured when due. The indorsee, having sued the drawee, was nonsuited on the above facts. The indorsee then brought an action against A. for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procurement; and although the jury negatived fraud in fact, yet it was holden (1); that A. was liable, for there was a fraud in law," "because, without the representation of the defendant, the bill would never have circulated as an accepted bill; and it was only in consequence of the false statement of the defendant, that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss." (2)

In the foregoing case there was a direct assertion of that, which the defendant knew to be untrue; but where the party making the representation does not know it to be untrue, the action cannot (3) be maintained. Thus, if a person act upon a power of attorney, which he supposes to be genuine, but which is in fact a forgery, he will incur no responsibility. (4)

A credit having been lodged with defendant by a foreign house in favour of T. to a limited amount, on an express stipulation that goods should be previously lodged with defendant to treble that amount, and plaintiff having inquired of defendant the responsibility of T., to which he replied, he knew nothing of him, except what he had heard of him from his correspondent, but that a credit had been lodged with him for so much, by a respectable house, which he held at the disposal of T. (not mentioning the previous stipulation), and that upon a view of all the circumstances which had come to his knowledge the plaintiff might execute T.'s order with safety, which was for the delivery of goods on credit:—It was held, that there was a material suppression of the truth on defendant's part, and sufficient evidence for the jury to find fraud, which was the gist of the action, though defendant added, when he made the representation, that he gave the advice without prejudice to himself. (5) So if A. fraudulently misrepresent the circumstances of B. in order to induce C. to give him credit, and add, "if he does not pay for the goods I will," the court held, that this action might have been maintained against A. even without the addition of the promise. (6)

In ordinary cases, the person who gives a representation of the credit of a third person, is not liable beyond the value of the goods furnished on the facts of the representation (7); but circumstances may exist, which will render him liable to losses arising from subsequent dealings (8), as in cases of conspiracy to pay for the first order, and for none that may be subsequently delivered.

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Where party making the representation does not know it to be untrue.

Qualified credit represented as an unqualified credit.

Fraudulent misrepresentation in order to induce credit.

EXTENT OF RISK.

(1) *Polhill v. Walter*, 3 B. & Ad. 114.

(2) *Per Lord Tenterden*, *ibid.*

(3) *Freeman v. Baker*, 5 B. & Ad. 797.

(4) *Per Lord Tenterden in Polhill v. Walter*, 3 *ibid.* 124.

(5) *Eyre v. Durnford*, 1 East, 318.

(6) *Hamar v. Alexander*, 2 N. R. 241.

(7) *De Graves v. Smith*, 2 Camp. 533.

(8) *Hutchinson v. Bell*, 1 Taunt. 558.

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**COMPETENCY
OF WITNESS.**

In an action for a deceitful representation of the credit of a third person, that person is a competent witness for the plaintiff. (1) Similar misrepresentations made by the defendant to other persons are, it has been held, admissible in evidence to prove a fraudulent connection between the defendant and the customer. (2)

(1) *Richardson v. Smith*, 1 Camp. 277.
Brant v. Robinson, R. & M. 48. *Smith v.*
Harris, 2 Stark. 47.

(2) *Beal v. Thatcher*, 3 Esp. N. P. C. 194.

DETINUE.

1. **GENERALLY**, p. 1309.
2. **BY WHOM DETINUE CAN AND CANNOT BE MAINTAINED**, pp. 1309—1311.
3. **AGAINST WHOM DETINUE CAN AND CANNOT BE MAINTAINED**, pp. 1311, 1312.
4. **PROPERTY FOR WHICH DETINUE LIES**, p. 1312.
5. **THE DECLARATION — PLEADINGS — EVIDENCE — STAT. 1 & 2 WILL. 4. c. 58. — BAIL — LIMITATION OF ACTION — DAMAGES — JUDGMENT — EXECUTION**, pp. 1312, 1314.

1. GENERALLY.

The action of detinue is the only remedy by suit at law for the recovery of a personal chattel *in specie*, except in those instances where the party can obtain possession by replevying the same, and by action of replevin. (1) In trespass or trover for taking or detaining goods, or in *assumpsit* for not delivering them, damages only can be recovered. Formerly the defendant was permitted to “wage his law;” but this disadvantage does not now exist, stat. 3 & 4 Will. 4. c. 42. s. 13. having abolished “wager of law.”

In order to ground an action of detinue, which is only for *detaining* the property, it is requisite, 1. That the defendant came lawfully into possession of the goods, as, either by delivery to him, or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value; and 4. that they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. (2)

GENERALLY.

Defined.

Stat. 3 & 4 Will.
4. c. 42. s. 13.

What is requisite in order to support the action.

2. BY WHOM DETINUE CAN AND CANNOT BE MAINTAINED.

At the time the action is brought, the plaintiff must have a property either absolute or special in personal goods, capable of being distinguished (3); and it seems, that if a man detain the goods of a feme covert, which came to his

BY WHOM DETINUE CAN AND CANNOT BE MAINTAINED.
Absolute or special property

(1) 3 Black. Com. 146. 152. Willes, 120.
Co. Litt. 286. (b.) Com. Dig. Detinue
(A.).

(2) Co. Litt. 286. 3 Black. Com. 152.
(3) Bull. N. P. 49. (a.)

BY WHOM DETINUE CAN AND CANNOT BE MAINTAINED.

must be in plaintiff at the time of action brought.

Special property.
Interest in goods under a penal statute.

Actual possession not required.

Unexecuted contract between seller and purchaser.

Reversioner.

hands before the marriage, the husband can only bring detinue, because the law transfers the property to him, and the detainer is the cause of action. (1)

A person who has only a special property as a bailee, &c. (2), or an heir who is entitled to an estate *pur autre vie* as special occupant (3), can support this action.

If a statute prohibit goods under pain of forfeiture, one part to the king, and another to him who will inform, seize, or sue for the same, any person may bring detinue for the goods, for the bringing the action vests a property in him (4); and if A. deposit the title deeds of his estate with B., and before action convey the estate, he cannot recover, for the title deeds go with the estate (5): so also if I. deliver goods to B. who loses them, and D. finds them and delivers them to J. S. who has a right thereto, I. cannot bring detinue against D., because he is not privy to any delivery. (6)

If a person have the absolute or general property in certain specific goods, and the right to immediate possession thereof, he can support this action, although he has never had the actual possession; therefore an heir may maintain detinue for an heir-loom (7); and if goods be delivered to A. to deliver to B., the latter may support this action, the property being vested in him by the delivery to his use. (8) If A., without the authority of B., pledge his property with C., a joint action of detinue is maintainable by B. against both A. and C. (9)

Where a man comes to a shop to buy goods, and they agree upon a price and a day of payment, and the buyer takes them away, detinue will not lie, because the property was changed by a lawful bargain; but if they agree for present money, and the buyer take the goods away without payment, detinue lies, because the property is not altered. (10)

So if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer; for earnest does not alter the property, but only binds the bargain (11); and therefore, if no other time for payment be appointed, the money must be paid on fetching away the goods: the earnest gives the party a right to demand; but a bare demand without payment is void. After earnest, the vendor cannot sell the goods to another, without a default in the vendee; and therefore, if the vendee do not come and pay, and take the goods, the vendor ought to request him; and then, if he do not in convenient time, the agreement is dissolved, and the vendor at liberty to sell to another person. (12)

If the plaintiff have not the right to the immediate possession of the

(1) Bull. N. P. 50., *sed vide* R. T. H. 120.
(2) 1 Rol. Abr. Detinue (C.), 606. 2 Saund. 47. (b, c, d.) n. 1. *Philips v. Robinson*, 4 Bing. 111.

(3) *Atkinson v. Baker*, 4 T. R. 229. 231.

(4) *Roberts q. t. v. Withered*, 5 Mod. 193. 12 *ibid.* 92. *Roberts v. Wetherall*, 1 Salk. 223. Bull. N. P. 50. (a.) 2 Stark. Ev. 280.

(5) *Philips v. Robinson*, 4 Bing. 106.

(6) 2 Danv. 511.

(7) Com. Dig. Detinue (A.). Bro. Abr. Detinue, pl. 30. 2 Saund. 47. (a.) 1 Rol. Abr. Detinue (B, C.), 606.

(8) 2 Saund. 47. (a.) n. 1. Bro. Abr.

Detinue, pl. 30. 45. 1 Rol. Abr. Detinue (B, C.) 606. Com. Dig. Detinue (A.). *Philips v. Robinson*, 4 Bing. 111. 1 Chitt. Pl. 122.

(9) *Garth v. Howard*, 5 C. & P. 346. 8 Bing. 451. 1 M. & Sc. 628. *Quære*, Whether in such an action a verdict may be taken against one defendant only? *Ibid.*

(10) *Batemans v. Elman*, Cro. Eliz. 867. Bull. N. P. 50. (a.)

(11) *Anon.* 12 Mod. 345.

(12) *Langfort v. Tiler*, 1 Salk. 113. Bull. N. P. 50. (a.)

goods, and his interest be in reversion, he cannot support detinue, trover, or trespass.

BY WHOM DETINUE CAN AND CANNOT BE MAINTAINED.

So likewise where the plaintiff delivered to the defendant the title deeds of the plaintiff's wife's estate, and afterwards levied a fine of the property to the use of his son:—It was held, that he could not support detinue for the deeds. (1)

3. AGAINST WHOM DETINUE CAN AND CANNOT BE MAINTAINED.

AGAINST WHOM DETINUE CAN AND CANNOT BE MAINTAINED.

Detinue lies against any person who has the actual possession of the chattel, and who acquired it by lawful means, as either by bailment, delivery, or finding (2), and the legal owner of an estate can in trover recover the the deeds from the mortgagee, without tendering the mortgage money. (3) It has been contended, that if a chattel be taken tortiously, this action cannot be maintained (4), because by trespass the property of the plaintiff became divested, and therefore the property in the chattel was not vested in the plaintiff at the time of the commencement of his action (5); but property is not divested by trespass, for though a trespasser did possess, the property is not thereby altered. (6) If detinue could not be supported because the original taking was tortious, no adequate remedy would exist, for in trover damages only can be recovered, and the thing detained may be of such a description, that a judgment merely for damages would be an inadequate satisfaction (7): besides, reasoning upon analogy, no person can avail himself of his own wrong; and if goods, &c. be taken away, and continue *in specie* in the hands of the executor of the wrong-doer, replevin or detinue may be supported against the executor. (8)

Tortious possession.

The gist of the action being the *detainer*, it follows, that if goods come to a feme sole and she marry, the action must be brought against husband and wife (9); but if chattels be delivered to husband and wife after marriage, the husband must be sued alone. (10)

Feme covert.

If an infant have bought goods, and on application for payment he refuse to pay on the ground of his infancy, and any of the goods remain *in specie*, they should be demanded, and afterwards the prudent course will be to declare in detinue for the goods, with a count in debt for goods sold and delivered; and at least on the former the plaintiff would recover, should the defendant plead infancy to the latter. (11)

Infant.

Detinue cannot be supported against a person who never had the posses-

Insufficiency of possession.

(1) *Philips v. Robinson*, 4 Bing. 106. 12 Moore, 308.

(2) *Kettle v. Bromsall*, Willes, 118. Co. Litt. 286. (b.) F. N. B. 138. (E.) 2 Bac. Abr. Detinue (A.), 662.

(3) *Harrington v. Price*, 3 B. & Ad. 170.

(4) 1 Chitt. Pl. 123. cit. 6 Hen. 7. 9. 3 Black. Com. 152. Bro. Abr. Detinue, pl. 36. 53. Com. Dig. Detinue (D.). Vin. Abr. Detinue (B. 2.), pl. 5.; Trespass (Y.), pl. 12. Cro. Eliz. 824. 10 Ves. 162.

(5) 6 Hen. 7. 9. Dict. Ld. Kenyon, 1 East, 107, 108.

(6) Com. Dig. Bien (E.).

(7) *Bishop v. Montague* (Countess of), Cro. Eliz. 824. Com. Dig. Action (M. 6.). 27 Hen. 8. 22. Vin. Abr. Detinue (D. 5.), pl. 62.

(8) Bro. Abr. Detinue, pl. 19., *vide etiam* 1 Saund. 216, 217. (a.) 1 Chitt. Pl. 123.

(9) Co. Litt. 351. (b.)

(10) Bull. N. P. 50. cit. *Isaac v. Clarke*, H. T. 12 Jac. 1. 1 Rol. 128. 38 Edw. 3. 1 n.

(11) 1 Chitt. Pl. 124.

AGAINST WHOM
DETINUE CAN
AND CANNOT BE
MAINTAINED.

sion of the goods; as against the executor of a bailee, who had destroyed the chattel (1), or that the goods came to the possession of the executor (2); nor does it lie against a bailee, if, before demand, he lose them by accident (3), though if he wrongfully deliver the goods to another, he will continue liable. (4) If there be several executors, and one only has the possession, the action must be brought against him alone. (5) The detention of goods seized by excise officers, after payment of the penalty on a conviction by justices, is not unlawful, if no *demand* have been made. (6)

False repre-
sentation of
ownership.

It seems, that if the defendant represent that he has the goods, and thereby induce the owner to bring the action against him, he is liable, although it does not appear, that he had the general controlling power over the goods. (7)

PROPERTY FOR
WHICH DETI-
NUE LIES.

4. PROPERTY FOR WHICH DETINUE LIES.

Specific chattels
can alone be
recovered, not
real property.

Detinue is only sustainable for the recovery of a specific *chattel*, and not for real property. (8)

Identity of
goods must be
ascertainable by
certain means.

The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means, so that, if the plaintiff recover, the sheriff may be able to deliver the goods to him: thus, it lies for a horse, or money in a bag, &c.; for the recovery of charters and title deeds if they can be described, and what they concern (9), or if such deeds are in a chest (10), and it is sustainable for not delivering a specific chattel in pursuance of a bailment or other contract. (11)

Property for
which detinue
cannot be main-
tained.

Detinue will not lie for money or corn, &c. not in a bag or chest, or otherwise distinguishable from property of the same description (12); and property in some particular chattel must be vested in the plaintiff, and therefore *assumpsit*, or debt in the *detinet*, is the only remedy for the non delivery of corn, &c. sold, where no specific corn was contracted for. (13)

Animals *feræ
naturæ*.

It also seems, that detinue will not lie for hawks, hounds, apes, or popinjays, or animals *feræ naturæ*, though made tame. (14)

THE DECLARA-
TION—PLEAD-
INGS—EVI-
DENCE—STAT.
1 & 2 WILL. 4.
C. 58.—BAIL
—LIMITATION
OF ACTION—

5. THE DECLARATION—PLEADINGS—EVIDENCE—STAT. 1 & 2 WILL. 4. C. 58.—BAIL—LIMITATION OF ACTION—DAMAGES—JUDGMENT—EXECUTION.

The declaration must contain more certainty than is necessary in trover; in most other respects it agrees with that action (15): but the manner in

- (1) Bull. N. P. 50.
- (2) Bro. Abr. Detinue, pl. 19. *Isaack v. Clark*, 2 Bulst. 303.
- (3) Bro. Abr. Detinue, pl. 1. 33. 40.
- (4) Ibid. pl. 2. 34. *Devereux v. Barclay*, 2 B. & A. 703. *Shaw v. Whiteman*, Peake's N. P. C. 42.
- (5) Bro. Abr. Detinue, pl. 19.
- (6) *Hutchings v. Morris*, 6 B. & C. 464.
- (7) *Hall v. White*, 3 C. & P. 136.
- (8) *Coupledike v. Coupledike*, Cro. Jac. 39.
- (9) Co. Litt. 286. Bull. N. P. 50. n.

- (10) *Banks v. Whetstone*, F. Moore, 394.
- (11) F. N. B. 138. Willes, 120. 3 Black. Com. 152.
- (12) Com. Dig. Detinue (B, C.). Co. Litt. 286. (b.) 3 Black. Com. 152. *Isaack v. Clark*, 2 Bulst. 308. *Banks v. Whetstone*, F. Moore, 394.
- (13) 3 Wood. 104. 1 Dyer, 24. (b.)
- (14) Bro. Abr. Detinue, pl. 44. Bull. N. P. 50.
- (15) 2 Rol. Abr. Triall (C.), 703. Bull. N. P. 50.

which the goods came into the possession of the defendant is matter of inducement only (1), and where the goods are alleged to have come to defendant by finding, it is sufficient for the plaintiff to prove, that the goods came to defendant by wrong at least, unless the finding be traversed. (2) It is not necessary to state the date of a deed (3); and if the action be brought for several articles, the distinct value of each, need not be set forth in the declaration, for the jury can sever the values by their verdict. (4)

THE DECLARATION, &c.

DAMAGES—
JUDGMENT—
EXECUTION.
DECLARATION.

In the case of a special bailment it is proper to declare, at least in one count on the bailment (5), and to lay a special request (6); but in other cases it is sufficient to declare upon the supposed finding, which is not traversable (7); and the plaintiff may declare on a bailment to redeliver on request, and yet in his replication rely on a different bailment. (8)

Special bailment.

In detinue for a bond, a variance as to the sum will be material (9), and if it be proved to be a greater or less sum than that in the declaration, it will not be sufficient. (10)

Variance.

In detinue, the plea of non detinue operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial is admissible under that plea.

PLEADINGS.
Non detinue.

If the defendant rely upon a justifiable detainer, he must plead it specially. (11)

Defendant in detinue can plead in *justification*, that the goods were pawned to him for money which remains unpaid (12), that he has a lien thereon (13), that he retains them by authority of law (14), or if upon a *bailment*, that they were delivered to the person for whom they were bailed (15); or he may plead in *excuse*, that the goods were delivered to him to take care of, as his own proper goods, and that they were afterwards feloniously stolen by some person unknown, without his wilful default or privity. (16)

Justification.

Bailment.
Excuse.

The plaintiff must on the plea of *non detinet* shew a right to have the goods delivered to him (17), the detention of the goods by the defendant, and their value. (18)

EVIDENCE.

Proof of plaintiff under plea of *non detinet*.

In an action of detinue against an attorney for not delivering up papers to his client after his bill has been paid, if the defendant plead *non detinet*, the plaintiff must prove, that the papers were in the defendant's possession; but evidence that they were produced by his agent before the master, on the taxation of his bill, is sufficient proof of his possession. (19) And, as the gist of the action of *detinue* is the *detainer*, the bailment in the declaration is in general immaterial; therefore the defendant may set up in his plea a bailment different from that stated in the declaration, and the plaintiff with-

Against an attorney for not delivering up papers.

(1) *Miles v. Graham*, 1 N. R. 140. *Walker v. Jones*, 2 C. & M. 672.

(2) *Ibid*.

(3) *Alcorn v. Westbrook*, 1 Wils. 116.

(4) *Pawly v. Holly*, 2 W. Black. 853. Bull. N. P. 51. (a.) n.

(5) *Miles v. Graham*, 1 N. R. 146.

(6) 1 Chitt. Pl. 124. cit. Willes, 120.

(7) *Mills v. Graham*, 1 N. R. 140. *Atkinson v. Baker*, 4 T. R. 229. Willes, 120.

(8) *Gledstane v. Hewitt*, 1 Tyrw. 445. 1 C. & J. 565.

(9) Co. Litt. 283. Bull. N. P. 51.

(10) Co. Litt. 283. Bull. N. P. 50. (a.) 2 Rol. Abr. Trial (C.), 708.

(11) *Richardson v. Frankum*, 8 Dowl. P. C. 346.

(12) Co. Litt. 283.

(13) *Alexander v. M' Cowan*, cit. Tidd's N. P. 329. As to whether it is necessary to plead a lien or partnership, vide *Stancliffe v. Hardwick*, 2 C. M. & R. 1. 3 Dowl. P. C. 762.

(14) Com. Dig. Pleader, 3. (M. 22.)

(15) *Ibid*. 2. (X. 6.) Tidd's N. P. 329.

(16) *Kettle v. Bromsall*, Willes, 119.

(17) *Land v. North*, 4 Doug. 256.

(18) *Anderson v. Passman*, 7 C. & P. 193.

(19) *Ibid*.

THE DECLARATION, &c.

out traversing it, may shew, that the detainer is wrongful notwithstanding, without being guilty of a departure. (1)

If a defendant, in an action of detinue for papers, set up as a defence, that he delivered up the papers to K., in pursuance of a notice from the plaintiff's attorney to that effect, the plaintiff's counsel may call K. as a witness in reply, to prove that he received the papers in another right, and not on behalf of the plaintiff; and K. is a competent witness to prove that he has a lien on the papers as against the defendant. (2)

**STAT. 1 & 2
WILL. 4. c. 58.**

Stat. 1 & 2 Will. 4. c. 58. for the trial of adverse claims, includes actions for detinue.

BAIL.

No person shall be holden to bail in trover or detinue, without an order made for that purpose by the chief justice or other judge of the court in which the action is brought. (3)

**LIMITATION OF
ACTION.**

By stat. 21 Jac. 1. c. 16. s. 3., all actions of detinue must be commenced within six years next after the cause of action, and not after.

DAMAGES.

In detinue the damages are merely nominal, but the jury find the value of the articles detained.

In an action of detinue for papers, the jury must find the value of each paper separately; and it is the duty of the plaintiff to prove the value of the articles he sues for. (4)

In detinue for several things, the court will not, on motion, assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff. (5)

JUDGMENT.

The verdict and judgment must be such, that a specific remedy may be had for recovery of the goods detained, or a satisfaction in value for each several parcel, in case they, or either of them, cannot be returned; and therefore, where the action is for several chattels, the jury ought by their verdict to assess the value of each separately. (6) A flock of sheep is entire (7); and if the jury neglect to find the value, the omission cannot be supplied by writ of inquiry. (8)

**Omission of
jury in finding
the value of the
articles claimed.**

The judgment is in the alternative, that the plaintiff do recover the goods or the value thereof, if he cannot have the goods themselves, and his damages for the detention, and his full costs of suit. (9) If the verdict be for the defendant, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence. (10)

EXECUTION.

The execution for the plaintiff is for the goods or their value, with damages and costs; for the defendant the execution is for the costs only. (11)

(1) *Gledstane v. Hewitt*, 1 Tyrw. 445. 1 C. & J. 565. Tidd's N. P. 364, 365.

(2) *Anderson v. Passman*, 7 C. & P. 193.

(3) Reg. Gen. H. T. 48 Geo. 3. 9 East, 325. 1 Taunt. 203. Dax, Fr. 50. Archb. C. Att. Pract. 31.

(4) *Anderson v. Passman*, 7 C. & P. 193.

(5) *Phillips v. Hayward*, 3 Dowl. P. C. 362.

(6) *Pawly v. Holly*, 2 W. Black. 854. 3 Hen. 6. 43. (a.) Jenk. 2 Cent. 112.

(7) Bull. N. P. 51. (a.)

(8) *Cheyney's case*, 10 Co. 119. (b.) *Herbert v. Waters*, 1 Salk. 206.

(9) *Peters v. Heyward*, Cro. Jac. 682, 683. Tidd, 887.

(10) Archb. by Chitt. 492. Tidd, 977. Stat. 23 Hen. 8. c. 15. s. 1.

(11) Archb. by Chitt. 559. Tidd, 993.

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1. DEFINED.

There is one case in which the law permits a man to minister redress to himself, and that is the case of distress. DEFINED.

The term distrain or distress is derived from the French word *distresse* : in Latin it is called *districtio, sive angustia*, because the cattle distrained are put into a strait, which we call a pound. (1)

A distress is the taking of a personal chattel, without legal process, from the possession of a wrong-doer into the hands of the party grieved ; as a pledge for the redress of an injury, the performance of a duty, or the satisfaction of a demand. (2)

A distress was regarded at the common law only as a pledge ; and from this principle various exemptions have arisen, from the general liability to distress, both with respect to the nature of the thing distrained, and the property, or possession of the person from whom it is taken. A distress was regarded at the common law only as a pledge.

2. CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

A distress is of two kinds, either for non payment of rent or other duties, or for cattle trespassing and doing damage. CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

A distress at common law can be made for the non performance of certain services, or services which may be reduced to a certainty. (3) It lies for neglecting to do suit at the lord's court (4), for hereditary service (5), suit-service to a hundred-court or court-baron (6), for amerciaments in a court-leet, such as for a nuisance, refusing to take a public office (7), or for an offence committed in such court. (8) Non performance of services which can be reduced to a certainty.

The right to distrain for an amerciament in a court-baron (9), for a breach of a bye-law (10), or for a toll in a fair (11), may be justified upon prescription. Amerciaments. Prescriptive right of distress.

A distress cannot be made for the toll of goods fraudulently sold out of a market to avoid the toll ; but the party injured must bring a special action on the case. (12) Court-baron. Tolls.

Distress was incident to every rent-service, and by particular reservation to rent-charges ; and by stat. 4. Geo. 2. c. 28., rents-seck were made equally liable, consequently distress may be taken for any kind of rent in arrear, if there be an actual demise. (13) Rent-service.

Where the beasts of a stranger wander on the grounds of another, doing hurt or damage by treading down grass or the like, the owner or occupier of the soil can distrain them, till satisfaction be made for the injury committed ; and it seems the owner of land may distrain tithes as damage Damage feasant.

(1) Co. Litt. 96. (a.)

(2) Bradby by Adams, 1.

(3) Co. 96. (a.)

(4) 1 Rol. Abr. Distres (F.), 665.

(5) Ibid. Plowd. 96.

(6) 1 Rol. Abr. Distres (E.), 665.

(7) *Prat v. Stearn*, Cro. Jac. 382.

(8) 1 Rol. Abr. Distres (F.), 666.

(9) Ibid.

(10) Dyer, 321. (b.) ; 322. (a.)

(11) 1 Rol. Abr. Distres (F.), 666.

(12) *Blakey v. Dinsdale*, Cowp. 661., et vide *Hutchings v. Morris*, 6 B. & C. 464.

(13) *Dunk v. Hunter*, 5 B. & A. 322. *Regnart v. Porter*, 7 Bing. 451.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Statutable right of distress.

Assessments for the poor.

House and window tax.

Land tax.

LANDLORD AND TENANT.

There must be an actual and an existing demise.

Lease partially void.

Not a present demise.

Where parties have no power to grant a lease.

feasant after a reasonable time (1); but to support a distress for damage feasant, it must appear, that the party distraining had actually got into the *locus in quo* before the cattle had got out of it. (2)

The right of distress has been in a great variety of instances conferred by statutes for the protection of public and private rights of property, a detailed account of which, would be inconsistent with the arrangement of this treatise.

Statutable assessments made for the relief of the poor can be recovered by distress and sale.

The collector of the house and window tax under stat. 43 Geo. 3. c. 161. can distrain for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, and the person in arrear has other goods of his own on the premises, sufficient to satisfy the arrears. (3)

Under stat. 38 Geo. 3. c. 5. ss. 2 & 12, land tax for the quarter ending 25th March is due, and may be demanded, and upon default in payment, distrained for at any period during that quarter. (4)

A distress cannot be made, unless there be an actual demise at a specific rent. Therefore, where a tenant held premises under an agreement for a future lease, and no lease had been executed, or rent subsequently paid, it was held, that the landlord could not distrain for rent; his remedy was by action for use and occupation, for "there can be no distress" said Abbott C. J., "unless there be a contract for an actual demise at a specific sum." (5)

So where a lease of tithes and land was granted at an entire rent for both, and the lease as to the tithes was void, it not being under seal, it was held, that a distress for the rent was unlawful, there being no distinct rent reserved on the land. (6)

In *Hayward v. Haswell* (7) it appeared by agreement between P. and H., that P. agreed to grant to H. a lease of land, and the buildings then standing thereon, and others to be erected thereon under the agreement, with the appurtenances, as they then were and had been in the possession of H. for a term of years to commence at a day then past, at a specified rent, payable on days then to come; and P. agreed in four months to erect certain buildings on the land; and H. agreed to take the lease and execute a counterpart, and in such four months to erect certain other buildings on the land; and it was agreed, that the lease should be granted immediately after P. should obtain his lease of the premises from M., under a then subsisting agreement between P. and M.; and that the lease from P. to H. should contain like covenants, &c. to those in the lease from M. to P., and such other covenants as were usual in such leases; and H. agreed to pay the rent, as if the lease from P. were already executed. If

(1) *Baker v. Leathers*, Wightw. 113.

(2) *Clement v. Milner*, 3 Esp. N. P. C. 95.

(3) *Juson v. Dixon*, 1 M. & S. 601.

(4) Under stat. 38 Geo. 3. c. 5. ss. 9 & 17., and 43 Geo. 3. c. 99. s. 33., when payment of land or assessed taxes is demanded upon the premises in the absence of the owner, mere non payment, without notice of the demand, is not a neglect or refusal to pay to justify an immediate distress; a rea-

sonable interval must be allowed between the demand and the seizure. *Gibbs v. Stead*, 2 M. & R. 547. 8 B. & C. 528.

(5) *Dunk v. Hunter*, 5 B. & A. 322., vide etiam *Hegan v. Johnson*, 2 Taunt. 148.

(6) *Gardiner v. Williamson*, 2 B. & Ad. 336., vide etiam *Bird v. Higginson*, 6 A. & E. 824.

(7) 6 A. & E. 265.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

H. failed to pay, such rent or perform the agreement, the agreement was to be void so far as regarded the engagements of P.; and P. might retain, or re-enter upon, and dispose of, the premises. If P. failed to perform, &c. he was to pay 500*l.* to H. as liquidated damages:—It was held, that the instrument did not amount to a present demise, inasmuch as P. appeared, by the agreement, to have no present power to grant a lease, and that H., having entered, and made default in payment of rent; P. could not distrain; Lord Denman observing “We cannot say that the parties intended to create a lease, when they knew there was no power to do so.”

In *Mechelen v. Wallace* (1) it appeared, that M. agreed verbally with W.'s agent to take a house of W. furnished, at 170*l.* *per annum* rent, for the house and furniture payable quarterly and in advance. The house was furnished only in part; but the agent said, that it should be completely furnished; not, however, specifying any time. M. was let into possession within a month from the above treaty. After the expiration of a quarter, W. distrained for rent, the furniture not having been sent in as promised. M. brought trespass:—It was held, that it was a question for the jury, whether the agreement to pay rent was absolute, or on condition only of the furniture being sent in; that there was evidence upon which they might find it to have been conditional; and therefore that the distress was not justified.

Where agreement to pay rent for a furnished house is not absolute, but conditional on furniture being sent in.

Where the defendant, having only a defeasible title, demised to the plaintiff for years, before the first quarter's rent was due, and the plaintiff was evicted by title paramount to the defendants, and remained out of possession for some weeks, but then entered again under a new agreement with the person who had evicted him by title paramount:—It was holden, that the defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of *non tenuit*. (2)

Where distress cannot be made in consequence of eviction.

Where a tenant for life, having a power to lease for twenty-one years, leased for fifty-three years to the defendant, who nine years after the death of such tenant underlet to the plaintiff, and in the following year the remainder-man, after giving the plaintiff and defendant notices to quit, granted the former a new lease, and received the rent due thereon for six years; at the expiration of which period the defendant, who had acquiesced in the transaction during the interval, distrained on the plaintiff's goods for six years' rent:—It was held, that such distress was illegal; and that, after such acquiescence, the plaintiff might plead *non tenuit* to the defendant's avowry under the lease, which the plaintiff accepted from him, and thereby deny the title of the party under whom he derived possession. (3)

Tenant for life, having a power to lease for twenty-one years, leasing for fifty-three years.

A tenant entered under an agreement, containing stipulations for a lease at 25*l.* a year, and an engagement by the landlord to complete certain erections. The erections were never completed, and the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made him for the expense of some repairs:—It was held, that

Demise at a rent certain will not be implied, where landlord has failed to complete certain erections.

(1) 7 A. & E. 54.

(3) *Neave v. Moss*, 8 Moore, 389. 1

(2) *Hopcraft v. Keys*, 9 Bing. 613. 2 M. Bing. 360.

& Sc 760

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Judgment of Chief Justice Tindal in *Regnart v. Porter*.

Where landlord not justified in distraining under stat. 8 Anne, c. 14. ss. 6. & 7.

Judgment of Mr. Justice Patteson in *Taylorson v. Peters*.

WHERE LANDLORD HAS NEGATIVED THE PRESUMPTION OF AN EXISTING TENANCY.

Effect of proceedings in ejectments.

Where landlord after judgment in ejectment can distrain.

Tenant holding over after notice to quit.

CATTLE PLACED BY OWNER OF LAND TO TAKE POSSESSION OF PREMISES.

a demise at a rent certain could not be implied, so as to entitle the landlord to distrain (1), Chief Justice Tindal observing, "The question is, whether there is evidence that Regnart held as a tenant to Porter at a rent certain; for unless he was tenant, and at a rent certain, the avowant had no right to distrain. It is admitted, that if there was any tenancy at all, it was not under the agreement in evidence, for that contains no words of present demise; and it may also be conceded, that if a party enters and pays, or promises to pay a rent certain, or settles it in account, a new agreement may be presumed, under which the landlord may have the right to distrain. The only question in this case is, whether the party did pay or promise to pay a rent certain, or settle it in account." Mr. Justice Alderson said, "Unless there be a demise at a rent certain, a landlord cannot distrain. The avowant, therefore, must fail in this case, as he has not proved even an admission by the plaintiff as to the amount of rent."

Where a tenant of a farm had remained a few days after the expiration of his term, and after entry by a new tenant, went away, leaving a cow and some pigs, but gave no further intimation of a purpose to return, or of holding any part of the farm:—It was held, that the landlord could not justify distraining the goods so left for arrears of rent under stat. 8 Anne, c. 14. ss. 6 & 7. (2), Mr. Justice Patteson observing, "To bring a case within sect. 7. of the statute of Anne, the continuance of possession may be either tortious or otherwise. In *Nuttall v. Staunton* (3) it was by permission. In *Beavan v. Delahay* (4) the possession was continued under a custom. But to make the statute applicable, there must be a keeping as the party's own, to the exclusion of other people. That fact is wanting here."

If a landlord have by his acts negatived the presumption of an existing tenancy, as by treating his tenant as a trespasser by ejecting him, he cannot distrain: thus, in *Bridges v. Smyth* (5), where a landlord treated an occupier of his land as a trespasser, by serving him with an ejectment, it was held, he could not afterwards distrain on him for rent, although the ejectment was directed against the claim of a third person, who came in and defended in lieu of the occupier, and the occupier was aware of that circumstance, and was never turned out of possession.

But after judgment in ejectment for non payment of rent, and before execution, the landlord may, within six months after the day of the demise in the declaration in ejectment, distrain for the rent, on account of which the ejectment was brought. (6)

A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy. (7)

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. (8)

(1) *Regnart v. Porter*, 7 Bing. 451. 5 M. & P. 370.

(2) *Taylorson v. Peters*, 7 A. & E. 110.

(3) 4 B. & C. 51.

(4) 1 Hen. Black. 5.

(5) 5 Bing. 410.

(6) *Dwyer v. Peacock*, 2 Fox & Smith (Irish), 34.

(7) *Jenner v. Clegg*, 1 M. & Rob. 213. *Sullivan v. Bishop*, 2 C. & P. 359., sed vide *Zouch d. Ward v. Willingale*, 1 Hen. Black. 311.

(8) *Tunton v. Costar*, 7 T. R. 431., et vide *Butcher v. Butcher*, 7 B. & C. 399. 1 M. & R. 220.

A slight degree of interest will however confer the right of distress: thus, a tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain. (1)

Where the plaintiff entered a farm under an oral agreement for a lease for ten years, and though the time for paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed, but the plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:—It was held, that the lessor might distrain. (2)

In *Buttery v. Robinson* (3) it appeared, that there was a devise of lands to A. for life, remainder to B. in fee, subject to and charged with the payment of 20*l.* a year to C. D. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B.:—It was held to be a charge on the land, for which C. D. might distrain.

If a trader, after committing an act of bankruptcy, take a shop, and agree to pay a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the fiat, and before the year expired, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the fiat, he may retain the amount of the half year's rent. (4)

Forehand rent may be distrained for by the landlord, although the landlord is aware, that an execution is about to be put in, at the suit of a judgment creditor. (5)

A landlord may distrain for the rent of ready-furnished lodgings. (6)

In *Clark v. Waterlow* (7) it appeared that A., wishing to take stables, desired B. to go to the landlord and take them for him, it being agreed that, when taken, A. should underlet one of the stables to B. by the week; B. took the stables of the landlord in his own name under a written agreement, but A. occupied all but the one which was underlet by A. to B., and B. for several weeks paid A. the weekly rent:—It was held, that in the original taking of them, B. was a mere trustee for A., and that it was not necessary that B. should have assigned his interest by writing under the third section of the Statute of Frauds, and that A. was, therefore, entitled to distrain on B. if the weekly rent was in arrear.

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term after its expiration. (8)

If the plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to his executing his *retorno habendo*, without waving his action against the sureties on the bond. (9)

A landlord may distrain for rent after having taken a note of hand for the amount, for it is no alteration of the debt until payment. (10) And an

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

WHERE LANDLORD CAN DISTRAIN.

Tenant from year to year.

Tenant entering upon a farm under an oral agreement.

Devise of land.

Trader after an act of bankruptcy taking a shop.

Forehand rent may be distrained for, notwithstanding the suit of a judgment creditor.

Ready-furnished lodgings.

Where lessee of land dies before the expiration of the term, and his administrator continues in possession.

Rights of landlord after a nonsuit in replevin.

Landlord hav-

(1) *Curtis v. Wheeler*, M. & M. 493.

(2) *Knight v. Bennett*, 3 Bing. 361. 11 Moore, 227.

(3) 3 Bing. 392.

(4) *Buckley v. Taylor*, 2 T. R. 500.

(5) *Harrison v. Barry*, 7 Price, 690.

(6) *Newman v. Anderton*, 2 N. R. 224.

(7) 8 C. & P. 368.

(8) *Braithwaite v. Cooksey*, 1 Hen. Black. 465.

(9) *Hefford v. Alger*, 1 Taunt. 218.

(10) *Harris v. Shipway*, and *Ewer v. Clifton (Lady)*, Bull. N. P. 182.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

ing taken a note of hand for the amount of rent.

Landlord agreeing by parol not to distrain an under-tenant.

REVERSIONERS.

PERSONS NOT HAVING THE REVERSION.

agreement to take interest on rent in arrear, does not take away the landlord's right of distress. (1)

In *Welsh v. Rose* (2) the plaintiff being desirous of taking apartments of one B., but not willing to do so unless the defendant, the superior landlord, would relieve him from the risk of having his goods distrained for B.'s rent; the defendant engaged, that as long as the plaintiff paid B. his rent, he (the defendant) would never trouble the plaintiff or his property. The plaintiff accordingly entered, but failed in the due payment of his rent: — It was held, that the landlord's right of distress was not taken away, notwithstanding that the plaintiff had, before the distress, tendered to B. the balance of rent due to him.

All those seised in fee who have granted out a lesser estate with a reservation of rent, may recover the rent when in arrear by distress; or if a man have not the reversion, he may reserve to himself a power of distraining, and such reservation will be good to bind the lessee by way of contract, for the performance whereof the lessor may have an action.

But where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the goodwill already paid by such assignee:" — It was held, that such agreement operated as a surrender of the whole term. The sum in the agreement was considered as a sum to be paid annually in gross, not as rent, and the assignee could not distrain either for that or for the original rent, but has a remedy by *assumpsit* for the sum reserved for the good-will. (3)

In some particular cases, the power of distress is held of common right, even without the reversion; as for rent granted for equality of partition by one coparcener to another, or for a rent granted in lieu of lands upon an exchange: in these cases the grantee may distrain without any provision of the parties, though he has no reversion, the law giving him such a power of distress, lest he should be without remedy: but if a man grant such a rent over to another after arrears incurred, he cannot distrain for such arrears, because they are by the grant divided from the freehold of the rent. A woman endowed of a rent as well as of land, whether it be rent-service, rent-charge, or rent-seck with or without deed (4), although she have not the reversion, might also distrain of common right (5); and this extension was made *in favorem dotis*. (6) The rents also paid by copyholders, as tenants of the manor to the lord, have always been considered as rent-service, fealty being necessarily incident to this species of tenure, and therefore are distrainable of common right. (7)

To an avowry for rent arrear, a plea, that by the demise in the avowry mentioned, avowant demised and transferred the premises to plaintiff for the residue of avowant's term and interest in the same, and that avowant had not at the time, when, &c. any reversionary interest in the premises after

(1) *Skerry v. Preston*, 2 Chlitt. 245.

(2) 4 M. & P. 484. 6 Bing. 638.

(3) *Smith v. Mapleback*, 1 T. R. 441.

(4) *Colt v. Coventry (Bishop of)*, Hob. 524. Woodfall by Harrison, 307. 140. 153.

(5) Co. Litt. 169. (a, b.)

(6) *Anon.* Keilw. 101.

(7) *Laughter v. Humphrey*, Cro. Eliz.

the expiration of the term granted to plaintiff by the demise, was held to be sufficient. (1)

Although a tenant in tail may make a lease not conformable to the enabling stat. 32 Hen. 8. c. 28., such lease is good as against himself, and therefore, as a reversioner, he may distrain even at common law for the rent reserved thereby. (2)

A tenant by the courtesy has an estate of freehold, and acquires in contemplation of law a reversion in all lands of the wife leased for years or life, and therefore may distrain of common right. If the wife's estate be but lands of inheritance, the husband when tenant by courtesy, may also distrain in respect of such seisin. (3)

By stat. 32 Hen. 8. c. 37., husbands seised in right of their wives, may distrain after their death for arrears incurred in their lifetime.

After the death of the wife, for all rent due in right of the wife, the husband may distrain alone, even if it accrue to her *in autre droit*, as executrix or administratrix (4); and though the wife may generally join with her husband, in no case whatever can she distrain alone. (5)

One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs, without an express authority from them. (6)

Coparceners are entitled of common right to distrain for a rent assigned upon partition (7), provided it be reserved out of the lands descended (8); and so may their grantees, for it is annexed to the estate. (9)

Although coparceners before partition are considered in law as one heir (10), and therefore must join in making a distress (11), it is otherwise after partition, for then they may make several distresses; so that even a rent-charge, though in its nature entire, and against common right, may be divided between coparceners, and by act in *law*, the tenant of the land is subject to several distresses. (12) But if there be three coparceners, and they make partition, and one of them grant 20s. *per annum* out of her part, to her two sisters and their heirs, for equality of partition, they shall have this rent in course of coparcenary, and shall join in an action for the same (13); and as this rent is entire in its creation, it should seem that they must join in the distress. (14) "So if two coparceners, by deed indented, alien both their parts to another in fee, rendering to them two and their heirs a rent out of the land, they are not joint tenants of this rent, but they shall have the rent in course of coparcenary, because their right in the land, out of which the rent is reserved, was in coparcenary." (15)

One coparcener cannot be deprived of her rights by the tortious acts of another (16); and if there be coparceners of a seignior, and one of them

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

TENANTS IN TAIL.

TENANTS BY COURTESY.

STAT. 32 HEN. 8. C. 37. HUSBAND SEISED JURE UXORIS.

COHEIRS IN GAVELKIND.

COPARCENERS.

One coparcener cannot be deprived of her

(1) A replication, with a power of distress given by the award of an arbitrator to whom all matters in difference between the parties had been referred, held ill, without averring that the arbitrator had authority to confer a power of distress, or that the right to distrain was one of the matters in difference. *Pascoe v. Pascoe*, 3 Bing. N. C. 898.

(2) *Woodfall by Harrison*, 306. *Exp. Smyth*, 1 Swanst. 346.

(3) *Bradby by Adams*, 46.

(4) *Osborne v. Wickenden*, 2 Saund. 195. *Ankerstein v. Clarke*, 4 T. R. 617. *Parry v. Hindle*, 2 Taunt. 181.

(5) *Woodfall by Harrison*, 309.

(6) *Leigh v. Shepherd*, 5 Moore, 297. 2 B. & B. 465.

(7) Co. Litt. 169. (a.) Harg. n. (I.) Ibid. 153. (a.)

(8) Co. Litt. 169.

(9) *Walker's case*, 3 Co. 22. (b.)

(10) Co. Litt. 163. (b.)

(11) *Stedman v. Bates*, 1 Salk. 390. 5 Mod. 141.

(12) Co. Litt. 164. (b.)

(13) Ibid. 169. (b.)

(14) *Stukeley v. Butler*, Hob. 172.

(15) Co. Litt. 169. (b.)

(16) Ibid. 184. (b.)

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

rights by the tortious acts of another.

TENANTS IN COMMON.

disseise the tenant of the land, the other coparcener shall distrain for her moiety.

Although a rent assigned upon partition be in general distrainable of common right, yet partition may be so made, as to sever the rent from the right of distress. (1)

Where there is in one of the coparceners, a unity of seisin or possession in the rent and the land on which it is charged, there, for the benefit of the coparcener entitled to the rent, the law apportions the rent by extinguishing only so much of it, as is proportionate to her share in the land. (2)

Tenants in common must avow separately (3); and it seems they should make several distresses (4): thus, where land was demised by four persons (whose original title did not appear), at one entire rent, to be divided and paid separately, in equal portions, and one of the four distrained upon the tenant for her own share of the rent:—It was held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant, they were tenants in common, and respectively entitled to separate distress. (5)

So likewise in *Harrison v. Barnby* (6) it was holden, that a terre-tenant holding under two tenants in common, cannot pay the whole rent to one, after notice from the other not to pay it; and if he do, the other tenant in common may distrain for his share.

But it seems, that the survivor of two tenants in common can distrain for the whole rent due upon a lease, although the reservation was to both, according to their respective interests. (7)

JOINT TENANTS.

One of several joint tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if, when applied to, they merely decline to act, that will not prevent him from proceeding. (8)

If one joint tenant distrain alone, he must avow in his own right, and as bailiff to the other joint tenant. (9)

LOARDS OF MANORS AND COMMONERS.

A lord of a manor can, of common right, distrain for his copyhold rents. (10)

When two commoners agreed, to their mutual advantage, not to exercise their respective rights for a certain term, one can distrain the other's cattle *damage feasant* during that time. (11)

In case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle of another, but not if an admeasurement be necessary. (12)

If the cattle of a stranger be placed on the common, the commoner can always resort to distress. (13)

TENANTS UN-

An entry under an execution, either by *elegit*, statute merchant, or statute

(1) Co. Litt. 150.(a.); 143.(a.); 151.(b.)

(2) Bro. Abr. Distress, pl. 38. 65.

(3) *Pullen v. Palmer*, 3 Salk. 207. 5 Mod. 73. 150.

(4) *Bradby* by Adams, 41.

(5) *Whitley v. Roberts*, M'Clel. & Y. 107.

(6) 5 T. R. 246., et vide *Doe d. Prichitt v. Mitchell*, 1 B. & B. 11.

(7) *Wallace v. M'Laren*, 1 M. & R. 516.

(8) *Robinson v. Hoffman*, 1 M. & P. 474. 4 Bing. 562. 3 C. & P. 234.

(9) *Pullen v. Palmer*, 5 Mod. 73. 150. 3 Salk. 207.

(10) *Laughter v. Humphrey*, Cro. Eliz. 524.

(11) *Whiteman v. King*, 2 Hen. Black. 4.

(12) *Hall v. Harding*, 4 Burr. 2426. 1 W. Black. 673., ante, 1038.

(13) *Ibid.*

staple, gives so far an estate on the rent of land, as to confer the power of distress, although there is but an uncertain interest in the reversion. (1)

An annuitant can distrain for arrears, though a term be vested in himself to secure the payment. (2)

Persons who have vested in them legal estates, though in trust for others, as the trustees of a feme covert, or the assignees of a bankrupt, can distrain for rent, in respect of such legal estates, in the same manner, as if they were beneficially interested therein.

Committees of the estates of lunatics were formerly persons appointed by the court of Chancery only to superintend and manage such estates, but not possessed of any interest therein. They are now enabled by stat. 43 Geo. 3. c. 75. to grant leases of the lunatic's estate, under the direction of the lord chancellor, and therefore, like other lessors, are entitled to distrain for the rent accrued.

In our ancient law the rights of guardian, especially in chivalry, formed a very important topic of inquiry; but the stat. 12 Car. 2. c. 24. having changed all the ancient military tenure into socage, and of the testamentary guardians appointed under the authority of the same statute; these guardians, as they do not derive their title from the infant himself, but from the appointment of the law, are considered as having not a bare authority, but an interest in the lands of the infant, and therefore may make leases of the lands in their own names, which will be good during the minority of the ward (3); and consequently, in respect of such leases, they possess the same powers of distress as other persons granting leases in their own right. (4)

If a lessee of a term grant out under-leases for any period, be it only a day, shorter than his own interest, he has a power of distress without reservation, which even passes to his executors. (5)

A lessee for years who assigns his term, cannot distrain for rent, but must bring his action on the contract. (6)

A., the lessee of two farms agreed with B., that he should have such lands during the leases; B. to remain tenant to A. during that period; and upon quitting the farms, B. was to be paid for the fallows and dung. B. took possession, and paid one year's rent to A., who afterwards distrained for rent in arrear:—It was held, that he was not entitled so to do, as the agreement operated as an absolute assignment of all A.'s interest in the farms. (7)

One who had a term which expired on the 11th November 1826, let the premises verbally from the 11th September to that day, for a certain rent payable immediately:—It was holden, that as it was a demise for the whole of his term, he had no right to distrain. (8)

Upon the execution of a mortgage, the legal estate in the mortgaged premises vests at once in the mortgagee; and if they are not in lease, he is consequently entitled to the immediate possession.

A mortgagee, after giving notice of the mortgage to the tenant in

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

DER EXECUTION.

ANNUITANTS.

TRUSTEES.

COMMITTEES OF LUNATICS

GUARDIANS.

TERMORS FOR YEARS.

Lessee of years who assigns his term cannot distrain for rent.

MORTGAGERS AND MORTGAGEES.

(1) Bro. Abr. Distress, pl. 72. *Cubit's case*, 4 Co. 7.

(2) *Fairfax v. Gray*, 2 W. Black. 1326.

(3) *Wade v. Baker*, 1 Ld. Raym. 131., vide *Osborn v. Carden*, cit. 10 East, 495. n.

(4) *Shopland v. Rioler*, Cro. Jac. 55. 98. *Bedell v. Constable*, Vaugh. 179.

(5) *Wade v. Marsh*, Latch, 211.

(6) — v. *Cooper*, 2 Wils. 375.

(7) *Parmenter v. Webber*, 2 Moore, 656.

(8) *Preece v. Corrie*, 5 Bing. 24. 2 M. & P. 57.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Mortgagee against lessee of mortgagor in possession.

When mortgagor cannot distress.

Stat. 4 Geo. 2. c. 28. s. 5.
CORPORATIONS.

TENANTS PUR AUTRE VIE.

SPECIAL POWERS OF DISTRESS.
Grantee of a rent-charge.

possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distress for it after such notice. (1)

Although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits at the time it became due. (2)

Where a mortgagor in possession makes a lease, after the mortgage, reserving rent, the mortgagee cannot, by merely giving the lessee notice of the mortgage, and that principal and interest are in arrear, and requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distress for rent subsequently accruing under the terms of the lease.

Nor if, after such mortgagee's death, his executors distress for rent accrued before his death, but after the notice, and avow upon a holding by the lessee under the terms of the original lease, as tenant to the mortgagee, will such avowry be supported by proof that, after the mortgagee's death, the lessee paid the executor's rent, in sums and at periods corresponding to the reservation in the lease, and by letter recognised them as his landlord's, such a recognition not having relation back to the notice. (3)

A mortgagor can distress under a lease by deed, granted by himself after the mortgage by virtue of the estoppel (4); but he cannot in any case distress for arrears of rent due on a lease made before the mortgage, for by the act of mortgaging the privity of estate is destroyed.

By stat. 4 Geo. 2. c. 28. s. 5., "every person, body politic or corporate, may have the like remedy by distress, and by impounding and selling the same in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years before the 23d of January, 1731, or shall be thereafter created, as in case of rent reserved upon a lease."

If a lease be made by the agent of a corporation not under their common seal, although it be invalid as a lease for want of due execution, yet if the tenant hold under it and pay rent to the bailiff of the corporation, it is sufficient to constitute a tenancy, at least from year to year, and to entitle the corporation to distress for the rent. (5)

By stat. 32 Hen. 8. c. 37. s. 4., tenants *pur autre vie* can distress for arrears during the life, and unpaid after the death of the *cestuique vie*, in like manner as at common law they might have done during his life.

Sometimes where the grantor of property parts with the reversion, he reserves a rent to himself with a special power to distress for such rent.

The grantee of a rent-charge can distress; so can an assignee for rent becoming due after the assignment. (6)

The goods of C. found upon land, out of which a rent-charge has been granted by A. to B., are liable to the distress of B. unless C. has an interest in the land paramount to that, which A. had at the time of the grant. (7)

(1) *Moss v. Gallimore*, 1 Doug. 279.

(2) *Ibid.*

(3) *Evans v. Elliot*, 9 A. & E. 342. *Quare*, How far the mortgagee by his own conduct, as by permitting the mortgagor to remain in possession and to lease without interfering, may preclude himself from treating

the mortgagor and his lessee as trespassers, is questionable?

(4) *Bradby by Adams*, 99. *Woodfall by Harrison*, 306.

(5) *Wood v. Tate*, 2 N. R. 247.

(6) *Maund's case*, 7 Co. 28.

(7) *Saffery v. Elgood*, 3 N. & M. 346. 1 A. & E. 191.

Where the defendant reserved rent, payable quarterly or half quarterly if required, and the defendant having received the rent quarterly for a twelvemonth, it was held, that he could not, without notice, distrain for a half quarter's rent. (1)

A devisee can distrain for rent devised to him out of lands, if the land be charged with a distress, but not otherwise (2)

By an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a corn-rent substituted, which was directed to be paid for ever afterwards to the impropriator and vicar by the person who, for the time being, should be in the possession or occupation of the land out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as for rent-service or other rent in arrear. For several years part of such land remained untenanted and wholly unprofitable to the owner, who, during that time, resided elsewhere; the land was then demised to a tenant, who entered and brought it into cultivation:—It was holden, that the goods of the tenant coming in under him, were liable to be distrained for such rent in arrear. (3)

A receiver appointed by the court of Chancery has a right to distrain for rent, without any special authority from the court for that purpose (4), because, as that court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premises in the meantime.

In replevin the defendant made cognisance as bailiff of R. W. for rent in arrear from the plaintiff under a demise from R. W.; on the production of the lease under which the plaintiff held, R. W. was described as a receiver appointed by the court of Chancery, and the rent was made payable to him or any future receiver:—It was holden, that R. W. was entitled to distrain for rent in arrear, and that the plaintiff was estopped by his own deed from pleading *non tenuit*. (5)

An authority to tenants to pay rent to a third party, whose receipt shall be their discharge, does not entitle such party to distrain, although he receives the rent for his own benefit. (6) Thus, where J. S., a bankrupt, received from his assignees the following memorandum:—"Mr. J. S. having completed an arrangement with Messrs. H. and Co., his assignees, for the five houses in Chequer Alley, and the arrears of rent due thereon, the tenants on the respective premises are hereby authorised to pay their rents to the said J. S., whose receipt shall be their discharge:"—It was held, that this memorandum gave J. S. no authority to distrain in the name of the assignees. (7)

A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year, for seventeen years, greater than the

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Devisee.

Tithes payable in respect of inclosures.

RECEIVERS AND AGENTS.

Receiver appointed by the court of Chancery.

Authority to tenants to pay rent to a third party, whose receipt shall be a discharge.

Amount of rent erroneously allowed.

(1) *Mallam v. Arden*, 10 Bing. 299.

(2) *Touchst. by Atherley*, 458. *Buttery v. Robinson*, 3 Bing. 392.

(3) *Newling v. Pearce*, 1 B. & C. 437., et vide *Bendyshe v. Pearce*, 4 Moore, 99. 1 B. & B. 460.

(4) *Bennett v. Robins*, 5 C. & P. 379.

Brandon v. Brandon, 5 Madd. 473., et vide *Hughes v. Hughes*, 3 Bro. C. C. 87.

(5) *Dancer v. Hastings*, 12 Moore, 34. 4 Bing. 2.

(6) *Ward v. Shew*, 9 Bing. 608. 2 M. & Sc. 756.

(7) *Ibid.*

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Stat. 6 Geo. 4. c. 16. s. 74.
BANKRUPTCY.

landlord was liable to pay, the landlord knowing or having the means of knowing all the facts:— It was held, that he could not distrain for the amount erroneously allowed, though the receipt given every year shewed the amount paid and the amount deducted. (1)

Under stat. 6 Geo. 4. c. 16. s. 74., no distress for rent made and levied after an act of bankruptcy upon the goods of any bankrupt (whether before or after the issuing of the fiat) will be available for more than one year's rent accrued prior to the date of the fiat; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available.

Where a trader, after committing an act of bankruptcy, took a shop and agreed to pay a half year's rent in advance, where by the custom of the country half a year's rent becomes due on the day on which the tenant entered, it was held, that the landlord, after "an assignment under the commission," and before the year expired, might distrain the goods on the premises for a half year's rent; or if he bought the tenant's goods at the sale under the "commission," he might retain the amount of the half year's rent. (2)

Where a landlord has no lien on his tenant's goods.

A landlord has no lien in the case of a bankruptcy, after the goods are removed from the premises; therefore, if he neglect to distrain, and suffer the goods to be sold by the assignees and removed from off the premises, he can only come in on an average with the rest of the creditors (3); and if he prove his debt for rent under the commission, and swear that he has no security, he thereby waves, it should seem, his right to distrain.

Landlord can distrain after act of bankruptcy.

As a landlord may distrain after an act of bankruptcy, if the rent be paid by the bankrupt to avoid the distress which is threatened, it is a protected payment, and the assignees cannot recover the amount from the landlord. (4)

INSOLVENCY.
Stat. 1 & 2 Vict. c. 110. s. 58.

How far distress only available for rent.

By stat. 1 & 2 Vict. c. 110. s. 58. it is enacted, "that no distress or distresses, for rent made or levied after the arrest, or other commencement of the imprisonment of any person whose estate shall, by any such order as aforesaid, have been vested in the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the making of such order, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act." (5)

A distress to be within this clause, must be both made and levied. (6) A landlord who has distrained the goods of a tenant, who being arrested after the distress goes to prison and petitions the Insolvent Debtors' Court before the goods are sold, is entitled to the whole of the rent due, and is not restricted to one year's rent. (7)

(1) *Bramston v. Robins*, 4 Bing. 11 12 201. *Darnton v. Pigman*, Peake's Add. Cas. 111.

(2) *Buckley v. Taylor*, 2 T. R. 600.

(5) *Vide* stat. 7 Geo. 4. c. 57. s. 31.

(3) *Exp. Plummer*, 1 Atk. 102. *Bradyle v. Ball*, 1 Bro. C. C. 427.

(6) *Theobald, Abo. Impris. Debt*, 73.

(4) *Stevenson v. Wood*, 5 Esp. N. P. C. 200. *Mavor v. Croome*, 8 Moore. 171. 2 Bing.

(7) *Wray v. Egremont (Earl of)*, 1 N. & M. 188. 4 B. & Ad. 122.

In *Gill v. Morgan* (1) it appeared, that W. C. held lands as tenant from year to year, and conveyed the same on his marriage to trustees, to the use of himself for life, or until he should become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or separate from his wife, and thereafter in trust to raise a rent-charge of 40*l. per annum* thereout for her jointure. W. C. took the benefit of the insolvent acts; his assignees entered on the lands, and distrained a cow grazing thereon, with permission of the survivor of the trustees:—It was held, that the assignees could not maintain an avowry for such distress damage feasant.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

Where assignees cannot maintain an avowry for distress damage feasant.

EXECUTORS AND ADMINISTRATORS.

Stat. 32 Hen. 8. c. 37. s. 1.

Remedies for executors, &c. to recover a rent due to their testator in his lifetime.

At common law neither executors nor administrators, could distrain for arrears incurred in the lifetime of the owner of a rent. (2)

But by stat. 32 Hen. 8. c. 37. s. 1. it is enacted, "that it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee farm is or shall be due, and not paid at the time of his death, as is aforesaid, to distrain for the arrearages of all such rents and fee farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents, or fee farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain, and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime; and the said executors or administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

This statute has been considered remedial, and extending to all executors of tenants for life, as well to those who before the statute were entitled to an action of debt, as to those who had no remedy whatever. (3)

By stat. 3 & 4 Will. 4. c. 42. s. 37. it is enacted, "that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner, as such lessor or landlord might have done in his lifetime."

Stat. 3 & 4 Will. 4. c. 42. s. 37.

Executors of lessor may distrain for arrears in his lifetime.

And by s. 38. "that such arrearages may be distrained for, after the end or determination of such term or lease, at will, in the same manner, as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

Sect. 38.

Arrears may be distrained for within six months after determination of term.

A cognisance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the tes-

Evidence of the recognition of an executor's

(1) 1 Smythe (Irish), 60.

(2) Co. Litt. 162. (a.)

(3) *Hool v. Bell*, 1 Ld. Raym. 172. 3 Salk. 136.

CAUSES FOR WHICH, AND PERSONS BY WHOM, A DISTRESS MAY BE MADE.

distress made by a bailiff.

Where a landlord is entitled to a term of years, and dies without appointing an executor.

OWNERS OF LAND FOR CATTLE DAMAGE FEASANT.

tator, and by his direction, but after his death; such distress, though made before probate, having been adopted and ratified by the executor. (1)

Where a landlord is entitled to a term of years, and dies without appointing an executor, a distress for rent made after his death, and before any grant of administration, cannot be justified. (2)

Allusion has been previously made (3) respecting the right to distrain cattle damage feasant; the following cases will further illustrate the subject:—

Where A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expense on certain closes belonging to A., A. covenanting that B. might turn out a mare, and that no other cattle should be fed there:—It was held, that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there. (4)

But where two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, it has been questioned, whether either of them be bound to guard against casual damage, which during, and by the fair enjoyment of his right, may happen to the other. (5) But clearly the one cannot distrain the cattle of the other damage feasant. (6)

BY WHOM A DISTRESS CAN BE TAKEN.

DISTRESS MAY BE MADE BY THE PRINCIPAL OR HIS AGENT.

Bailiff should have a written authority.

None of the proceedings in making a distress require a stamp, or to be under seal.

Persons distraining without having received an authority so to do.

3. BY WHOM A DISTRESS CAN BE TAKEN.

A distress for rent may be made either by the person to whom it is due, or by his bailiff, that is, an agent authorised by him to make the distress. If made by the person himself to whom the rent is due, whether he be the lord distraining for a rent-service, or the grantee of a rent-charge, or the lessor distraining for rent reserved on lease, for making the distress no particular form is required.

If the distress be made by a bailiff, he should be properly authorised to make it; for which purpose the landlord should give him a written authority, or, as it is usually termed, a warrant of distress.

Neither the warrant of distress, nor indeed any other of the proceedings in making a distress, require a stamp, or to be under seal, although made by a corporation aggregate (7); but the warrant must be signed by the person entitled to the rent, under whom the bailiff may afterwards justify or make cognisance for the distress in the replevin: and in the case of a joint distress, as by coparceners, the warrant must be signed by all the persons entitled to distrain.

If, however, a person distrain as bailiff to another, the distress will be good, although he did so without authority, provided the act be subsequently adopted by the party on whose behalf the distress was made; but if

(1) *Whitehead v. Taylor*, 10 A. & E. 210.

(2) *Keane v. Dee*, Alcock & Napier (Irish), 496.

(3) *Ante*, 1317, 1318.

(4) *Burt v. Moore*, 5 T. R. 329.

(5) *Churchill v. Evans*, 1 Taunt. 529.

(6) *Ibid.*

(7) *Anon.* 1 Salk. 191.

in the first instance he make the distress in his own name, he cannot afterwards protect his unlawful act, by declaring that he did so, as bailiff or agent. (1)

BY WHOM A
DISTRESS CAN
BE TAKEN.

If in replevin against a broker, it be proved, that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. (2)

Where the bailiff is provided with the requisite authority, he may proceed to make the distress in the same manner as if he were the landlord, only expressing that he makes the distress as the bailiff of the landlord for rent due to him, and by virtue of an authority given to himself by the landlord for that purpose. For if the bailiff be required to shew the cause for making the distress, he ought to do it; but if not required so to do, he may distrain generally. (3)

Mode in taking
distress, when
bailiff author-
ised.

4. TIME AT WHICH A DISTRESS MAY BE MADE.

As a distress for things damage feasant must be made whilst they are doing damage, the law allows the distress to be made in the night, or in fact, whenever they are so found on the land, for otherwise the cattle may escape. (4)

TIME AT WHICH
A DISTRESS MAY
BE MADE.

Distress for
damage feasant
may be made at
any time.

In order to give the tenant an opportunity of preventing a distress by a tender of the rent, a distress cannot be made in the night time, that is, between sunset and sunrise, either for a rent-service, or a rent-charge. (5)

Distress for any
species of rent
must be made
between sun-
rise and sun-
set.

By stat. 3 & 4 Will. 4. c. 27. s. 2., "after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

Stat. 3 & 4 Will.
4. c. 27. s. 2.

No land or rent
to be recovered
but within
twenty years
after the right
of action ac-
crued.

And by sect. 42., "after the said 31st day of December, 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee, or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be

Sect. 42.

No arrears of
rent or interest
to be recovered
for more than
six years.

(1) Godb. 109. 1 Saund. 347. (c.) n. 4.

(4) Co. Litt. 142. (a.)

(2) *Duncan v. Meikleham*, 3 C. & P. 172.

(5) Ibid. *Aldenburgh v. Peaple*, 6 C. & P. 212.

(3) *Buller's case*, 1 Leon. 50.

**TIME AT WHICH
A DISTRESS
MAY BE MADE.**

Time of distress with respect to the determination of the term.

Stat. 8 Anne, c. 14. ss. 6 & 7.

Rent in arrear upon a lease for life, &c. expired, may be distrained for, after the determination of the lease.

Distress to be within six months after the end of the lease, and during the landlord's title and tenant's possession.

Rent not strictly payable until the last minute of the natural day.

When landlord enabled to distrain after the determination of his tenancy.

brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

At the common law, for rent reserved upon a lease, the lessor could not distrain after the determination of the term, for thereby the privity of estate was destroyed; and therefore, for rent due on the last day of the term, the lessor could not distrain, because the term was ended. (1)

As this was productive of great inconvenience, it was enacted by stat. 8 Anne, c. 14. ss. 6 & 7., "that it shall and may be lawful for any person or persons, having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined:" provided "that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

This statute is not confined to a tortious holding over, nor to a holding over of the whole of the premises; and therefore, where the tenant held over a part by consent, it was held, that the landlord might distrain upon that part for arrears of rent due for the whole. (2) It has also been held, that the possession of the tenant under this statute, is not limited to the personal possession of the tenant himself, but that the possession of his administratrix is equally within the act; and consequently, the landlord may within the period prescribed, distrain upon her for the arrears due before and since the death of the intestate. (3)

Rent is not strictly payable until the last minute of the natural day; a distress cannot be made before the next day, for, until that time, it is not absolutely due. (4)

Where rent was reserved quarterly, or half quarterly if required, and the landlord received the rent quarterly for a twelvemonth, it was held that he could not, without notice, distrain for a half quarter's rent. (5)

The period at which the rent may be considered as due, and a distress be made for it, depends upon the nature of the contract; and therefore, where, by the custom of the country, half a year's rent becomes due upon the tenant's entry on the land, a distress may be made for it immediately. (6)

The stat. 8 Anne, c. 14. s. 6., which enables a landlord to distrain after the determination of a tenancy, does not apply to cases where the tenancy is put an end to, by the tenant's wrongful disclaimer. (7)

A termor who lets to an under-tenant cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-

(1) Co. Litt. 47. (b) *Antè*, 1330.

(2) *Nuttall v. Staunton*, 4 B. & C. 51.

(3) *Braithwaite v. Cooksey*, 1 Hen. Black. 465.

(4) *Duppa v. Mayo*, 1 Saund. 287. Co. Litt. 47. (b.) Harg. n. 6.

(5) *Mallam v. Arden*, 10 Bing. 299.

(6) *Buckley v. Taylor*, 2 T. R. 600.

McLeish v. Tate, Cowp. 784.

(7) *Doe d. David v. Williams*, 7 C. & P.

tenant refuse to acknowledge him as landlord, or pay him under threat of distress, although the under-tenant still retains the possession. (1)

TIME AT WHICH
A DISTRESS
MAY BE MADE.

By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thresh out his corn and fodder his cattle, till the May-day after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises corn in the straw; in January, 1825, his landlord distrained a rick of corn on the premises: — It was held, that the distress was valid (2), Mr. Justice Parke observing, "This case is one of a continuing tenancy, and *Beavan v. Delahay* (3) is conclusive on the point under consideration. That decision was confirmed in *Boraston v. Green* (4), where Mr. Justice Bayley considered, such a custom a prolongation of the term during which the landlord might distrain for the off-going rent. The statute of Anne does not apply, because the term is continued by the custom of the country."

Prolongation of
tenancy, under
custom of the
country, during
which the
landlord can
distrain.

A parol agreement between landlord and tenant from year to year in October, to change the gale-days from 8th July and 8th January to 29th September and 25th March, entitles the landlord to distrain after 29th September for the rent accruing due between that day and the 8th July preceding. (5)

Parol agree-
ment, changing
the gale-days.

5. PLACE AT WHICH A DISTRESS SHOULD BE MADE.

The king's highway was, by the common law, considered as a place privileged from distress; and the statute of Marlebridge, in affirmance of the common law, enacted that no man should, for any manner of cause, take distresses out of his fee, nor in the king's highway, or common street, but only the king, or his officers having authority to do the same.

PLACE AT
WHICH A DIS-
TRESS SHOULD
BE MADE.

By stat. Marle-
bridge, king's
highway pri-
vileged from
arrest.

The principle, established by the common law and the statute of Marlebridge, is, that the distress shall follow the rent; and, consequently, be confined to the land out of which it issues. Therefore, if two pieces of land be let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them, for this would be to make the rent of one issue out of the other (6); but where lands lying in different counties are let together by one demise at an entire rent, and it does not appear that the lands are separate from each other, it shall be intended they are contiguous, and one distress may be made for the whole rent. (7)

The distress
must follow the
rent, and be
confined to the
land out of
which it issues.

Where a rent is charged upon land, which is afterwards held by several tenants, the grantee may distrain for the whole upon the land of any one of them, because the entire rent issues out of every part of the land. (8)

(1) *Burne v. Richardson*, 4 Taunt. 720.

(5) *Purcell v. Nowlan*, 1 Smythe (Irish),

(2) *Knight v. Bennett*, 3 Bing. 364. 11 53.

Moore, 227.

(6) *Rogers v. Birkmere*, C. T. H. 245.

(3) 1 Hen. Black. 5., vide etiam *Lewis v. Harris*, ibid. 7. n.

Str. 1040.

(4) 16 East, 71.

(7) *Walter v. Rumbal*, 1 Ld. Raym. 55.
12 Mod. 76.

(8) 1 Rol. Abr. Distres (M.), 671.

**PLACE AT
WHICH A DIS-
TRESS SHOULD
BE MADE.**

Upon any part
out of which
the rent issues
a distress may
be made.

Pursuing dis-
tress.

Distress cannot
be made for
rent issuing
out of land,
enjoyed as a
mere easement
or privilege.

But if a man, seised of an advowson, make a lease thereof rendering rent, or if he demise a manor to which an advowson is appendant, yet he cannot distrain upon the glebe; for, in this case, the rent issues out of the advowson, or out of the manor, but not out of the glebe, in which the lessor had no estate. (1)

Upon any part of the land out of which the rent issues a distress may be made, either for a rent-service or a rent-charge (2); and if there be a house on the land, a distress may be made in the house; if the outer door be open, an inner door may be broken open, for the purpose of taking a distress. (3)

If the landlord enter upon the premises to distrain, and he has a view of the cattle or other chattels thereon, and the tenant remove them to prevent a distress, the landlord may follow and distrain them out of the premises; but if the beasts go off the land of themselves, before they are seen by the landlord, he cannot distrain them afterwards (4); and it is said, if the owner drive beasts damage feasant out of the soil, even with a view to evade a distress, they cannot be distrained, because the beasts must be damage feasant at the time of the distress.

In *Buszard v. Capel* (5) it was stated in a special verdict that, by an indenture, the defendant demised to the plaintiff a wharf with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that the exclusive use of the land of the river opposite to and in front of the wharf, between high and low water-mark, was demised as appurtenant to the wharf, but that the land itself was not demised:—It was held, that the meaning of this finding was, either that the land was demised as appurtenant to another piece of land, viz. to the wharf; or that the use and enjoyment of the land passed as appurtenant; consequently, no distress could be made of barges lying on such land, taking the finding of the jury either way. “If,” said Lord Tenterden, “the meaning of the finding of the jury be, that the land itself was demised as appurtenant to the wharf, that would be a finding, that one piece of land was appurtenant to another, which, in point of law, cannot be; if the meaning be, that the use and enjoyment of this land passed as appurtenant, that would be a mere privilege or easement, and the rent would not issue out of that; the landlord, therefore, could not distrain there for rent issuing out of the land in respect of which the easement or privilege had its existence.”

6. FRAUDULENT REMOVAL.

**FRAUDULENT
REMOVAL.**
Stat. 11 Geo. 2.
c. 19. s. 1.

By stat. 11 Geo. 2. c. 19. s. 1., “in case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof, any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises,

(1) 1 Rol. Abr. Distres (M.), 671.

(2) Com. Dig. Debt (A. 3.).

(3) *Anon.* Comb. 17. *Browning v. Dann*, & J. 344.
R. T. H. 168.

(4) Co. Litt. 161. (a.)

(5) 8 B. & C. 141. 6 Bing. 150. 3 Y.

his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or any person or persons by him, her, or them, for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent, and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises for such arrears of rent, any law, custom, or usage to the contrary in any wise notwithstanding."

FRAUDULENT REMOVAL.

Landlords may distrain and sell goods fraudulently carried off the premises within thirty days.

By s. 2., "no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bond fide*, and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid, any thing herein contained to the contrary notwithstanding."

Sect. 2.

Unless sold to any person not privy to the fraud.

By s. 3., "if any tenant or lessee shall fraudulently remove and convey away his or her goods and chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid, to be recovered by action of debt in any of his majesty's courts of record at Westminster, or in the courts of session in the counties palatine of Chester, Lancaster, or Durham respectively, or in the courts of grand sessions in Wales, wherein no essoin, protection, or wager of law shall be allowed, or more than one imparlance."

Sect. 3.

Penalty on such fraud, or assisting thereto.

By s. 4., "where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estate such goods or chattels were removed, his, her, or their bailiff, servant, or agent, in his, her, or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding, or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed, who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called quakers, upon affirmation required by law, and in a summary way determine, whether such person or persons be guilty of the offence, with which he or they are charged, and to inquire in like manner of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and, upon full proof of the offence, by order under their hands and seals, the said justices of the peace may and shall ad-

Sect. 4.

If the goods exceed not the value of 50*l.*, landlords to have recourse to two justices.

**FRAUDULENT
REMOVAL.**

judge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant, or agent, at such time, as the said justices shall appoint; and in case the offender or offenders having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress, may commit the offender or offenders to the house of correction, there to be kept to hard labour without bail or main-prize for the space of six months, unless the money so ordered to be paid as aforesaid, shall be sooner satisfied."

Sect. 5.

Appeal to quarter session.

Sect. 7.

Landlords may break open houses to seize goods fraudulently secured therein.

S. 5. gives an appeal to the quarter sessions.

By s. 7., "where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered to take and seize, as a distress for rent, such goods and chattels (first calling to his, her, or their assistance the constable, headborough, borsholder, or other peace-officer of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect, that such goods and chattels are therein, in the daytime, to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place."

The proceedings in distress, after the actual distrainer, are, in the case of a fraudulent removal, the same as in ordinary cases.

It is a question for the jury, whether a removal was fraudulent.

Cases to which stat. 11 Geo. 2. c. 19. applies.

It seems to be a question for the jury, whether a removal was fraudulent within the foregoing statute, although it be admitted at the trial by the tenant, that the removal was to avoid a distress. (1)

Stat. 11 Geo. 2. c. 19. applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods:—It was held, that, although the removal might not be clandestine, yet, if it was fraudulent (which was a question for the jury), the landlord was justified under the statute. (2)

Causing a difficulty in finding cattle.

It is not necessary under the statute to shew, in proof of concealment of cattle, that they were withdrawn from sight; if they have been removed to

(1) *John v. Jenkins*, 1 C. & M. 227. 3 (2) *Opperman v. Smith*, 4 D. & R. 33. Tyrw. 170.

a neighbour's field, so as to cause difficulty to the landlord in finding them, them, it is sufficient. (1)

A colourable possession by a servant of the tenant, will not deprive the landlord of his remedy on the statute. (2)

In an action on the statute against a tenant for fraudulently removing his goods from off premises to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal was with his privity (3); and it seems to be immaterial, whether the removal took place by night, or with any particular concealment. (4)

The mere removal of goods by the tenant from premises demised, when rent is in arrear, is not, of itself, fraudulent as against the landlord: to justify the landlord in pursuing them, he must shew that they were removed with a view to elude a distress (5); and there must be some evidence to shew that the removal was fraudulent, with intent to elude a distress, and also that sufficient was not left upon the demised premises to satisfy the landlord's claim. (6)

A creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a *bona fide* debt, without incurring the penalty against persons assisting a tenant in removing his goods from the premises, although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain. (7)

The statute applies to the goods of the tenant only, and not to those of a stranger; therefore, a plea justifying the following goods off the premises, and distraining them for rent in arrear, must shew that they were the tenant's goods. (8)

The right of the landlord under stat. 11 Geo. 2. c. 19. s. 1. to follow the tenant's goods in the case of a fraudulent and clandestine removal, does not attach, unless the rent has actually become due before the removal of the goods. (9)

Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there:—It was held, that they thereby became tenants to the lessor, and the cows being removed on the 10th to avoid a distress for arrears of rent, that he had a right to follow and distrain them under stat. 11 Geo. 2. c. 19. (10)

In trespass for taking goods under a distress for rent, if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded specially, as the statute 11 Geo. 2. c. 19. s. 21. does not apply to such a case (11), and cannot be given in evidence under the general issue. (12)

FRAUDULENT REMOVAL.

Colourable possession by a servant.

Not necessary to shew an actual participation in the removal by the tenant.

Goods must be removed with a view to elude the distress.

Creditor may remove goods from premises to satisfy a *bona fide* debt.

Statute applies to the goods of a tenant, not to those of a stranger.

Right of landlord does not attach unless the rent has actually become due.

Where the defence is a clandestine removal, it must be specially pleaded.

(1) *Stanley v. Wharton*, 9 Price, 301.

(2) *Exp. Pilton*, 1 B. & A. 369.

(3) *Lyster v. Brown*, 3 D. & R. 501. 1 C. & P. 121.

(4) *Ibid.*

(5) *Parry v. Duncan*, 7 Bing. 243. 5 M. & P. 19. M. & M. 533.

(6) *Ibid.*

(7) *Bach v. Meats*, 5 M. & S. 200.

(8) *Thornton v. Adams*, *ibid.* 38. *Postman v. Harrell*, 6 C. & P. 225.

(9) *Rand v. Vaughan*, 1 Bing. N. C. 767. *Watson v. Main*, 3 Esp. N.P.C. 15. *Furneaux v. Fotherby*, 4 Camp. 136. *Northfield v. Nightingale*, Woodfall by Harrison, 327.

(10) *Welch v. Myers*, 4 Camp. 368.

(11) *Postman v. Harrell*, 6 C. & P. 225.

(12) *Vaughan v. Davis*, 1 Esp. N.P.C. 257. *Furneaux v. Fotherby*, 4 Camp. 136.

FRAUDULENT REMOVAL.

Averment of the presence of a constable.

Acts and orders of tenant are admissible evidence of his own fraud.

Landlord, in an action against a stranger for assisting a tenant in a fraudulent removal, must bring his case within the first section.

Judgment of Mr. Justice Bayley in *Brooke v. Noakes*.

Jurisdiction of the superior courts not ousted by the inferior courts.

A plea under stat 11 Geo. 2. c. 19. s. 7. justifying the breaking open a lock to distrain cattle, which have been fraudulently removed to elude a distress for rent, must aver that a constable was present, when the lock was broken. (1)

In an action upon stat. 11 Geo. 2. c. 19. s. 3. against a defendant for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to its facility; and circumstances of suspicion may be laid before the jury to prove such a fraudulent co-operation as the legislature contemplated. (2)

It is not necessary to support such an action, that it should be proved that a distress was in progress, or about to be in execution, or even contemplated. It is enough, if the rent be shewn to be in arrear, and that the goods have been removed afterwards. (3)

In an action founded on the statute against a party for aiding and assisting a tenant in the fraudulent removal of his goods, with intent to prevent the landlord distraining them, it is incumbent on the landlord not only to prove, that the defendant assisted the tenant in such fraudulent removal, but also, that he was privy to the fraudulent intent of the tenant. Thus, in *Brooke v. Noakes* (4) Mr. Justice Bayley said, "The stat. 11 Geo. 2. c. 9. s. 3. is remedial as well as penal. It is remedial so far as it enlarges the remedy which the landlord had against his tenant; but it is so far penal that the landlord, who seeks to visit a third party with the penal consequences of the act, must bring the case, by strict proof, within the words of the enacting clause. It ought to have been proved, therefore, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining. Now, here there was no evidence which ought to have satisfied the jury, that the defendant assisted in the removal of the cattle. If the fact were so, it might have been proved by Rickwood, but the plaintiff did not call him. But, independently of that, I think that the defendant ought not to be visited with the penal consequences of this act of parliament, unless it be distinctly shewn, that he was privy to the fraudulent intent, with which the tenant's cattle were removed."

An averment in a declaration on the stat. 11 Geo. 2. c. 19. s. 3. to recover double the value of goods removed, in order to prevent a distress, that a certain sum was due for rent before the goods were removed, need not be precisely proved as laid (5); and the notice of distress which alleged a different sum to be due was held immaterial. (6)

The fourth section of the statute, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50*l.*, does not take away the jurisdiction of the superior courts (7); the remedy given by that section being cumulative, and therefore the landlord may elect at his option, which course may be most convenient to himself. (8)

Though the goods be worth less than 50*l.*, the landlord is not confined

(1) *Rich v. Woolley*, 7 Bing. 651. 5 M. & P. 663.

(2) *Ibid.* *Stanley v. Wharton*, 10 Price, 138. 9 *ibid.* 301.

(3) *Ibid.*, et vide *Woodgate v. Knatchbull*, 2 T. R. 154.

(4) 8 B. & C. 537. 2 M. & R. 570.

(5) *Gwinnet v. Phillips*, 3 T. R. 643.

(6) *Ibid.*

(7) *Bromley v. Holden*, M. & M. 175.

(8) *Stanley v. Wharton*, 10 Price, 138. 9 *ibid.* 301. *Basten v. Carew*, 3 B. & C. 649.

to his remedy by application to two magistrates. (1) And the fact, that the landlord in the first instance made his complaint before the magistrates, will not preclude him from afterwards maintaining an action. (2)

FRAUDULENT
REMOVAL.

7. THE SEIZURE.

THE SEIZURE.

I. *Mode of taking the Distress.*

The distress can be made, as previously observed, either by the landlord or his agent. If the landlord himself distrain the property, he should go upon the premises demised, and take hold of some piece of furniture, or other personal chattel found therein, and say, "I take this table (or whatever else it may be) in the name of all the other goods on these premises, as a distress for the sum of £—— rent, due to me at —— day last."

MODE OF
TAKING THE
DISTRESS.

In fact, a very slight expression of the landlord's intention to distrain is sufficient to commence a distress. Thus, where the plaintiff was possessed of a lathe, which was in the shop of one S. The latter being indebted to his landlord (the defendant) for rent, and the plaintiff being about to remove the lathe (between six and seven o'clock in the morning), the defendant interposed, saying, that "he would not suffer that or any of the other things to go off the premises till his rent was paid," and then left the shop. The plaintiff, however, removed the lathe, and about twelve o'clock the same day the defendant sent a broker to the premises to distrain, and followed and brought back the lathe. The plaintiff thereupon sued him in trover: — It was held, that the distress being commenced by the landlord's saying in the morning, that he would not suffer the things to be removed until his rent was paid, and completed by the entry of the broker afterwards, the landlord had a right to take and bring back the lathe, which had been carried away in the meantime. (3)

What is a suf-
ficient seizure.

Where the landlord's agent walked round a demised wharf, left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold if not replevied, &c. He then went away, leaving no one in possession: — It was held an actual seizure, and that quitting the premises without leaving any person in possession was no abandonment as between landlord and tenant in an action for an excessive distress (4); but it seems, that it would be otherwise as against third persons. (5)

A landlord's broker went to the tenant's house and pressed for payment of rent alleged to be due, and 3*l.* 3*s.* for the expenses of the levy, but touched nothing and made no inventory. The tenant paid him the rent and expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress it was held, that the defendant could not say, that there had been no actual distress. (6)

Where a sheriff's officer executed a writ of *fi. fa.* by going to the house, and informing the debtor he came to levy on his goods, and laying

Where not such
a seizure by the
sheriff as to bar

(1) *Bromley v. Holden*, M. & M. 175.

(2) *Horsefall v. Davy*, 1 Stark. 169. Holt's N. P. C. 147.

(3) *Wood v. Nunn*, 2 M. & P. 27. 5 Bing. 10.

(4) *Swann v. Falmouth (Earl of)*, 2 M. & R. 534. 8 B. & C. 456.

(5) *Ibid.*

(6) *Hutchins v. Scott*, 2 M. & W. 809.

THE SEIZURE.

the rights of
the landlord
from distrain-
ing.

Forcible entry.

his hand on a table said, "I take this table," and then locked up his warrant in the table drawer, took the key and went away, without leaving any person in possession, and after the *fi. fa.* was returnable, the landlord distrained the goods for rent:—It was held, that the sheriff could not maintain trespass against him. (1)

The lessee cannot enter a house to distrain if the door be not open, nor even a barn (2), nor throw down any gate or inclosure to get at a distress. (3) But he may make an aperture in a partition belonging to himself and in his own occupation, and so enter the premises and distrain. Thus, it was held that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent. (4)

In a distress for rent, if the outer door be open, the distrainer may justify breaking open an inner door or lock, in order to find any goods which are distrainable. (5)

If a distress be once lawfully made, and the distrainer be afterwards forcibly expelled, he may it seems, with the assistance of a police officer, break open the outer door in order to renew the distress. (6)

Relinquish-
ment of dis-
tress.

Where a broker's man having taken possession of property under a distress for rent, after remaining two days left the house in a state of great excitement, bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission:—It was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them. (7)

Presence of a
police officer.

In making a distress for rent, circumstances may occur, which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shewn that his presence was rendered necessary either from threats of resistance, or the apprehension of violence, &c. (8)

It is not necessary that a party seizing goods fraudulently removed (under statute 11 Geo. 2. c. 19. s. 7.) should first call to his assistance an ordinary peace officer; it is sufficient, if he be assisted by a person appointed a special constable for the occasion. (9)

II. Where a second Distress may be taken.

WHERE A
SECOND DIS-
TRESS MAY BE
TAKEN.

By the common law, if there were sufficient property upon the premises, and the landlord neglected to take sufficient distress, he could not again resort to the tenant's property to make up any deficiency in the first dis-

(1) *Blades v. Arundale*, 1 M. & S. 711

(2) *Vln. Abr. Distress* (E. 2.).

(3) *Co. Litt.* 161. (a.)

(4) *Gould v. Bradstock*, 4 Taunt. 562.

(5) *Browning v. Dann*, Bull. N. P. 81. (c.)

(6) *Francombe v. Pinche*, Esp. N. P. 389.
Bradby by Adams, 95.

(7) *Russell v. Rider*, 6 C. & P. 416.

(8) *Skidmore v. Booth*, 6 C. & P. 777.

(9) *Cartwright v. Smith*, 1 M. & Rob. 284.

distress. (1) But by the statute 17 Car. 2. c. 7. s. 4. (2) it is enacted, that where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may distrain again for the said arrears.

THE SEIZURE.

Where rent is due upon several days, the taking of a distress on one day for the one day will be no bar to the taking of another on another day (3); nor does it matter whether the first distress be taken for the rent which last became due. (4) Where cattle, taken and impounded as a distress, die, without any fault or neglect in the distrainer, there he may lawfully take another distress (5); but not if the distress escape. (6)

Rent due upon several days.

Where cattle die, impounded as a distress, without fault of distrainee.

III. Things which can and cannot be distrained.

1. Generally.

THINGS WHICH CAN AND CANNOT BE DISTRAINED.

GENERALLY.

At common law, there are six sorts of things which are not distrainable: — 1. Things annexed to the freehold; 2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ; 3. Cocks or sheaves of corn; 4. Things in actual use; 5. Beasts of the plough and instruments of husbandry; 6. The instruments of a man's trade or profession.

The first four sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The last two were only exempt *sub modo*, that is, upon a supposition, that there was a sufficient distress besides.

2. Fixtures.

"Things annexed to the freehold, as furnaces, mill-stones, or chimney-pieces, cannot be distrained, because they cannot be taken away without doing injury to the freehold, which the law will not allow." (7) And this privilege extends to things which the tenant will not be allowed to remove from the premises, by reason of their being considered as annexed to the freehold, though they be not affixed to it; for even if a mill-stone be taken out of its proper place to be picked, it cannot be distrained, because such removal is of necessity, and it is still part of the mill; nor can a smith's anvil on which he works be distrained, though it be not fastened by nails, for it is accounted part of the forge. (8)

FIXTURES.

Mill-stone.

Smith's anvil.

A kiln cannot be distrained (9), and it is questionable whether machinery fixed by bolts to the floor of a factory can be distrained for rent. (10)

A kiln.

(1) *Anon.* F. Moore, 7. *Anon.* Cro. Eliz. 13. *Wallis v. Savill*, 2 Lutw. 1536.

(2) Extended to Wales and the counties palatine, 19 Car. 2. c. 5.

(3) *Anon.* F. Moore, 7.

(4) *Pamer v. Stabick*, 1 Sid. 44.

(5) *Anon.* Dyer, 280. (b.) pl. 14. *Vasper v. Eddowes*, 1 Ld. Raym. 720. 1 Salk. 248. Holt, 256. 11 Mod. 21. 12 *ibid.* 658.

(6) *Vasper v. Eddowes*, 1 Ld. Raym. 720.

(7) Co. Litt. 47. (b.) *Simpson v. Har- topp*, Willes, 512. *Winn v. Ingilby (Bart.)*, 5 B. & A. 625.

(8) Bro. Abr. Distress, pl. 23.

(9) *Niblet v. Smith*, 4 T. R. 504.

(10) *Duck v. Braddyll*, M'Clel. 217. 13 Price, 459.

THE SEIZURE.**Iron salt-pans.**

Distinction between a distress and an execution respecting fixtures.

Iron salt-pans placed on a frame of brick, and used in the boiling of salt; being parcel of such works, are fixtures. (1)

There is a distinction in this respect between a distress and an execution; for under the latter, fixtures, which would be removable by the defendant, as between him and his lessor, may be seized (2); and so may growing corn (3), though neither the tenant's fixtures, nor the growing corn, would at common law have been distrainable. (4)

3. Corn and growing Crops.**CORN AND GROWING CROPS.**

Stat. 2 Will. & M. c. 5. s. 3.

Under the principles of the common law, grain or flour could not be taken out of a sack, or hay from a barn, because the quantity taken could not be ascertained (5); nor corn in the sheaf, because the grain must be shed and scattered by removal, unless indeed it were found in a cart, in which it could be removed without further injury or loss; to remedy which defects, it was enacted by stat. 2 Will. & M. c. 5. s. 3., that sheaves or cocks of corn, or loose corn and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied or sold; but the same must not be removed to the damage of the owner from such place.

Standing crops cannot be distrained upon under a clause in an annuity deed, giving a power to enter and distrain for arrears in like manner as for arrears of rent. Thus, in *Miller v. Green (in error)* (6), where T. granted an annuity charged upon certain premises, with a power, in case the annuity should be in arrear, to enter upon the premises and distrain for the annuity, "and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might be detained, managed, sold, and disposed of, and as if the annuity were a rent reserved upon a lease:" — It was held, that growing crops could not be distrained under this power.

Stat. 11 Geo. 2. c. 19. s. 8.

Landlord may distrain stock or cattle on the premises for arrears of rent.

By stat. 11 Geo. 2. c. 19. s. 8., "every lessor or landlord, lessors or landlords, or his, her, or their steward, bailiff, receiver, or other person or persons empowered by him, her, or them, to take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants, feeding or depasturing upon any common, appendant or appurtenant, or any ways belonging to all or any part of the premises demised or holden, and also to take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estates so demised or holden, as a distress for arrears of rent, and the same to cut, gather, make, cure, carry; and lay up, when ripe, in the barns, or other proper place on the premises so demised or holden; and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn or proper place which such lessor or landlord, lessors or landlords, shall hire or otherwise procure for that purpose, and as near as

(1) *Mansfield (Earl of) v. Blackburne*, 6 Bing. N. C. 426.

(2) *Pool's case*, 1 Salk. 368. *Lawton v. Lawton*, 3 Atk. 13. *Storer v. Hunter*, 3 B. & C. 368.

(3) *Ibid.*

(4) 1 Smith's Leading Cases, 192.

(5) 1 Rol. Abr. Distres (H.), 667.

(6) 2 Tyrw. 1. 2 C. & J. 143. 8 Bing. 92. 1 M. & Sc. 199.

THE SEIZURE.

may be to the premises; and in convenient time to appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of, and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before."

By s. 9., "notice of the place where the goods and chattels so distrained shall be lodged or deposited, shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessee or tenant, or left at the last place of his or her abode; and that if after any distress for arrears of rent so taken, of corn, grass, hops, roots, fruits, pulse, or other product which shall be growing as aforesaid, and at any time before the same shall be ripe and cut, cured, or gathered, the tenant or lessee, his or her executors, administrators, or assigns, shall pay, or cause to be paid to the lessor or landlord, lessors or landlords for whom such distress shall be taken, or to the steward or other person usually employed to receive the rent of such lessor or lessors, landlord or landlords, the whole rent which shall then be in arrear, together with the full costs and charges of making such distress, and which shall have been occasioned thereby, that then, and upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease; and the corn, grass, hops, roots, fruits, pulse, or other product so distrained, shall be delivered up to the lessee or tenant, his or her executors, administrators, or assigns, any thing hereinbefore contained to the contrary notwithstanding."

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Tenants to have notice of the place where the distress is lodged.

Distress of corn, &c. to cease, if rent be paid before it be cut.

The words, "other product," apply only to other product of a nature similar to the things specified, that is to say, product to which the process of ripening, and being cut, gathered, made, and laid up when ripe is incidental.

Definition of the words, "other product."

Therefore trees, shrubs, and plants growing in a nurseryman's ground, and removable by the tenant from time to time, are not distrainable for rent, under stat. 11 Geo. 2. c. 19. s. 8. (1)

By stat. 56 Geo. 3. c. 50. s. 6., "in all cases where any purchaser or purchasers of any crop or produce hereinbefore mentioned shall have entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof, which, at the time of such sale and the execution of such agreement entered into under the provisions of this act, shall have been severed from the soil, and sold, subject to such agreement, by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of this act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person or persons shall employ, keep, or use on such lands, for the purpose of thrashing out, carrying or consuming any such corn, hay, straw, turnips, or other produce, under the provisions of the act, and the agreement or agreements directed

Stat. 56 Geo. 3. c. 50. s. 6.

Landlords not to distrain for rent on purchasers of crops severed from the soil, or other things sold subject to agreement.

(1) *Clark v. Calvert*, 3 Moore, 96. *Clark v. Gaskarth*, 2 ibid. 491. 8 Taunt. 431.

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Sect. 7.

Sheriff not to sell clover, &c. growing with corn.

Sect. 8.

Proviso for contracts.

Crops remaining on premises, after having been taken in execution.

to be entered into between the sheriff or other officer, and the purchaser or purchasers of such crops and produce, as hereinbefore are mentioned."

S. 7. enacts, "that no sheriff or other officer shall by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown, or be growing under any crop of standing corn."

But it has been provided by s. 8., "that this statute shall not extend to any straw, turnips, or other articles, which the tenant may remove from the farm consistently with some contract in writing."

A tenant's growing crops, taken in execution and sold, and remaining on the premises a reasonable time for the purpose of being reaped, are not distrainable by the landlord for rent become due after the taking in execution. (1)

And where such crops having been so taken, sold, and left on the premises, and the arrears of rent paid, pursuant to stat. 8 Anne, c. 14. s. 1., the landlord cannot distrain them for rent subsequently due, on the ground, that the purchaser has not entered into the agreement with the sheriff, to use and expend the produce in a proper manner, directed by stat. 56 Geo. 3. c. 50. s. 3.; nor is he entitled to presume, from the absence of such agreement, that the straw of such crops was sold for the purpose of being carried off the land, contrary to the first section of such statute. (2)

Where a landlord seized and sold under a distress for rent growing crops, which were afterwards taken away by the purchaser, and it appeared that they were sold for the full value which they would have fetched, if sold at the proper time, and the rent proved to be due exceeded the amount for which the crops sold: — It was held, in trover by the tenant, that he was entitled to nominal damages only. (3)

THINGS DELIVERED IN THE WAY OF TRADE.

Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

Farriers.

Weavers.

Tailors.

Carcass of a beast in the custody of a butcher.

Definition of the words

"public trade."

IV. *Things delivered in the Way of Trade.*

In *Simpson v. Hartopp* (4) Chief Justice Willes said, "Things sent or delivered to a person exercising a trade, to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on, if such things under these circumstances, could be distrained for rent due from the person in whose custody they are."

The carcass of a beast in the custody of a butcher, sent to him for the purpose of being slaughtered for the sender, is privileged from distress. (5) Notwithstanding the sender be also a butcher. (6)

In the foregoing case it was contended, that in order to protect the property from distress, it was requisite that the trade should be public, and that taking in the cattle of others to slaughter must be essential to it, and that the trade of a butcher was not *public* in the sense of the words which

(1) *Gwilliam v. Barker*, 1 Price, 274.

(2) *Wright v. Dewes*, 1 A. & E. 641.

(3) *Proudlove v. Twemlow*, 1 C. & M. 326.

(4) Willes, 512.

(5) *Brown v. Shevill*, 2 A. & E. 138. 4 N. & M. 277.

(6) *Ibid.*

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the excepted rule of privilege from distress requires; upon which Lord Denman observed, "Observations have been made on the word *public*, which occurs in *Gisbourn v. Hurst* (1); but we must not insist upon this word so strictly as to hold, that it comprehends only such trades as are commonly called public, like those of an innkeeper or a weaver."

Goods carried to be weighed at a private beam.

Public fair.

Cattle depasturing on their way to market.

Goods carried to be weighed, even at a private beam, if in the way of trade, or a horse that has carried corn to a mill to be ground, and during the grinding of the corn is tied to the mill door, are privileged from distress for rent. Goods in a public fair cannot be distrained, unless it be for toll due from their owner (2); nor a horse which carries corn to a market, and is placed for a time in a private yard. (3) It has been held, that if cattle be put to stand or depasture in a place on their way to the market, but *remote* from it, they may be distrained by the landlord for his rent, although he had notice of their being there, and consented to it; for such parol license is no waiver of the right of distress without an express agreement to that effect. (4) But if such consent be deceitfully given for the purpose of obtaining a distress, equity will relieve upon the ground of fraud. (5)

Auction mart.

Goods deposited upon the premises of an auctioneer for the purposes of sale, are privileged from being distrained for the rent of those premises (6), because, it is *interest reipublicæ* to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. This privilege is, therefore, of great importance to the seller of goods, who should not be exposed to the risk of losing them from the default of the parties, on whose premises they may be deposited for that purpose; besides which, the exemption from liability to distress in a case of this sort occasions no hardship, as the privilege is generally applicable to goods, which no man could possibly suppose to be the property of the individual from whom the rent is due.

Common carrier.

Bailee.

Factor.

Goods are privileged from distress while in the hands of a common carrier; and even a private person undertaking to carry them for hire is, *pro hac vice*, considered as a carrier, and the goods are protected while they remain in his possession. (7) Goods landed at a wharf, and deposited in a warehouse there (8), cannot be distrained for the rent of the warehouse; and it is immaterial, whether they are deposited by the principal or his factor. (9) Neither can goods of the principal in the hands of his factor be distrained by the landlord for the rent of the factor's premises. (10)

Corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it were deposited in a warehouse belonging to the factor himself. (11)

Cattle belonging to a drover.

Cattle belonging to a drover on their way to market for the purpose of being sold there, and put to graze for the night, immediately before the

(1) 1 Salk. 249.

(2) *Osbuston v. James*, 2 Lutw. 1380.

(3) *Rede v. Burley*, Cro. Eliz. 596.

(4) *Fowkes v. Joyce*, 3 Lev. 260. 2 Lutw. 1161. 2 Vern. 131., sed vide *Nugent v. Kirwan*, post, 1346. 1350, n. (2.)

(5) *Ibid.*

(6) *Adams v. Grane*, 1 C. & M. 380. 3 Tyrw. 326.

(7) *Gisbourn v. Hurst*, 1 Salk. 249.

(8) *Francis v. Wyatt*, 3 Burr. 1502.

(9) *Thompson v. Mashiter*, 1 Bing. 283.

(10) *Gilman v. Elton*, 3 B. & B. 75.

(11) *Matthias v. Mesnard*, 2 C. & P. 353.

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on their way to market.

Judgment of Mr. Justice Burton in *Nugent v. Kirwan*.

morning on which the market is to be held, are privileged from distress by the landlord of the *locus in quo* for rent due out of that place. Thus, Mr. Justice Burton in *Nugent v. Kirwan* (1) observed, "The whole authorities taken together, and now subsisting on the subject, amount, as it appears to me, to the establishment of this proposition, viz. that cattle, in their transmission to a public market for the purpose of sale there, are to be protected from distress on the same principle that goods transmitted for manufacture or other purposes of trade are so protected, and thus falling within the reason of *Read v. Burley* (2) and *Gisbourn v. Hurst*." (3)

Guest at an inn.

Chariot standing in the coach-house of a livery-stable-keeper.

Although the goods of a guest at a public inn are privileged from distress because such a place is *publici juris*, and all men have a right to use it without molestation (4); yet this exemption does not extend to the case of a chariot standing in the coach-house of a livery-stable-keeper, for that is not a common inn, and the hire of its standing may be considered as part of the profits of the premises. (5) The goods to be exempted from distress must also be within the very precincts of the inn, and not on other premises at a distance belonging to it. (6) And even within the inn itself, the exemption does not extend to the goods of a person dwelling therein as a tenant, rather than a guest. (7)

Implements of trade.

An implement of trade, *e. g.* a threshing machine, not a fixture, is liable to a distress for rent, unless in actual use at the time, or, if there be no other sufficient distress upon the premises. (8)

Thus, where the plaintiff let to one J. S. a threshing machine; who on Saturday afternoon ceased working it, and the plaintiff having a considerable distance to convey it home, it was left on the premises of J. S. till the following Monday morning, when it was distrained by the landlord for rent:— It was held, that in the absence of proof of sufficient distress *aliunde*, the machine was well taken. (9)

Judgment of Lord Lyndhurst in *Wood v. Clarke*.

In *Wood v. Clarke* (10) it was held, that materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due from the weaver to his landlord; but a frame or other machinery delivered by the manufacturer to the weaver, together with the materials for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due, Lord Lyndhurst observing, "This case does not turn upon the privilege of a workman in respect of the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman, not only with the materials upon which he was to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege, whether it is confined to the materials which he sup-

(1) 1 Jebb & Symes (Irish), 97.

(2) Cro. Eliz. 549.

(3) 1 Salk. 249. In stating facts to bring a case within this privilege, a pleading which shews the stoppage to have been, not an abuse, but a fair and reasonable use of the privilege, without shewing the stoppage to have been absolutely necessary, is good upon general demurrer. *Nugent v. Kirwan*, 1 Jebb & Symes (Irish), 97.

(4) *Robinson v. Walter*, 3 Bulst. 269.

(5) *Francis v. Wyatt*, 3 Burr. 1498. 1 W. Black, 483.

(6) *Crosier v. Tomlinson*, Barnes, 472. cit. 3 Burr. 1500.

(7) *Francis v. Wyatt*, 1 W. Black, 484.

(8) *Fenton v. Logan*, 3 M. & Sc. 82. 9 Bing. 676.

(9) Ibid.

(10) 1 C. & J. 484., *et vide* 1 Tyrw. 315.

plies, or extends also to the machinery by which the working up is effected. It appears to me that it is confined to the materials, and does not include the machinery. The instances put in the books, as to this head of privilege, apply to the materials only, and not to the machinery. Coke upon Littleton (1), in enumerating the things which are exempt, mentions (amongst others) materials in a weaver's shop, for the making of cloth, but is wholly silent as to the machinery by which the cloth is to be made. It cannot be said that, under the term *materials*, machinery would be included." "None of the cases go beyond this, that the material to be worked upon is privileged, that the conveyance by which it is carried to and from the place of manufacture is privileged, that it is privileged in the hands of a carrier whilst he is carrying it, in the hands of a factor to whom it is consigned, and in the hands and warehouse of a wharfinger where it is lodged and deposited by the factor. There is no case or *dictum*, that the machinery by which it is to be manufactured is included in the privilege. The only colour for including it, seems to arise from the use of the word *managed* in *Gisbourn v. Hurst* (2); but that appears to apply only to the management of the material in its original or wrought state, and to the machinery or engine by which it is wrought. The case of *Gorton v. Falkner* (3) comes so near to the present, and differs from it by such minute points of distinction, that it is a strong authority to shew, that the privilege is confined to the material, and that it has been the common understanding that it did not extend under any circumstances to the machinery. It might have been said in *Simpson v. Hartopp* (4), that it was for the benefit of trade and commerce that the owner of a loom, who let it to a workman, should have the privilege of having it protected from distress; and, as that action was brought by the owner of the loom, it is probable that this privilege would have been insisted on, had it been thought tenable. That case is important, because it shews an inclination, at that distance of time, to clothe the machinery with a general and unqualified protection; and yet, from that period to the present, it is singular, that the mode pursued in this case, so obvious and simple if available, should never have been adopted. *Gorton v. Falkner* improved upon the attempt made in *Simpson v. Hartopp*. The loom was *lent* not *let*; it was not lent for any definite time, so that the owner might resume it when he thought proper, and it was only to be used for the owner. The sole difference between that case and the present is, that the loan in that case was general, and not for a particular transaction, and that it is not there expressly stated, that the owner of the loom was to find materials. But neither of these circumstances appears to us to make any material distinction." "Although this may also be the case where the privilege is clear and its extent ascertained, we think it not an immaterial consideration, when the extent of the privilege is the point to be determined. We are therefore of opinion, that the privilege from distress for rent does not extend to the machinery of the employer, because there is no decision and no *dictum* that such a privilege exists; because it is not necessary for the protection of trade that it should exist (upon principle, it would equally extend to any machinery lent, though not lent by the

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hurst in *Wood*
v. Clarke.

(1) 47. (a.)
(2) 1 Salk. 249.

(3) 4 T. R. 565.
(4) Willes, 512.

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employer, and to which it has been decided that it does not extend); and because the whole premises out of which the rent issued might be inclusively occupied and entirely filled by the machinery for which the privilege is claimed."

Goods of a stranger when not privileged.

Judgment of Lord Denman in *Muspratt v. Gregory*.

In *Muspratt v. Gregory* (1) it appeared, that salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchaser, which came for the purpose of being loaded with it, into a cut or canal on the premises, communicating with a public navigation. The boat of the plaintiff, an alkali manufacturer, was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture:—It was held, on error, that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt; Lord Denman observing, "The acknowledged head of exemption, which approaches nearest to the present case, is the second of those specified by Lord Chief Justice Willes in the case of *Simpson v. Hartopp* (2), viz. things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or business. Such are the cases of goods delivered to tradesmen, artificers, carriers, factors, wharfingers, auctioneers, carcass-butchers, and the like. Now, admitting that the business of the salt works carried on by the tenant of the land, was a public trade within the meaning of the second example mentioned by the Lord Chief Justice Willes, being open to the dealings of all persons indiscriminately, it is to be observed, in the first place, that the plaintiff's boat was not delivered to a person exercising that business. It was never placed under his charge or in his custody, but was left by the owner, for his own convenience, in the place where it was distrained; nor was it brought or left there for the purpose of being taken care of, managed, or in any way dealt with, or, so far as appears, of being loaded, by the tenant of the land. The case, therefore, is not analogous to the example."

"Being unable to find any acknowledged class of exemptions under which the present case can be ranged, or to which it can, by fair analogy, be compared, we think that the privilege contended for ought not to be allowed, and that the judgment of the court of Exchequer ought to be affirmed."

V. *Things in actual Use.*

THINGS IN ACTUAL USE.

Things in actual use, as a horse upon which a man is riding, or an axe in the hands of a man who is cutting wood, and the like, are privileged from distress, in order to prevent a breach of the peace which might be occasioned by an attempt to distrain them. (3)

Stocking loom.

In trover for a stocking loom which had been distrained for rent, where it appeared that an apprentice was using the loom at the time it was taken, the court held, it could not legally be taken while the apprentice was using it (4), unless there was not sufficient distress besides.

(1) 3 M. & W. 677.

(2) Willes, 512.

(3) 1 Inst. 47. (a.) *Simpson v. Hartopp*,

Willes, 514. *Storey v. Robinson*, 6 T. R. 138.

1 Smith's Leading Cases, 193.

(4) *Watts v. Davies*, Selw. N. P. 666.

But though wearing apparel, if in actual use, cannot be distrained, yet if it be not in use it may be distrained, even though it be only taken off for natural repose. (1)

A horse cannot be distrained damage feasant if there be a rider upon him. (2) But a horse may be distrained damage feasant, although a person may be leading him at the time. (3)

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Wearing apparel.

Horse cannot be distrained damage feasant if there be a rider on him.

VI. *Beasts of the Plough, and Instruments of Husbandry, or of a Man's Trade or Profession.*

BEASTS OF THE PLOUGH, AND INSTRUMENTS OF HUSBANDRY, OR OF A MAN'S TRADE OR PROFESSION.

In *Simpson v. Hartopp* (4) Chief Justice Willes states, "Beasts of the plough, &c. were not distrainable in favour of husbandry, which is of so great advantage to the nation; and likewise, because a man should not be left quite destitute of getting a living for himself and his family." And the same reasons hold in the case of the instruments of a man's trade or profession.

"But these two last are privileged in case there is distress enough besides; otherwise they may be distrained." (5)

Beasts of the plough can be distrained for poor rates, though there are other distrainable goods on the premises, more than sufficient to answer the value of the demand. (6)

Beasts of the plough, can be distrained for poor rates.

This decision proceeded on the analogy between such a distress and an execution. It must further be observed, with respect to things privileged *sub modo*, that, even though there be a sufficient distress besides, yet if that distress consist of growing crops, which are only distrainable by statute, and are not immediately productive, the landlord is not bound to avail himself of it, but may distrain the things privileged *sub modo* (7): and possibly, as observed by Mr. Smith (8), the principle of this decision may hereafter be thought to extend to every case of a distress given by statute, but not liable to precisely the same rules of treatment as a distress at common law.

According to Sir Edward Coke, armour, wearing apparel, jewels, and household utensils, are likewise privileged as long as other property remains on the premises sufficient to satisfy the distress. (9)

Wearing apparel.

VII. *Cattle agisting.*

The beasts of a stranger, though in general liable to be taken if found upon the premises demised, are not distrainable where they have entered the lands under particular circumstances.

CATTLE AGISTING.

(1) *Bisset v. Caldwell*, Peake's N. P. C. 4 T. R. 565. *Piggott v. Birtles*, 1 M. & W. 50. *Baynes v. Smith*, 1 Esp. N. P. C. 206. n. 441.

(2) *Storey v. Robinson*, 6 T. R. 138.

(6) *Hutchins v. Chambers*, 1 Burr. 579.

(3) *Wagstaff v. Clack*, cit. Woodfall by Harrison, 313. 529.

(7) *Piggott v. Birtles*, 1 M. & W. 441.

(4) Willes, 512.

(8) 1 Smith's Leading Cases, 194.

(5) *Vide etiam* 1 Inst. 47. (a, b.) *Fenton* N. P. C. 206.

(9) 2 Inst. 132. *Baynes v. Smith*, 1 Esp.

v. Logan, 9 Bing. 676. *Gorton v. Falkner*,

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Cattle depasturing on their way to market.

When there are no sufficient fences, cattle cannot be distrained until they have been *levant* and *couchant*.

Cattle put by their owner or by his consent upon the land to agist, or for any other purpose, are immediately liable to be distrained (1), except where they are on their way to a market, and are turned in for the night for their necessary refreshment, with the privity of the lessor or the lessee, in which case it seems, that they are privileged for the public benefit. (2) Where the cattle of a stranger break through the fences, and enter the tenant's land, they are distrainable for the landlord's rent immediately (3): and so if the owner of the cattle be bound to repair his fences, and by his negligence in not repairing, his beasts escape into his neighbour's land. (4)

But where there are no sufficient fences to divide the stranger's from the tenant's lands, the lessee cannot distrain them for rent arrear, until they have been *levant* and *couchant* upon the tenant's land. (5) If the lessor or his tenant were bound to repair the fences, and their negligence enabled the stranger's cattle to escape and enter the land, the lessor shall not be permitted to distrain them, though they may have been *levant* and *couchant*, until actual notice have been given to the owner, and he, after reasonable time allowed him, have neglected to remove them. (6) And in all cases, if the owner make fresh pursuit, and endeavour to bring back his cattle, they are not distrainable. (7) Lastly, if the cattle are put upon the land by the consent or connivance of the lessor, and any fraud appear on his part, equity will relieve the owner; as where a lessor seeing sheep put upon his tenant's land, consented to their remaining there for one night, and next day distrained them. (8) And where a tenant in common with B. leases his share, the cattle of B. or any other person depasturing by his license cannot be taken by A. for rent due to his tenant. (9)

VIII. *Animals, Ferae Naturæ.*ANIMALS FERÆ
NATURÆ.

The thing taken must be the valuable property of some person; therefore, things in which a man can have no property are not liable to be taken in distress, as animals *feræ naturæ*; and according to Lord Coke, "dogs, ducks, does, coneys, and the like" (10): but it was observed by Lord Chief Justice Willes in *Davies v. Powell* (11), that the rule with respect to dogs was plainly too general; because it is clear a man may have a valuable property in a dog. And with respect to deer, it was in the same case expressly

(1) *Read v. Burley*, Cro. Eliz. 549.

(2) *Tate v. Glead*, C. B. H. T. 24 Geo. 3. cit. Comyn, L. & T. 337. 2 Saund. 290. n. 7., vide contra, *Fowkes v. Joyce*, 2 Vern. 131. 3 Lev. 260. 2 Lutw. 1161.

(3) Co. Litt. 47. (b.)

(4) *Gill v. Gawin*, 2 Rol. 124.

(5) *Kimp v. Cruwes*, 2 Lutw. 1577. 1530. *Lucie's case*, Palm. 43. *Jordan v. Martin*, 1 Mod. 63.

(6) *Kimp v. Cruwes*, 2 Lutw. 1580., vide contra, *Poole v. Longueville*, 2 Saund. 289. 2 Keb. 660. 729. 3 Salk. 166. But this case is much questioned by Saunders, and he shews the difference between a distress for service and by a lord of a seignory, or for arrears by the grantor of a rent-charge (neither of whom are bound to regard the state of the fences), and a distress for rent reserved upon

a lease by the landlord who is bound to see that the fences are repaired. *Vide etiam* Serjeant Williams's note upon this case, and *Anon. Dyer*, 317. (b.) Co. Litt. 47. (b.) n. 3. 1 Rol. Abr. Distress (I.) 668. &c.

(7) *Reynolds v. Okeley*, Hob. 265. Brownl. 170.

(8) *Fowkes v. Joyce*, 2 Vern. 129. Prec. Ch. 7. And upon this occasion the case of *Brodon v. Pierce* was cited, where, being twenty years' arrear of a rent-charge, and the cattle came by escape out of the next ground, and were distrained, Lord Nottingham relieved against the distress. 2 Vern. 131. Comyn, L. & T. 338. n.

(9) *Kempe v. Cory*, 2 Vent. 283.

(10) Co. Litt. 47. (a.)

(11) Willes, 48.

decided, that though deer in a chase or forest might fall within Lord Coke's rule of exemption, yet when they are kept in a park or inclosure as a matter of profit or value, they are no longer free from liability or distress. (1)

Birds kept in cages have been held to be the subject of a right of property, and therefore they may be distrained.

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IX. *Property belonging to the Ordnance, for Tithe Composition.*

PROPERTY BELONGING TO THE ORDNANCE, FOR TITHE COMPOSITION.

A distress for the arrears of tithe composition, cannot be made upon lands held by the officers of ordnance, for ordnance purposes, in trust for the crown. Thus, in *Meade v. Warburton* (2) Mr. Justice Jebb said, "Stat. 4 Geo. 4. c. 99. does not create any new ways or means, but puts tithes on the footing of rent, and empowers the incumbent to employ such ways and means as he might employ for the recovery of rent. Now it is plain, that we could not employ the means of distraining against the king for rent, to which the land in the king's possession might be liable; and as no greater power is given by the act as to composition for tithe, than that which already existed as to rent, it follows, that the incumbent has not this remedy against the king."

Distress for arrears of tithe composition cannot be made upon lands held by officers of the ordnance.

Judgment of Mr. Justice Jebb in *Meade v. Warburton*.

X. *Chattels in Execution.*

Those things cannot be distrained which are already in the custody of the law, because the distrainer cannot legally take them into his own possession, an interest in the goods being vested in third persons by the act of law, which cannot be divested unless by their own default.

CHATTELS IN EXECUTION.

The stat. 8 Anne, c. 14. has given the landlord, to a certain extent, a lien on his tenant's goods when taken in execution, the first section of that statute having enacted, that no goods, taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution unless the party at whose suit execution is sued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent, and if more, than the amount of one year's rent, due at the time of the execution. But by the eighth section the crown may levy, recover, or seize any debts, fines, penalties, or forfeitures, as if that act had not been made.

Stat. 8 Anne, c. 14. ss. 1 & 8.

In *Reed v. Thoyts* (3), which was an action on case against a sheriff, the first count was framed upon stat. 8 Anne, c. 14. s. 1. for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice; and stated, that defendant took the goods of T., the tenant of the plaintiff, under a *fiery facias* issued against T. at the suit of B. This was not traversed by the pleas, and no other execution appeared:—It was held, that the connection of the party, who was shewn to have seized the goods, with the defendant, sufficiently appeared, without producing any warrant from the defendant to that party. The second count was in trover for seizing the same goods.

(1) *Davies v. Powell*, Willes, 46. 7 Mod. 249. 3 Black. Com. 7. n.

(2) *Alcock & Napier* (Irish), 287. (3) 6 M. & W. 410.

THE SEIZURE.

The plaintiff put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due; the tenant having remained in possession as before; and the jury found the bill of sale fraudulent:—It was held, that although the bill of sale might still be valid against the plaintiff as a party to it, though void as to other creditors, the plaintiff was not prevented from recovering on the first count, that being distinct from the second.

Fictitious bill of sale.

If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before. (1)

Goods seized under an extent.

Where goods have been seized under an extent, the landlord has no claim upon them for his rent until the extent be satisfied; and it is immaterial whether it be an extent in chief, or an extent in aid, the latter being a prerogative process, and in effect operating for the benefit of the crown, although issued in aid of a subject. (2) Where, also, an extent is issued upon process of outlawry, the landlord is not entitled to the benefit of the statute, unless the outlawry be in a civil suit; in which case the *capias ultra-gatum* is to be considered only as a private execution, and within the provision of the statute. (3)

Property in goods not altered by the mere act of distraining.

As the property in goods is not altered by the mere act of distraining (4), the landlord will lose his remedy, if the goods are seized under an extent for the benefit of the crown (5) after distress and appraisement, but before actual sale.

Things distrained damage feasant cannot be taken for rent; nor can goods in a bailiff's hands under an execution; or goods taken under an attachment; or goods which have been sold under a writ of execution, but which are so circumstanced, as in the case of growing crops, that they cannot be removed from the premises. (6)

DISPOSAL OF A DISTRESS.**8. DISPOSAL OF A DISTRESS.****I. The Inventory.****THE INVENTORY.**

As the distress may be made on all, or only on a part of the tenant's goods, it is proper, that the distrainee should know what goods the landlord intends to comprise within the distress, that he may know what he will be obliged to replevy. For this purpose, as soon as the distress is made, whether by the landlord or his bailiff, an inventory of the goods distrained must be prepared, and a copy of the inventory with the notice communicated to the distrainee.

THE NOTICE.**II. The Notice.****Notice of taking distress need**

The notice of taking the distress is not required by the statute to be in writing; and therefore a parol notice may be given, either to the tenant of

(1) *Smith v. Russell*, 3 Taunt. 400.
 (2) *Rex v. De Caux*, 2 Price, 17.
 (3) *Rex v. Southerby*, Bunb. 5. *Greaves v. D'Acastro*, *ibid.* 194. *Rex v. Pritchard*, *ibid.* 269. *St. John's College v. Murcott*, 7 T. R. 259. *Bradby by Adams*, 81.

(4) *Rex v. Cotton*, Parker, 113. 133. *Thurston v. Mills*, 16 East, 254.
 (5) *Greaves v. D'Acastro*, Bunb. 194., vide *Rex v. Hodder*, 4 Price, 313.
 (6) *Woodfall by Harrison*, 320.

the premises, or the owner of the goods distrained (1); and although such notice is directed by stat. 2 Will. & M. sess. 1. c. 5. s. 2. to specify the cause of the taking, it is not material, whether it actually state the period of the rent's becoming due (2), or even whether the true cause of taking the goods be expressed therein, since a man may distrain for one cause, and justify for another. (3) If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the statute, at the chief mansion house, or other most notorious part of the premises charged with the rent.

DISPOSAL OF A
DISTRESS.

not be in writing.

Service of
notice.

III. *The Appraisement.*

THE APPRAISE-
MENT.

Stat. 2 Will. &
M. sess. 1. c. 5.
s. 2.

Goods dis-
trained for rent
may be ap-
praised and
sold.

By stat. 2 Will. & M. sess. 1. c. 5. s. 2., "where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff, according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers, (whom such sheriff, under-sheriff, or constable, are hereby empowered to swear) to appraise the same truly, according to the best of their understandings; and after such appraisement, shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use."

The stat. 13 Edw. 1. c. 37. (Westm. 2.), which enacts that no distress shall be taken except by bailiffs "sworn and known," does not apply for distresses taken for rent in arrear. (4)

Stat. 13 Edw. 1.
c. 37. does not
apply to dis-
tresses taken
for rent in ar-
rear.

Stat. 57 Geo. 3. c. 93., regulating the costs of distresses for rent not exceeding 20*l.*, has not repealed the provisions of stat. 2 Will. & M. sess. 1. c. 5., so as to make an appraisement by one broker sufficient upon such distress. Thus, in *Allen v. Flicker* (5) Lord Denman observed, "It is clear to me that the act of 2 Will. & M. c. 5. is in full force. The schedule of 57 Geo. 3. c. 93. probably refers to the case of the employment of a single appraiser by consent; but, at all events, it is too loosely worded to operate as a repeal of the former act."

NUMBER OF
APPRAISERS.
Stat. 57 Geo. 3.
c. 93. has not
repealed stat. 2
W. & M. sess. 1.
c. 5. making
an appraisement
by one broker
sufficient.

(1) *Walker v. Rumbald*, 12 Mod. 76.

(2) *Moss v. Gallimore*, Doug. 279.

(3) Godb. 109, 110. *Groenvelt v. Bur-*
well, 1 Ld. Raym. 454. 466. *Butler and*
Baker's case, 3 Co. 26.

(4) *Begbie v. Hayne*, 2 Bing. N. C. 124.

2 Scott, 193.

(5) 10 A. & E. 640. *Bishop v. Bryant*, 6
C. & P. 484., sed vide *Fletcher v. Saunders*,
ibid. 747.

DISPOSAL OF A
DISTRESS.

Swearing ap-
praisers.

c. 5. s. 1. must attend with the appraisers at the time of the appraisement, and must swear them before they make it (1); and the appraiser must be sworn before the constable of the parish where the distress is taken: the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted. (2)

It is illegal to swear the person who distrains as one of the appraisers (3); and a distress so appraised is irregular. (4)

The constable usually indorses a memorandum on the inventory, of his having sworn the appraisers, and which indorsement does not require an affidavit stamp. (5)

The appraisers having been sworn, proceed to write their appraisement on the inventory.

Stat. 55 Geo. 3.
c. 184. Amount
of stamp duty.

By stat. 55 Geo. 3. c. 184., the stamp to be affixed upon such appraisements of goods and chattels, where the amount of £ s. d. the valuation shall not exceed 50l., must be - - 0 2 6

And when it shall exceed 50l. and not exceed 100l. - 0 5 0

100 200 - 0 10 0

200 500 - 0 15 0

500 - - 1 0 0

Distress sold
without pre-
vious appraise-
ment.

Where a distress is sold without previous appraisement, the party distrained on, can only recover the value of the goods *minus* the amount of rent due; but he may recover special damage sustained by such an illegal sale. (6)

In case, for selling goods under a distress without appraisement, if the sum produced be less than the fair value to the tenant, he may recover the difference, without any allegation of special damage. (7)

If the tenant, to save expense, request that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. (8)

IMPOUNDING
DISTRESS.

Stat. 1 & 2 Ph.
& M. c. 12.
s. 1.

Where dis-
tresses shall be
impounded.

IV. *Impounding Distress.*

By stat. 1 & 2 Ph. & M. c. 12. s. 1., "no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where such distress is or shall be taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress is taken; and that no cattle or other goods distrained or taken by way of distress, for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time."

By stat. 2 Will. & M. sess. 1. c. 5. s. 4., "upon any pound breach or res-

(1) *Kenney v. May*, 1 M. & Rob. 56.

(2) *Avenell v. Croker*, M. & M. 172.

(3) *Andrews v. Russel*, Bull. N. P. 81.

(4) *Westwood v. Cowne*, 1 Stark. 172.

(5) *Dunn v. Lowe*, 4 Bing. 193.

(6) *Biggins v. Goode*, 2 Tyrw. 447. 2 C. & J. 364.

(7) *Knotts v. Curtis*, 5 C. & P. 322. 2 Tyrw. 449. n.

(8) *Ibid. Bishop v. Bryant*, 6 C. & P. 484. In an action for wrongfully refusing to permit plaintiff to appraise goods distrained, the defendant being under terms to plead issuably, pleaded that plaintiff was tenant to defendant, and that the goods were taken as a distress for arrears of rent:— It was held an issuable plea. *Sealey v. Harris*, 7 Dowl. P. C. 195.

cous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their *treble* damages and costs of suit against the offender or offenders in any such rescous or pound breach, any or either of them, or against the owners of the goods distrained, in case the same be afterwards found to have come to his use or possession."

DISPOSAL OF A
DISTRESS.

The word "treble" in this statute refers to the word "costs," as well as the word damages, and consequently that the costs shall be treble as well the damages. (1)

Construction of
the word
"treble."

A tender of the rent after the cattle were impounded, is no answer to an action under this statute. (2)

Tender of rent
after cattle im-
pounded.

Where lands lying in two adjoining counties were let under one demise at one entire rent, and the landlord distrained cattle in both counties for rent in arrear, it was decided, he could chase them all into one county; but if the counties had not adjoined, it would have been otherwise. (3) The offence created in this statute for impounding a distress in a wrong place is but a single offence, and will be satisfied by one forfeiture, though three or four be concerned in doing the act, as the offence cannot be severed so as to make each offender separately liable to the penalty; the construction of the statute being, that the penalty shall be referred to the offence, not to the person. (4) Thus, where three persons distrained a flock of sheep, and severally impounded them in three several pounds:—It was held, that they should forfeit one 5*l.*, and one treble damages (5); and that in such an action, the venue may be laid in either county. (6)

Impounding a
distress in a
wrong place, is
but a single
offence.

The second section of the statute does not extend to cases where the goods are impounded on the premises, by virtue of stat. 11 Geo. 2. c. 19. s. 10. (7)

Where the distress was made, it was by the common law the duty of the distrainer to remove the goods from the premises within a convenient time; and by stat. 2 Will. & M. c. 5., unless the goods distrained were corn, hay, or straw, it was necessary to remove them immediately (8), in order to impound them in some other place of safety; and the distrainer may still do so if he think fit, giving notice to the tenant or owner of the place to which they are conveyed.

Stat. 2 Will. &
M. c. 5. Dis-
trainer must
remove the
goods within a
convenient
time.

By stat. 11 Geo. 2. c. 19. s. 10., "it shall be lawful for any person or persons taking any distress so made for any kind of rent, to impound or otherwise secure the distress, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress; and so appraise, sell, and dispose of the same upon the premises, in like manner, and under the like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises, by virtue of an act made in the second year of King William and Mary, intituled, 'an act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time;' or of one other act made in the fourth

Stat. 11 Geo. 2.
c. 19. s. 10.
Distresses may
be secured and
sold on the
premises.

(1) *Lawson v. Story*, 1 Ld. Raym. 19.

(2) *Firth v. Purvis*, 5 T. R. 432.

(3) *Walter v. Rumbal*, 1 Ld. Raym. 53.
12 Mod. 76. 1 Salk. 247.

(4) *Rex v. Clark*, Cowp. 612.

(5) *Partridge v. Naylor*, Cro. Eliz. 480.
F. Moore, 453.

(6) *Pope v. Davis*, 2 Taunt. 252. 2 Camp.
266.

(7) *Child v. Chamberlain*, 3 N. & M. 520.
5 B. & Ad. 1049.

(8) *Dod v. Monger*, 6 Mod. 215.

**DISPOSAL OF A
DISTRESS.**

year of his present majesty, intituled, 'an act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents and renewal of leases;' and that it shall and may be lawful, to and for any person or persons whatsoever, to come and go to and from such place, or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof; and that if any pound, breach, or rescous shall be made of any goods and chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this act, the person or persons aggrieved thereby shall have the like remedy, as in cases of pound, breach, or rescous is given and provided by the said statute."

**Stat. 5 & 6 Will.
4. c. 59. s. 4.**

Parties impounding cattle to provide sufficient food for them.

By stat. 5 & 6 Will. 4. c. 59. s. 4., "every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any inclosed place, shall and he is hereby required to find, provide, and supply such horse, ass, or other cattle or animal so impounded or confined, daily with good and sufficient food and nourishment, for so long a time as such horse, ass, or other cattle or animal shall remain, and continue so impounded or confined as aforesaid; and every such person who shall so find, provide, and supply any such horse, ass, or other cattle, or animal, with such daily food and nourishment as aforesaid, shall and may, and he and they are hereby authorised and empowered to recover of and from the owner or owners of such cattle or animal, not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture, or any damage or injury, may be recovered under and by virtue of any of the powers or authorities in this act contained; and which value of the food and nourishment so to be supplied as aforesaid, such justice is hereby authorised and empowered to ascertain, determine, and enforce as aforesaid; and every person who shall have so supplied such food and nourishment as aforesaid shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass, or other cattle or animal, openly at any public market (after having given three days' public printed notice thereof), for the most money that can be then got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal."

**Remedy for the
recovery
thereof.****Sect. 5.**

Persons may enter pounds, &c.

By s. 5. it is enacted, that in case any horse, ass, or other cattle or animal shall at any time so remain impounded or confined as aforesaid, without sufficient daily food or nourishment more than twenty-four hours, it shall and may be lawful for any person or persons whomsoever from time to time, and as often as shall be necessary, to enter into and upon any such common pound, open pound, or close pound, or other inclosed place in which any such cattle or animal shall be so impounded or confined, and to supply such cattle or animal with such good and sufficient food and nourishment during so long a time as such cattle or animal shall so remain

and continue impounded or confined as aforesaid, without being liable to any action of trespass, or other proceeding by any person or persons whomsoever, for or by reason of any such entry or entries for the purposes aforesaid."

DISPOSAL OF A
DISTRESS.

In an action for abusing a distress by putting the animals distrained into a muddy pound, whereby they were injured, it is no defence that the place was the manor pound, and was *generally* in a proper state: the distrainer must, at his peril, put the distress into a pound which is, not only in general, but at the particular time, fit for it; and if the common pound be unfit (though by reason of casualty, as rain or snow), he must find another. (1)

Placing cattle
in an improper
pound.

A. being in arrear for rent of a cottage, his landlord distrained the goods there, and locked up the cottage, and after selling the goods kept possession, the tenant saying "he would have done with it:"—It was held, in an action by the tenant for an expulsion, that the landlord was justified in impounding the distress on the premises, and in locking up the cottage to secure the distress, but that he could not avail himself of the tenant's license to take possession, unless he specially pleaded it. (2)

Impounding
distress on pre-
mises, and
locking up the
cottage.

V. Pound-breach, and Rescous.

Rescue is the taking away and setting at liberty against law a distress taken for rent or damage feasant, after it has been in the possession of the party distraining (3); but preventing a person from making a distress is no rescue (4); and it is no answer to an action on the stat. 2 Will. & M. c. 5. for a pound-breach, that the rent and demand were tendered after this distress and impounding. (5)

POUND-BREACH
AND RESCOUS.

If a hayward take cattle, which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are damage feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier. (6)

Where a rescue
can be justified.

Where the plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant; but during his absence the cattle escaped for half an hour into the defendant's ground, from whence the plaintiff, on his return, drove them to his own yard, and the defendant having taken them from thence:—It was held to be no rescue, as the leaving the cattle in the defendant's ground was an abandonment of the distress. (7)

Wherever a distress is wrongful in its inception, it may be rescued; and in some cases rescue may be made of a distress, that has only become wrongful by matter subsequent.

If a distress be taken without cause, as where rent is not due, the owner may make *rescous* before the distress is impounded. So if the owner tender the rent before distress taken. But, after the distress is impounded, the owner cannot break the pound and take the distress out of the pound, for it is then in the custody of the law. (8)

Distress taken
without cause.

(1) *Wilder v. Speer*, 8 A. & E. 547.

(2) *Cox v. Painter*, 7 C. & P. 767.

(3) Bull. N. P. 61. (a.) 1 Inst. 160. (b.)
F. N. B. 101.

(4) *Ibid.*

(5) *Firth v. Purvis*, 5 T. R. 432.

(6) *Rex v. Bradshaw*, 7 C. & P. 233.

(7) *Knowles v. Blake*, 5 Bing. 499. 3 M.
& P. 214.

(8) 1 Inst. 47. (b.) 160. (b.)

DISPOSAL OF A
DISTRESS.

Where plea held to be defective for not alleging that the cattle were retaken upon a fresh pursuit.

Plea of recaption.

Escape of cattle from the pound.

DUTY AND RESPONSIBILITY OF
POUND-KEEPER.

Where the defendants pleaded, that they had distrained A.'s cattle for rent due from him to B.; that the plaintiff wrongfully took away the cattle so distrained, and then in the custody of the defendants; and because they were wrongfully detained by the plaintiff in the close in which, &c. the defendants, as bailiffs of B., broke open the close to retake the cattle and impound them as a distress for rent due:—It was held, that such plea was bad, as it did not allege, that the cattle were retaken upon a fresh pursuit. (1)

A plea of recaption upon a rescue must aver, that the recaption was on fresh pursuit. (2)

Where cattle are distrained damage feasant, and put into a sufficient pound, and escape without default or neglect of the distrainer, he may bring trespass for the damage. And although the defendant plead, that the cattle were taken damage feasant, and impounded, and escaped without his default, a replication, stating that the distress was put into a proper pound, and escaped without neglect or default of the plaintiff, is a sufficient answer. (3)

A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. (4)

Trespass *vi et armis* does not lie against a pound-keeper merely for receiving a distress, though the original taking be tortious, unless he exceeds his duty and assents to the trespass. (5)

A pound-keeper cannot bring an action if the pound be broken; it must be brought by the party interested.

VI. *Replevying and tendering Amount of Distress.*REPLEVYING
AND TENDERING
AMOUNT OF
DISTRESS.

A tender of the rent supersedes the power of distress.

Tender after distress has been impounded.

"An inventory of cattle, &c. distrained upon, and the same are impounded

The distrainer can replevy his goods at any time before *actual* sale. (6)
If the landlord or his bailiff have entered upon the premises to distrain, it is still competent to the tenant to prevent such distress by tendering the arrears of rent; and if after such tender a distress be taken, it is a wrongful seizure (7); and even after the landlord has distrained, and before he has impounded the goods, the tenant may claim their return by a tender of the arrears and the expenses of the distress, and if the landlord refuse to deliver them, it is a wrongful *detainer*. (8) And so where standing corn is distrained, the tenant may tender the rent at any time before the corn is ripe; and if the landlord afterwards take it, he will be a trespasser. (9)

A tender after the distress is impounded in a *public pound* is insufficient, because it is then in the custody of the law (10); but tender of amends while in a *private pound* is not too late. (11)

Where upon cattle being distrained, the distrainer left a note stating their number with the distrainee, and on the following morning delivered to the distrainee a notice of distress, in which he stated, that he had distrained upon the cattle, and had impounded them in the place or places thereunder

(1) *Rich v. Woolley*, 5 M. & P. 663. 7 Bing. 965.

(2) *Ibid.*

(3) *Williams v. Price*, 3 B. & Ad. 695.

(4) *Badkin v. Powell*, Cowp. 476., et vide *Brandling v. Kent*, 1 T. R. 60.

(5) *Ibid.*

(6) *Jacob v. King*, 5 Taunt. 451.

(7) 2 Inst. 107. *Carpenter's case*, 8 Co. 146. (b.)

(8) *Ibid.* *Vertue v. Beasley*, 1 M. & Rob. 21.

(9) *Owen v. Legh*, 3 B. & A. 470.

(10) *Firth v. Purvis*, 5 T. R. 432.

(11) *Browne v. Powell*, 4 Bing. 230. 12 Moore, 454.

mentioned, which notice concluded thus, "An inventory of the cattle, &c. distrained upon, and the same are impounded upon the premises:"—It was held, that the impounding was complete, as against a tender subsequent to the notice. (1)

DISPOSAL OF A
DISTRESS.

upon the pre-
mises."

Corn, grass, and such things as are made liable to distress by stat. 11 Geo. 2. c. 19., are an exception to this rule; for by s. 9., if the lessee, his executors or administrators, shall tender to the landlord or his steward, or receiver of rents, the whole of the arrears of rent and incidental expenses after such distress shall have been taken, and at any time before it shall be ripe and cut, cured, or gathered, the distress shall be thereupon delivered up to the lessee or his personal representatives.

Though the distress be made by a broker, a tender in a case within stat. 57 Geo. 3. c. 93. of the rent and costs to the landlord, or the party to whom the rent is due, will be sufficient. (2)

Tender to the
principal is suf-
ficient in all
cases.

The landlord's privilege of distraining may be waved by contract, as when the tenant with the privity of landlord sold by auction a right of eatage of pasture, which the plaintiff purchased, and the proceeds were paid to the landlord:—It was held (*Parke B. dissent.*), that a contract by the landlord might be implied not to distrain cattle put in the land to consume the eatage, and that a distress of the plaintiff's cattle for rent accrued previous to the sale was unlawful. (3)

Landlord's
right of distress
may be waved
by contract.

But where the plaintiff being about to take an apartment of the defendant's tenant, was promised by the defendant, that so long as he paid the rent to the tenant, his property should be safe; and having paid part, and tendered the residue, the defendant without notice of the tender distrained his goods for rent due from the tenant:—It was held, that his right to distrain, was not barred by his promise. (4)

No action lies against one who distrains cattle damage feasant for impounding them, instead of accepting a compensation for the damages tendered before the cattle were impounded. (5) Nor can an action on the case be maintained for detaining cattle distrained damage feasant, where a tender of sufficient amends was made after the cattle had been impounded. (6)

TENDER OF
AMENDS FOR
CATTLE DA-
MAGE FEASANT.

Where the distrainer's wife had been in the usual habit of acting as his agent in such matters, and made a distress of cattle damage feasant in his absence, a tender of amends to her was held sufficient (7); and where cattle distrained damage feasant were in a private pound, and the distrainer admitted they were about to be forwarded to a public pound:—It was held, that a tender of amends made, while they were in the private pound, was not too late. (8)

VII. Sale of Distress.

By stat. 2 Will. & M. sess. 1. c. 5. s. 2. (9), the distress, unless replevied within five days after seizure, must be sold. (10)

SALE OF DIS-
TRESS.
Stat. 2 Will. &
M. sess. 1. c. 5.
s. 2.

(1) *Thomas v. Harries*, 1 M. & G. 695.
Bonquet J. and Erskine J. hesit., Maule J.
dubit.

(2) *Smith v. Goodwin*, 4 B. & Ad. 413. 1
N. & M. 371.

(3) *Horsford v. Webster*, 1 C. M. & R.
696.

(4) *Welsh v. Ross*, 6 Bing. 638.

(5) *Anscomb v. Shore*, 1 Taunt. 261. 1
Camp. 285.

(6) *Sheriff v. James*, 1 Bing. 341. 8
Moore, 334.

(7) *Browne v. Powell*, 4 Bing. 230. 12

Moore, 454.

(8) *Ibid.*

(9) *Antd.*, p. 1353.

(10) *Piggott v. Birtles*, 1 M. & W. 441.

**DISPOSAL OF A
DISTRESS.**

Computation of the time allowed before a distress can be sold.

The five days allowed before a distress can be sold, are inclusive of the day of sale (1), but must be exclusive of the time of it; so that where the distress was made on the morning of the 12th of May, and the sale on the afternoon of the 17th, it was held to be regular, because the five days expired on the morning of the latter day.

If goods be distrained for rent, the landlord must wait five whole days, *i. e.* five times twenty-four hours, before he sells; and if he do not, he is liable to an action. Thus, where a distress was made on Friday at 2 P. M., and the sale was on the following Wednesday at 11 A. M., the sale was held to be wrongful. (2)

Where time allowed after the expiration of the five days for selling the distress.

And a reasonable time after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. (3)

If, however, he suffer them to remain beyond such reasonable time without the consent of the tenant, he becomes a trespasser. (4)

If a landlord who has distrained for rent, do not sell upon the expiration of the five days, in consequence of an arrangement between him and the tenant, that is no proof *per se* of collusion. (5)

Detention of the goods of a lodger.

The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of his tenant. (6)

A tenant, whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under stat. 2 Will. & M. sess. 1. c. 5. for selling the same before five days had elapsed after the seizure, as such sale was altogether void. (7)

No particular order required by law to be observed on the sale of goods.

It seems, that there is no order required by law to be observed on the sale of goods, as that the beasts of the plough should be postponed to other goods; nor is it, therefore, a cause of action that beasts of the plough were sold before other goods were disposed of, if the distress itself be not wrongful. (8)

Irregular sale.

Where a broker having distrained goods for rent, was afterwards sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation:—It was held, that the sale was irregular under stat. 2 Will. & M. sess. 1. c. 5. s. 2. (9)

If goods be removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them. (10)

Goods improperly lotted.

Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew, that the goods were allowed to stand in the rain, and that they were improperly lotted. (11)

Amount of damages.

In an action of tort for an illegal sale of goods, the jury are not bound to find a verdict for the gross amount produced by the sale. (12)

(1) *Wallace v. King*, 1 Hen. Black. 13.

(2) *Harper v. Taswell*, 6 C. & P. 166.

(3) *Pitt v. Shew*, 4 B. & A. 208.

(4) *Griffin v. Scott*, 2 Ld. Raym. 1424. Str. 717. *Winterbourne v. Morgan*, 11 East, 395.

(5) *Harrison v. Barry*, 7 Price, 690.

(6) *Fisher v. Algar*, 2 C. & P. 374.

(7) *Owen v. Legh*, 3 B. & A. 470.

(8) *Jenner v. Folland*, 6 Price, 5. 2 Chitt. 167.

(9) *Lyon v. Weldon*, 2 Bing. 337.

(10) *Bishop v. Bryant*, 6 C. & P. 484.

(11) *Poynter v. Buckley*, 5 *ibid.* 512.

(12) *Clarke v. Nicholson*, 1 Gale, 21.

VIII. *Time of Sale.*

It seems advisable, when the terms of the stat. 11 Geo. 2. c. 19. are not strictly complied with, by impounding the goods on some convenient part of the premises, but the same are suffered to remain dispersed over different parts of such tenements, that the express consent of the owner to their so remaining should be obtained, as it was held in a case before Lord Mansfield, where on a distress of household furniture, which remained untouched in different apartments, but during the five days were visited by the bailiff, that without the implied assent of the owner, the distrainer was liable to an action of trespass. (1)

TIME OF SALE.
Stat. 11 Geo. 2.
c. 19.

As it is in many cases desirable for the tenant, that the goods should not be sold so soon as the law permits, it is very usual for him to sign an agreement or consent to their remaining for a longer time on the premises, in the custody of the distrainer, or a person by him appointed for that purpose; and such consent, it is most proper, though not absolute necessary, to have in writing. (2)

If such consent be given on the part of the tenant, then the goods should not be sold until the expiration of the time agreed upon; but otherwise, the stat. 2 Will. & M. sess. 1 c. 5. directs them to be sold at the expiration of five days after the distress, in the manner therein prescribed. (3)

A declaration in case against a sheriff, alleged the recovery of a judgment against W., and of the issuing of a writ of *testatum fi. fa.* directed to the defendant, by virtue of which he seized the goods of W., and remained in possession thereof a long time. Breach, that defendant wrongfully forbore to sell the goods from the 30th of April to the 17th of May, when he returned; that he had taken, &c. the goods of W., and falsely returned, that the goods remained on his hands for want of buyers. Pleas: First, that the defendant did not seize or take in execution any goods of W. or remain in possession under the writ; Secondly, that the defendant could not, during the time in the declaration mentioned, have sold the goods. Thirdly, a fiat in bankruptcy against W., by which the goods vested in the official assignee. It was held, that the first plea was bad for duplicity; that the second plea amounted to the general issue; and that the third plea was an argumentative denial that the goods seized were the goods of W. (4)

Leave and license may be given in evidence under the general issue to a count in trespass for breaking and entering, and continuing in possession, under a distress for rent beyond the time allowed by law. (5)

Leave and license may be given in evidence under the general issue to a count in trespass.

(1) *Washborn v. Black*, cit. in *Winterbourne v. Morgan*, 11 East, 405. The evidence in this case of implied consent was, that the plaintiff said, how much she was obliged to Mr. M., who had acted like a gentleman.

(2) Memorandum, that "I, A. B., do hereby consent and agree that C. D., my landlord, who hath distrained my goods and chattels for rent, in a dwelling-house, &c. situate at _____, in the county of _____, shall continue in possession of my said goods and chattels in the said dwelling-house, &c. for the space of

days from the date hereof; the said C. D. having agreed to forbear the sale of the said goods and chattels for the said space of time, to enable me to discharge the said rent; and I, the said A. B., do hereby agree to pay the expenses of keeping the said possession.

As witness my hand, the _____ day of _____, in the year of our Lord, 18____.

"A. B."
(3) *Bradby by Adams*, 154, 155. *antè*, 1359, tit. SALE OF DISTRESS.

(4) *Rowe v. Ames*, 8 Dowl. P. C. 750.

(5) *Purcell v. Nowlan*, 1 Smythe (Irish), 53.

Costs of Dis-
tresses.

9. COSTS OF DISTRESSES.

Stat. 57 Geo. 3.
c. 93. s. 1.

Charges for
making a dis-
tress for rent,
where the sum
due does not
exceed 20*l*.

By stat. 57 Geo. 3. c. 93. s. 1, "no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of 20*l*. for and in respect of such rent, nor any person whatsoever employed in any manner, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs or charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed, and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall take any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done:" —

SCHEDULE.

	£	s.	d.
Levying distress - - - - -	- 0	3	0
Man in possession, per day - - - - -	- 0	2	6
Appraisement, whether by one broker or more, 6 <i>d</i> . in the pound on the value of the goods - - - - -	- 0	0	0
Stamp, the lawful amount thereof - - - - -	- 0	0	0
All expenses of advertisements, if any such - - - - -	- 0	10	0
Catalogues, sale, and commission, and delivery of goods, 1 <i>s</i> . in the pound on the net produce of the sale. - - - - -	- 0	0	0

Sect. 2 & 4.
Remedy for
party grieved.

By sects. 2. & 4., a party aggrieved by any such practice may apply to a justice of the peace, who may adjudge treble the amount of money unlawfully taken to be paid with costs, which may be levied by distress; and if the complaint be unfounded, may give costs to the party complained against; but no judgment is to be given against any landlord, unless he personally levies the distress.

Sect. 6.
Brokers to
give copies of
their charges to
persons dis-
trained.

By sect. 6., every broker or other person who shall make and levy any distress whatsoever shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of rent demanded exceed the sum of 20*l*.

Stat. 7 & 8 Geo.
4. c. 17.

By stat. 7 & 8 Geo. 4. c. 17., all the rules, regulations, clauses, provisions, penalties, matters and things in stat. 57 Geo. 3. c. 93. contained, are extended so far as the same are applicable and capable of being put in execution with respect to any distress or levy for land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever, in all cases where the sum demanded or due for or in respect of such taxes, rates, tithes, assessments, or impositions, shall not exceed 20*l*.

In an action for a vexatious and excessive distress, the plaintiff having

received the taxed costs of his replevin on the distress, was held not entitled to recover, as damages, the extra costs occasioned to him by the replevin. (1)

COSTS OF DISTRESSES.

There is no statutory limit to the amount of the costs and charges for levying and impounding a distress for rent above 20*l.*, where it is impounded on the premises by virtue of stat. 11 Geo. 2. c. 19. s. 10. (2)

Stat. 11 Geo. 2. c. 19. s. 10.

For distresses where the sum distrained for exceeds the sum of 20*l.*, the costs are not specified. The general practice, however, appears to be, to charge 1*s.* in the pound for the levy, and 3*s.* 6*d.* a day for the man in possession. By statute, 57 Geo. 3. c. 93. s. 6., "Every broker, or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of 20*l.*"

Costs of distresses for more than 20*l.*

Stat. 57 Geo. 3. c. 93. does not apply to a case of a distress taken for more than 20*l.*, though made upon goods which are made at, appraised at, and sold for less than 20*l.* (3)

Stat. 57 Geo. 3. c. 93.

The stat. Westm. 2. c. 27., which requires distresses to be made by brokers sworn and known, does not extend to distresses for rent. (4)

Stat. Westm. 2. c. 27.

Where a distress is made under the authority of one local act, and the notice of distress states it to be made under another, and the plaintiff discontinues an action brought in respect of that distress, the mistake as to the act authorising the distress does not interfere with the defendant's claim to treble costs under that act, in case of discontinuance, although the plaintiff may have adopted a form of action not contemplated by the protecting act. (5)

Distress under the authority of a local act.

A distraining order will not be granted against tenants, after attachments have been acted upon and found fruitless, except upon terms that the costs of the attachments shall be no charge upon the estate. (6)

10. REMEDY FOR AN ILLEGAL DISTRESS.

REMEDY FOR AN ILLEGAL DISTRESS.

I. *Wrongful Distress.*

WRONGFUL DISTRESS.

A distress may be denominated wrongful, either by being tortious in its very inception, or by being rendered so by its unlawful continuance. If, therefore, a distress be illegally made, as by a landlord for rent, when in fact no rent is due, or a distress be unlawfully taken in the highway, it is so entirely wrongful, that the law permits the person whose goods are so distrained to redress himself by retaking them out of the hands of the trespasser (7); and a distress being in the first instance only a means of compelling satisfaction, if such satisfaction be tendered at the

May be retaken by the distrainer.

Distress after tender.

(1) *Grace v. Morgan*, 2 Bing. N. C. 594.

(4) *Child v. Chamberlain*, 6 C. & P. 213.

(2) *Child v. Chamberlain*, 3 N. & M. 520.
5 B. & Ad. 1049. 6 C. & P. 213.

(5) *Debney v. Corbett*, 5 Dowl. P. C. 704.

(3) *Ibid.*

(6) *Ryder v. Dickson*, 1 Hayes (Irish), 36.

(7) Co. Litt. 47. (b.)

REMEDY FOR
AN ILLEGAL
DISTRESS.

time the distress is about to be made, that renders the subsequent distress altogether wrongful. Thus, if a man come to distrain for rent in arrear or damage feasant, and before the distress a tender be made of the arrears of the rent, or sufficient amends for the damage with the costs (if any) of the distress, a subsequent distress is altogether tortious, and the tenant or owner may immediately rescue his property from the hands of the distrainer (1): and if, in the case of rent in arrear or damage feasant, the person whose goods are distrained, shall after the distress and before the impounding, tender a sufficient satisfaction for such arrears or damage done, together with the discharges of the distress, the subsequent detainer of goods becomes unlawful: and in such cases it seems, that the owner of the goods may rescue them without being deemed a trespasser (2): but this must be done before any part of the goods is impounded (3), as they are afterwards in the custody of the law; for, as Lord Coke expresses it, "Tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined." (4)

Trover and
case.

In addition to the remedies of trespass and replevin in the case of a wrongful distress for rent, that is to say, of a distress where no rent is due at the time of making the distress, or where there has been a tender of the amount due (5), the party grieved can maintain trover, or a special action on the case; and it is immaterial whether the goods distrained have been sold by the distrainer, or redeemed by the party distrained on. (6) There is also, in addition to these common law remedies, the following statutory provision:—by stat. 2 Will. & M. sess. 1. c. 5. s. 5. it is enacted, that in case any distress and sale shall be made by virtue or colour of that act for rent pretended to be in arrear and due, where in truth no rent is in arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, that then the owner of such goods so distrained and sold, his executors or administrators, may by action of trespass or upon the case, to be brought against the person so distraining, or his executors or administrators, recover double the value of the goods so distrained and sold, together with full costs of suit.

Stat. 2 W. & M.
sess. 1. c. 5.
s. 5.
Double da-
mages and
costs against
wrongful de-
tainer.

Requisite alle-
gations.

In an action on this statute it seems to be sufficient for the declaration to allege, that the distress was made for rent supposed to be due upon a certain demise, before then made by the defendant to the plaintiff, without specifying the particulars of the demise itself; and to state generally that it was taken for and in the name of a distress, without adding for rent arrear. (7)

Stat. 11 Geo. 2
c. 19. s. 8.

The stat. 11 Geo. 2. c. 19. s. 8., which empowers landlords to distrain growing crops for rent in arrear, gives them no power of sale until the crops are ripe and severed from the land. A sale therefore of crops so seized

(1) Co. Litt. 47. (b.)	Mod. 661. <i>Allen v. Bayley</i> , 2 Lutw. 1596.
(2) <i>Bevil's case</i> , 4 Co. 11. (b.) <i>Firth v. Jennings v. Cousins</i> , Hetl. 165. <i>Aier v. Purvis</i> , 5 T. R. 483.	<i>Rushton</i> , 3 Keb. 190.
(3) <i>Alwayes v. Broome</i> , 2 Lutw. 262.	(5) <i>Branscomb v. Bridges</i> , 1 B. & C. 145.
(4) <i>Six Carpenter's case</i> , 8 Co. 147. 2	(6) <i>Shipwick v. Blanchard</i> , 6 T. R. 298.
Inst. 107., et vide <i>Vaspor v. Edwards</i> , 12	(7) <i>Salter v. Brunsden</i> , 4 Mod. 231.

before severance is altogether void, and forms no ground of action against the landlord. (1)

REMEDY FOR
AN ILLEGAL
DISTRESS.

In the case of a wrongful distress of cattle damage feasant, if the owner pay money for their release, he cannot recover it back in an action for money had and received (2); nor can he, it should seem, maintain a special action on the case where the original seizure is lawful, and there has been a tender of amends before impounding for the injury done by the subsequent detention of the cattle. (3) An action of trespass or replevin is the proper remedy in either of these cases; and it seems, from the language of the court in *Anscomb v. Shore* (4), that, unlike the case of a wrongful distress for rent (5), trover cannot in any case be maintained for a wrongful distress of cattle damage feasant: but this point is very doubtful. (6)

Damage
feasant.

II. Irregular Distress.

By any irregularity in taking the distress the landlord became at common law a trespasser *ab initio*, and the tenant might have maintained an action against him accordingly.

IRREGULAR
DISTRESS.

But by stat. 11 Geo. 2. c. 19. s. 19., "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case at the election of the plaintiff or plaintiffs, provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she, or they shall be paid his, her, or their full costs of suit, and have all the like remedies for the same, as in other cases of costs."

Stat. 11 Geo. 2.
c. 19. ss. 19,
20.

Distresses for
rent not un-
lawful, &c. for
any irregu-
larity therein;

By sect. 20., "no tenant or tenants, lessee or lessees, shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party or parties distraining, his, her, or their agent or agents, before such action brought."

Nor tenants to
recover by ac-
tion, on tender
of amends.

The only difference which this statute made was, that where the landlord begins the distress in right, and carries it out in wrong, he can only be charged from the time when the wrong commenced.

To bring a case within this statute the taking must be originally lawful, and consequently its operation is limited to acts subsequent to the distress (7); and although by the words of the statute, where any unlawful act or irregularity has been committed after the taking, the party grieved may recover satisfaction by an action of trespass or on the case at his election (8),

To bring a case
within stat. 11
Geo. 2. c. 19.
s. 19., the taking
must be origin-
ally lawful.

(1) *Owen v. Legh*, 3 B. & A. 470.

(2) *Lindon v. Hooper*, Cowp. 414.

(3) *Anscomb v. Shore*, 1 Camp. 285.
1 Taunt. 261. *Bagshaw v. Goward*, Cro.
Jac. 147.

(4) 1 Camp. 285.

(5) *Shipwick v. Blanchard*, 6 T. R. 298.

(6) *Bishop v. Montague (Viscountess)*, Cro.
Eliz. 824. *Branscomb v. Bridges*, 1 B. & C.
145. *Bradby by Adams*, 177.

(7) 1 Esp. N. P. 395.

(8) *Winterbourne v. Morgan*, 11 East, 395.
401.

REMEDY FOR AN ILLEGAL DISTRESS.

Where the taking is originally lawful, the aggrieved cannot maintain trover.

Party remaining on premises, and committing some substantive act of trespass.

Where case the proper remedy.

Justification under stat. 11 Geo. 2. c. 19. s. 21.

Irregularity in driving or impounding distress.

yet the aggrieved must elect his form of action according to the nature of the injury committed, and not arbitrarily, and in opposition to the general rules of law.

Where the taking is originally lawful, the aggrieved cannot maintain trover, although, as has been already stated, he may do so where the taking is wrongful (1), because such action assumes the defendant to have been a trespasser *ab initio*. (2)

But if the party remain on the premises, and commit some substantive act of trespass, as by removing the goods after the expiration of the five days, trespass is the proper form of action for such wrongful act, although it may be doubtful, if there be no irregularity beyond the mere remaining on the premises, whether case is not the proper remedy. (3)

If, on the other hand, he sell the goods without appraising them (4), or take an excessive distress, or detain in his hands the proceeds of the goods sold under the distress, *ultra* the rent and costs, in all these cases a special action on the case is the proper proceeding; and it seems also in the latter case, that he may waive the tort, and bring *assumpsit* to recover back the surplus money withheld from him. (5)

Under stat. 11 Geo. 2. c. 19. s. 21., which allows the defendant to plead the general issue, a landlord cannot justify under the plea of the general issue given by such act, except for acts done as landlord; and therefore, although he may justify as far as the distress goes, he cannot justify expulsion under this issue: so, also, if the goods continue on the premises beyond the five days, he cannot justify, under this issue, entering the house to remove them afterwards, but must plead a license to justify the *asportavit*, or *liberum tenementum* to justify the expulsion. (6)

These provisions extend to all distresses for rent, but not to distresses for other causes, which are therefore still governed, with respect to an irregularity in their proceedings, by the rule of the common law; so that trespass may be maintained upon any irregularity committed in such distresses, as for example an abuse of the thing distrained. (7)

There is, however, one exception, viz. stat. 1 & 2 Ph. & M. c. 12., respecting the driving and impounding of the distress.

In an action for an irregular distress, the only evidence at all affecting K. the landlord, was, that all the defendants appeared by the same attorney, and that the defendants' attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K.;" and that the managing clerk of the defendants' attorney, when he served it, had offered 10*l.* to settle the action:—It was held, that this was not evidence to go to the jury as against K.; and an acquittal of K. was directed. (8)

In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; and a variance in this respect is fatal. (9)

In actions for irregular distresses, the correct practice is to make either the landlord alone, or the landlord and the broker defendants, and not to

(1) *Shipwick v. Blanchard*, 6 T. R. 298.

(2) *Wallace v. King*, 1 Hen. Black. 13.

(3) *Winterbourne v. Morgan*, 11 East, 395. 401.

(4) *Messing v. Kemble*, 2 Camp. 115.

(5) *Winterbourne v. Morgan*, 11 East, 395. 401.

(6) Hunt's Gilbert, 83. cit. Bradby by Adams, 188.

(7) *Bagshaw v. Goward*, Cro. Jac. 147.

(8) *Crabb v. Killick*, 6 C. & P. 216.

(9) *Ireland v. Johnson*, 1 Bing. N. C. 162. 4 M. & Sc. 706.

join appraisers, &c.; and if a plaintiff do join them, the judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c. (1)

REMEDY FOR
AN ILLEGAL
DISTRESS.

Where the tenant consents to the postponement of the sale of a distress, he waves an irregularity arising from the notice of sale not having been posted in the next market-town, as directed by stat. 25 Geo. 2. c. 13. (2)

Waver of an
irregular dis-
tress.

III. *Excessive Distress.*

Excessive distresses were always illegal at the common law; and this principle was subsequently confirmed by statutory enactments.

EXCESSIVE DIS-
TRESS.

Thus by stat. *De Distractione Scaccarii* (51 Hen. 3. st. 4.) it was provided, "that distresses should be reasonable after the value of the debt or demand, and by the estimation of neighbours and not by strangers, and not outrageous."

Stat. *De Dis-
trictione Scac-
carii*, 51 Hen. 3.
st. 4.

By stat. Marlebridge, c. 4. (confirmed by *Articuli super Chartas*, 28 Edw. 1. st. 3. c. 12.) it was enacted, "that distresses shall be reasonable, and not too great, and they that take great and unreasonable distresses, shall be grievously amerced for the excess of such distresses."

Stat. *de Marle-
berge*, 52 Hen. 3.
c. 4.

The operation of the statute of Marlebridge is general, and it applies to all cases of distress whatsoever (3); and in general, the only remedy to be pursued, is an action founded on the statute; and no indictment or information will lie for an excessive distress (4): if an excessive distress be abused, or if to such distress be added any other distinct trespass, these are separate causes of action. (5)

Operation of
stat. of Marle-
bridge is gene-
ral.

"There can be no remedy upon the statute of Marlebridge, where there is a remedy at the common law; nor if the plaintiff has recovered in replevin, can he afterwards bring an action on that statute; for an action on that statute is founded on there being a cause of distress, of which the recovery in replevin shews there was none: moreover, in replevin, damages were recoverable for the taking; and a man shall not be permitted to say, there was a cause of distress, after he has recovered, upon the ground of its being unlawful." (6)

The distress for the taking of which an action on the statute of Marlebridge may be brought, must be one obviously excessive. As if a man distrain two or three oxen for twelve pence; or if he distrain a horse or an ox for a small sum, where a sheep or a pig may be taken, this is an excessive distress, because he might have taken a beast of less value.

Distress must
be obviously
excessive.

But if there be no other distress on the land, then the taking of one entire thing, however great may be its value, is not unreasonable (7); and therefore it has been said, that even for a small demand a cart and horses may be distrained, because they are not severable from each other. (8)

(1) *Child v. Chamberlain*, 6 C. & P. 213.
3 N. & M. 520. 5 B. & Ad. 1049.

(2) *Dwyer v. Peacock (Clerk)*, 2 Fox & Smith, (Irish) 34.

(3) 2 Inst. 107.

(4) *Rex v. Ledgingham*, 1 Vent. 104. 1 Lev. 299.

(5) *Lynne v. Moody*, Str. 851. *Etherton v. Popplewell*, 1 East, 139.

(6) Hunt's Gilbert, 68.

(7) *Field v. Mitchell*, 6 Esp. N. P. C. 71.
Avenell v. Croker, M. & M. 172.

(8) *Clarke v. Tucket*, 2 Vent. 183. 1 Rol. Abr. Distress (R.), 674.

REMEDY FOR
AN ILLEGAL
DISTRESS.

Where goods
are not so re-
moved as to
prevent dis-
trainee from
carrying on his
business.

Broker relin-
quishing pos-
session after an
agreement to
pay the rent on
a stipulated
day.

Case or trespass
lies after tender
of rent.

Rent reduced
by payments of
land tax.

Where trover
not maintain-
able.

Recovery in re-
plevin will bar
an action for ex-
cessive distress.

Malice need
not be proven.

Criterion for
estimating da-
mages.

Where excess
consists wholly
in seizing
growing crops.

Not requisite to
prove precise

If A., the tenant of B., has paid all his rent, and got his landlord's receipt for it, but fearing that his goods will be taken on legal process, agree with his landlord to destroy the receipt, and that the latter shall put in a distress for rent to protect the goods, and the landlord do so, and sell the goods, and keep the proceeds, this distress is good as between A. and B., though void as against a third person; and A. can maintain no action against B. for it. (1)

An action will lie for an excessive distress, and leaving a man in possession, although the goods of the tenant are not so completely removed from his control, as to prevent him from carrying on his business. (2)

An arrangement between the parties respecting the sale of the goods distrained after the distress, but before sale, does not divest the plaintiff of his right of action; because a right of action once vested, can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. (3)

A broker having distrained the goods of a tenant for rent in arrear, he signed an agreement in writing, drawn up by the broker, that if he, the tenant, did not pay the rent on or before a given day, the broker might re-enter and distrain again:—It was held, that this did not estop the plaintiff from afterwards complaining of an excessive distress, made in consequence of the rent not being paid at the stipulated time. (4)

Case lies as well as trespass for an excessive distress after tender of the rent due. (5)

Where rent has been reduced by payments of land tax, &c. if the landlord distrain for the whole sum reserved, the tenant may properly sue in case. (6)

Trover is not maintainable for goods merely seized as a distress excessive in quantity. (7)

A recovery in replevin is a bar to an action for an excessive distress. (8)

In an action of case for excessive distress, express malice is not necessary to be proved to support the declaration. (9)

In an action for an excessive distress, the question is, what the goods seized would have sold for at a broker's sale; if it be excessive, the plaintiff is entitled to recover the fair value of them. (10)

A landlord is liable to some damages in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, in replevying the crops. (11)

It is not incumbent on the plaintiff, in an action for an excessive distress,

(1) *Sims v. Tuffs*, 6 C. & P. 207.

(2) *Baylis v. Usher*, 4 M. & P. 790. S. C. nom. *Bayliss v. Fisher*, 7 Bing. 153.

(3) *Willoughby v. Backhouse*, 4 D. & R. 539. 2 B. & C. 821.

(4) *Holland v. Bird*, 3 M. & Sc. 363. 10 Bing. 15.

(5) *Ibid*.

(6) *Carter v. Carter*, 5 Bing. 406. 2 M.

& P. 723.

(7) *Whitworth v. Smith*, 1 M. & Rob. 193.

(8) *Phillips v. Berryman*, 3 Doug. 286.

(9) *Field v. Mitchell*, 6 Esp. N. P. C. 71.

(10) *Wells v. Moody*, 7 C. & P. 59.

(11) *Piggott v. Birtles*, 1 M. & W. 441.

to prove the precise amount of rent due, as stated in the declaration, the substantial allegation being, that more was distrained for than was actually due. (1)

REMEDY FOR
AN ILLEGAL
DISTRESS.

In case for an excessive distress, though the warrant of distress be for a greater sum than is really due, the plaintiff is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due. (2)

amount of rent
due.

11. INDEMNITY ON DISTRESSES.

Where a person makes a distress on behalf of another, it is usual for the principal to give his agent an indemnity to be responsible for all the legal acts of the agent.

INDEMNITY ON
DISTRESSES.

In *Toplis v. Grane* (3), the defendant, attorney of O., authorised the plaintiffs, as brokers, to distrain the goods on A.'s premises, for rent due to O.; whereupon the distress was made. Some of the goods being privileged from distress, and claimed by the owners, the plaintiffs required an indemnity, which the defendant gave on the part of O., and afterwards said he would give a further guaranty. The owners of the privileged goods having sued and recovered against the plaintiffs, it was held, that the defendants were bound to make good the loss they had sustained.

But a landlord is not liable in trespass for the wilful and unauthorised acts of his bailiffs committed in the conduct of a distress. (4)

Landlord
not liable for
the wilful and
unauthorised
acts of his bai-
liffs.

Where A. gave authority to B. to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account;" and B. made the distress, and his men being told by the son of C., that a certain cask contained spent liquor of no value, they took the cask to pieces, and let the liquor run off: but which was, in fact, cochineal dye belonging to D.; and for the wasting of it, D. recovered damages against B. in an action of trover:—It was held (5), that B. could not recover the amount of those damages from A. in an action on the indemnity, Chief Justice Tindal observing, "It never could be intended, that the defendant was to indemnify the plaintiff against the acts of his own servants; and I am of opinion, that it only applies to cases where a distress was illegal, because the landlord had no right to put in such distress."

Where an in-
demnity will
only apply to
cases where a
distress is il-
legal.

A landlord distraining is, *prima facie*, liable for the act of his bailiff in taking goods privileged from distress, though they never come to his hands. But if, when he knows the circumstances, he disclaim and repudiate the act, he is not bound by it. (6)

Landlord *prima*
facie liable for
the act of his
bailiff.

The goods of an under-tenant were distrained and sold by the superior landlord for rent due from the immediate tenant; the under-tenant at the sale purchased the goods, and paid for them to the superior landlord:—It was held, that he could maintain an action against his immediate lessor, for money paid to his use. (7)

NOTICE OF AC-
TION.

(1) *Sells v. Hoare*, 8 Moore, 451. 1 Bing. 401. 1 C. & P. 28.

(2) *Crowder v. Self*, 2 M. & Rob. 190. *Wilkinson v. Terry*, 1 ibid. 377.

(3) 5 Bing. N. C. 636.

(4) *Thynne v. Russell*, 1 Jebb & Symes (Irish), 155.

(5) *Draper v. Thompson*, 4 C. & P. 84.

(6) *Hurry v. Rickman*, 1 M. & Rob. 126.

(7) *Byrne v. Shipley*, 2 Hudson & Brooke (Irish), 195.

**INDEMNITY ON
DISTRESSES.**

Making a distress for two causes, one being justifiable; but as to the other, notice of action required.

A party making a distress for two causes, as to one of which he is justified and entitled to notice of action, is nevertheless liable in trespass as to the other. (1)

A distress for tithe composition under stat. 4 Geo. 4. c. 99. is not such an act done in pursuance of that statute, as entitles the distrainer to thirty day's notice of action under the 58th section. (2)

(1) *Lamont v. Southall*, 5 M. & W. 416.

(2) *Murphy v. Cross*, 2 Jones (Irish), 41.

EJECTMENT.

1. DEFINED, pp. 1374—1376.

2. TITLE REQUISITE TO MAINTAIN EJECTMENT, pp. 1376—1383.

Lessee of plaintiff must have a legal estate, an equitable title not sufficient — Plaintiff must recover on the strength of his own title — Lessee cannot dispute the title of his lessor — Payment of rent under a mistake — Where possession has been fraudulently obtained — Copyholder if admitted, cannot dispute his lord's title — Where a conveyance of the legal estate will be presumed — Where legal estate not evicted by lessor's acceptance of rent and costs — Setting up an outstanding term in a terre tenant — RIGHT OF ENTRY — Must be immediate at the time of the demise — Not assignable — LIMITATION OF ACTION — Stats. 21 Jac. 1. c. 16. s. 1. — 3 & 4 Will. 4. c. 27. — 7 Will. 4. and 1 Vict. c. 28. — 3 & 4 Will. 4. c. 27. ss. 15, 16. — Construction of stat. 3 & 4 Will. 4. c. 27. s. 15. — Judgment of Mr. Baron Pennefather in O'Sullivan (Lessee of) v. M'Sweeny — TITLE ACQUIRED BY AN ADVERSE POSSESSION OF TWENTY YEARS — POSSESSORY TITLE WHEN SUFFICIENT — Adverse possession how negatived — Entry by heir in right of his ancestor — ACCRUER OF TITLE TO TENANT AT WILL.

3. BY WHOM EJECTMENT CAN AND CANNOT BE MAINTAINED, pp. 1383—1391.

4. PROPERTY FOR WHICH AN EJECTMENT DOES AND DOES NOT LIE, pp. 1391—1393.

5. WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT, pp. 1393—1397.

I. TO AVOID A FINE, pp. 1393—1395.

II. WHERE THE POSSESSION IS VACANT, p. 1395.

III. PROCEEDINGS IN AN INFERIOR COURT, p. 1396.

IV. BY JOINT TENANTS AND TENANTS IN COMMON — CORPORATIONS — RECEIVER — LANDLORD AND TENANT — STATUTE OF LIMITATIONS, pp. 1396, 1397.

V. EFFECT OF ENTRY, p. 1397.

6. NOTICE TO QUIT, pp. 1397—1415.

I. WHEN REQUISITE, pp. 1397—1400.

An existing tenancy from year to year — What is not an existing tenancy — Party in possession of premises with the privity and consent of the owner, no express tenancy having been created — Party lawfully in possession cannot be ejected until such possession be determined — PERSONAL REPRESENTATIVES — INFANTS — MORTGAGOR AND MORTGAGEE.

II. WHERE NOT REQUISITE, pp. 1400—1402.

Tenancy determined by effluxion of time, or happening of a particular event — Entering under an agreement for a lease, and continuing in possession for the period for which the lease was to be granted — Holding under an agreement for a lease for six years requiring a six months' notice from the tenant previously to giving up possession — An agreement for a future lease — Lessee disclaiming the title of his lessor — Attornment of tenant — Mortgagee v. Mortgagor — Assignees of mortgages — Claimants under writs of elegit — Co-partners — Chaplain of a college not a curate within stat. 57 Geo. 3. c. 99. s. 67.

III. TIME OF GIVING NOTICE, pp. 1402—1407.

Incumbent on lessee to shew the commencement of his tenancy — Tenant bound by his statement respecting the termination of his tenancy — Where house and land are let together to be entered upon at different times — Notice must be given with reference to the substantial time of entry — Six months' notice — Remainder man creating a new tenancy under a void lease — Agreement for an increase of rent does not create a new tenancy — WHERE A TENANCY COMMENCES AND EXPIRES AT ANY OF THE USUAL FEASTS — Notice can be given to quit upon a particular day, or in general terms at the expiration of the current year — Tenant of a house is entitled to the same privileges with respect to the notice to quit as the occupier of land — Lodgings — CUSTOM OF THE COUNTRY — QUARTERLY RESERVATION OF RENT — CONSTRUCTION OF NOTICES.

IV. BY WHOM NOTICE MAY BE GIVEN, pp. 1407—1409.

V. TO WHOM NOTICE SHOULD BE GIVEN, pp. 1409, 1410.

VI. FORM OF NOTICE, pp. 1410—1412.

Parol notice — Notice to tenant when landlord intends to enforce double value under stat. 4 Geo. 2. c. 28. s. 1. — Subscribing witness — Language of notice should be unambiguous — Notice will not be invalid unless it contain a real and bona fide option — DESCRIPTION OF PREMISES — Under what words "tithes" will be included — Direction of notice.

VII. MODE OF SERVICE, p. 1412.

VIII. WAVER OF NOTICE, pp. 1412—1415.

7. THE DECLARATION, pp. 1415—1424.

How intitled — VENUE — PARTIES — Tenants in possession — Insertion of a person's name as defendant without his authority — THE DEMISE — Demise declared upon, must be consistent with the title of the lessor — Describing property under an equitable article instead of a legal demise — Where doubts exist as to the party in whom the legal title is vested — Demise by churchwardens and overseers — Corporations aggregate and sole — Infant — Joint tenants or parceners — Tenants in common — DAY OF DEMISE — By administrator — Heir — Landlord — Pauper — Rectors — Tenant at will — Tenant from year to year — LENGTH OF TERM DURING WHICH THE PREMISES HAVE BEEN DEMISED — SITUATION OF THE THING DEMANDED — DESCRIPTION OF THE PROPERTY — THE ENTRY — THE OUSTER — INTRODUCTION OF AN ATTORNEY'S NAME IN DECLARATION NOT REQUISITE — ALLEGATION OF BEING INDEBTED TO THE QUEEN, AND THE QUO MINUS NOT REQUISITE.

8. NOTICE SUBSCRIBED TO THE DECLARATION, pp. 1424—1426.

By whom to be given — To whom and how directed — Service on several tenants — When to appear.

9. AMENDMENT OF DECLARATION, p. 1426.

10. SERVICE OF DECLARATION, pp. 1426—1437.

TIME OF SERVICE — UPON WHOM SERVICE TO BE MADE — Agents — Assignees — Attorney — Bailiff — Broker — Brother of tenant — Chapel keeper — Clerks of companies — Commissioners — Daughter of tenant — East India Company — Executors — Heir — Lunatic — Messenger and official assignee — Mother of tenant — Nephew of tenant — Overseers — Prisoner — Railway company — Receiver — Servant — Sister of tenant — Son of tenant — TENANT — Mistake in name — Refusing to receive notice — Preventing service by fraud — Rendering premises inaccessible — Where a service on one tenant is a service on his co-tenant — Where tenant has gone out of the country — Tenant absconding or keeping out of the way — PERSONATION — Tenant dying after service on his servant — Acknowledgment of service by tenant — Trustees — Wife of tenant — Wife of son of tenant — Insufficient service upon wife.

11. AFFIDAVIT OF SERVICE, pp. 1437—1440.

Material allegations — BY WHOM TO BE MADE — HOW INTITULED — Omitting the year when service was made — Word "served" not essentially requisite — MODE OF STATING THE SERVICE ON TENANT, OR ON THE MEMBERS OF HIS FAMILY, &c. — EXPLANATION

OF NOTICE — *Affixing copy of declaration on premises — Where affidavit appears defective — THE JURAT.*

12. JUDGMENT AGAINST CASUAL EJECTOR, pp. 1441, 1442.

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14. APPEARANCE OF DEFENDANT, pp. 1443—1446.

Appearance of landlord under stat. 11 Geo. 2. c. 19. s. 13. — Persons who cannot defend — Penalty on tenant for disobedience to stat. 11 Geo. 2. c. 19.

15. THE CONSENT RULE, pp. 1446—1448.

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Of what term and how made up — Where defendant can plead specially — Where there are several defendants who plead separately — Variance between the record and issue — Defendant should appear notwithstanding a variance.

17. PARTICULARS OF DEMAND — CONSOLIDATION OF EJECTMENTS — STAY OF PROCEEDINGS UNDER STAT. 7 GEO. 2. c. 20. s. 1. — COGNOVIT — CERTIORARI AND HABEAS CORPUS, pp. 1449—1452.

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I. WHERE DEFENDANT DOES AND DOES NOT APPEAR, p. 1453.

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III. NEW TRIAL, pp. 1454, 1455.

20. THE DAMAGES, p. 1455.

21. THE COSTS, pp. 1455—1458.

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23. SCIRE FACIAS, pp. 1459, 1460.

24. WRIT OF ERROR, pp. 1460, 1461.

25. WHERE EQUITY WILL RESTRAIN ACTIONS OF EJECTMENT, pp. 1461, 1462.

26. EXECUTION, pp. 1462—1467.

I. GENERALLY, pp. 1462, 1463.

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EJECTMENT.

III. DELIVERY OF WRIT TO THE SHERIFF AND DELIVERY OF POSSESSION, pp. 1464, 1465.

IV. WRIT OF RESTITUTION, pp. 1465, 1466.

V. REMEDIES FOR DISTURBANCE OF POSSESSION, pp. 1466, 1467.

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Plaintiff must prove a legal and possessory title — Administrator — Admissions in a deed — Affidavit — Alienation — Assignees of a bankrupt or Insolvent — Conusee of statute merchant — Conusee of statute staple — Copyhold — Deed — Devisee of freehold — Copyhold — Leasehold — Elegit, tenant by — Executors — Fieri facias — Guardian — Heir at law — Husband and wife — Joint tenant — Landlord — Mortgagor and Mortgagee — Possession — Rector — Stamp — Variance — WITNESS, COMPETENCY OF.

28. EJECTMENT BY LANDLORD AGAINST TENANT, pp. 1477—1490.

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II. PROCEEDINGS UNDER STAT. 4 GEO. 2. c. 28. pp. 1478—1482.

Construction of statute — Declaration and service of — Judgment against casual ejector — Appearance, plea, &c. — Stay of proceedings — Tender of rent — Equitable relief — EVIDENCE — DEFENCE — Forfeiture (waiver of) — Consolidation of defences.

III. PROCEEDINGS UNDER STAT. 1 GEO. 4. c. 87. pp. 1488—1489.

Stat. 1 Geo. 4. c. 87. s. 1., declaration under — Construction of statute — Notice subscribed to the declaration — Bail — Security for costs — THE TRIAL — Appearance and plea — EVIDENCE — Tenant at will — STAY OF EXECUTION.

IV. EJECTMENT UNDER STAT. 11 GEO. 4. AND 1 WILL. 4. c. 70. pp. 1489, 1490.

Stat. 11 Geo. 4. and 1 Will. 4. c. 70. ss. 36, 37. — By whom action maintainable — DECLARATION AND NOTICE — Judgment against casual ejector — Appearance and plea — Notice of trial — Stay of proceedings.

V. STATUTES FOR RECOVERY OF POSSESSION OF PROPERTY BEFORE MAGISTRATES, p. 1490.

29. ACTION FOR MESNE PROFITS, pp. 1490—1497.

I. GENERALLY, pp. 1490, 1491.

II. BY WHOM ACTION CAN AND CANNOT BE MAINTAINED, pp. 1491, 1492.

III. THE DECLARATION AND PLEADINGS, pp. 1492—1494.

IV. EVIDENCE, pp. 1494, 1495.

V. DAMAGES AND COSTS, pp. 1495, 1496.

VI. BAIL — PAYMENT OF MONEY INTO COURT — JUDGMENT — STAY OF EXECUTION, p. 1497.

1. DEFINED.

DEFINED.

In *Fairclain d. Fowler v. Shamtitle* (1) Lord Mansfield said, "The action of ejectment is the creature of Westminster Hall, introduced within time of memory, and moulded gradually into a course of practice, by rules of the courts."

(1) 3 Burr. 1292.

Ejectment is a *real* action in respect of the *lands*, and *personal* in respect of the *damages and costs*; — it is therefore a mixed action, in which a lessee for years, when ousted, can recover his term, as also his damages. (1) It is also a possessory action, and only maintainable where the lessor of the plaintiff may enter. (2)

DEFINED.

Real action in respect of lands, personal in respect of damages and costs.

After the disuse of real actions, questions of title to land were usually tried in actions of replevin or trespass, *quare clausum fregit*; and this practice continued, until the introduction of trying titles by the action of *ejectio firmæ*. But in the *ejectio firmæ* damages only could be recovered until, or shortly after the 6 Rich. 2., when the judges resolved, that the term as well as damages might be recovered.

The action of ejectment is formed on the plan of the *ejectio firmæ*. Where in this action the right to lands and tenements is tried, it is called ejectment on the title. This is where any person having legal title, as by descent, by purchase, by devise, the expiration of leases for terms for years, death of tenant for life, forfeiture for breach of covenant, or such causes, becomes entitled to the possession of lands, tenements or hereditaments — his mode of proceeding to recover them is by ejectment.

Ejectment on the title.

The present mode of proceeding by ejectment is said to have been introduced by Lord Chief Justice Rolle, who presided in the upper bench during the time of the Commonwealth, to avoid, on the one hand, the necessity of making an actual entry, and selling a lease on the premises, for trying the title; and, on the other, to obviate the inconvenience arising from the action being brought against the casual ejector, and give the tenant in all cases an opportunity of defending his title upon proper terms. In this mode of proceeding, it is not necessary for the claimant to make an actual entry, or seal and deliver a lease on the premises, or for the lessee to enter thereon, and be ousted by the defendant; but the first proceeding is, the delivery of a declaration to the tenant in possession, on a feigned demise, in which the supposed lessee is the nominal plaintiff, and a casual ejector defendant: to which declaration a notice is annexed, from the casual ejector to the tenant in possession, advising him to appear within a limited time, and cause himself to be made defendant in his stead, otherwise, [that judgment will be entered therein against the casual ejector by default, and the tenant will be turned out of possession.

Present mode of proceeding by ejectment introduced by Chief Justice Rolle.

On receipt of this declaration and notice, if the tenant do not appear in the limited time, he is supposed to have no title to the premises; and an affidavit having been made of the service of the declaration and notice, the court will order judgment to be entered against the casual ejector by default, and possession of the premises will be given to the lessor of the plaintiff, who is considered as the real claimant. But if the tenant mean to appear, pursuant to the notice, a rule of court is drawn up, by consent of the parties, or their attorneys, (which is called the consent rule), by which it is ordered, that the tenant be made defendant, instead of the casual ejector, and forthwith appear at the suit of the plaintiff, and file common bail, and receive a declaration in an action of trespass and ejectment

(1) 3 Bac. Abr. Ejectment (A.), 2. Stat. (2) *Kilwick v. Maidman*, 1 Burr. 119. 1 Geo. 4. c. 87.

DEFINED.

for the premises in question (describing them according to the rule) (1), and plead thereto not guilty; and upon the trial of the issues, confess, lease, entry, and ouster, and insist upon the title only, otherwise that judgment will be entered for the plaintiff against the casual ejector by default: and as the lessor of the plaintiff will not, in this mode of proceeding, be able to prove an actual lease, entry, and ouster, it is further ordered by the consent rule, that if, upon the trial of the issue, the tenant shall not confess the same, whereby the plaintiff shall not be able further to prosecute his suit against him, then no costs shall be allowed for not further prosecuting the same, but the tenant shall pay the costs to the plaintiff. On the other hand, as the ejectment is brought in the name of the nominal plaintiff, against whom the defendant, if he succeeded, would have no remedy for his costs, it is further ordered, that if, upon the trial of the issue, a verdict shall be given for the defendant, or it shall happen that the plaintiff shall not further prosecute his suit, for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay costs to the defendant.

Where the claimant must make an actual entry, and seal a lease on the premises.

This mode of proceeding, however, cannot be pursued in the case of a vacant possession, where there is no tenant to whom the declaration can be delivered; nor as between landlord and tenant when the premises are wholly deserted by the latter, and his place of residence is unknown (2); and the case is not provided for by the statute 4 Geo. 2. c. 28. (3); nor, as it seems, when the ejectment is brought in an inferior court, which has not the power of framing the rule to confess lease, entry, and ouster; nor the means, if such rule were entered into, of enforcing obedience thereto. (4) In these cases, therefore, the claimant must still proceed in the ancient mode, by making an actual entry, and sealing a lease on the premises. (5)

TITLE REQUISITE TO MAINTAIN EJECTMENT.

Lessee of the plaintiff must have a legal estate—an equitable title not sufficient.

Plaintiff must recover on the strength of his own title.

Lessee cannot dispute the title of his lessor.

2. TITLE REQUISITE TO MAINTAIN EJECTMENT.

In order to maintain an ejectment, it is necessary that the lessee of the plaintiff should have a legal estate in the tenements sought to be recovered, an equitable title not being deemed sufficient.

The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant. (6) Possession gives the defendant a right against every man who cannot shew a good title (7); but a lessee will not be permitted to defend an ejectment against his own landlord, from whom he has received possession, on a supposed defect in the title of the landlord (8); nor if B., claiming under A., let lands for a year and die, and A. after the expiration of the term brings an ejectment against C., C. cannot dispute (9) the title of A.; nor when the tenant in possession has

(1) R. M. 1 Geo. 4. K. B. R. H. 1 & 2 Geo. 4. C. P. R. E. 2 Geo. 4. Exch.

(2) Tidd, 1204.

(3) Ibid.

(4) *Sherman v. Cocke*, 1 Keb. 795.

(5) 1 Lil. Pr. Reg. 498, 499.

(6) *Per* Lee C. J. in *Martin v. Strachan*, 5 T. R. 110. n.

(7) *Per* Lord Mansfield in 4 Burr. 2487.

(8) *Driver d. Oxenden v. Laurence*, 2 W. Black. 1259.

(9) *Barwick v. Thompson*, 7 T. R. 488.

paid rent to the lessor of the plaintiff, can a third person come in and defend as landlord without the tenant, and dispute the lessor of the plaintiff's title (1): neither the tenant, nor any one claiming by him, can controvert the landlord's title; he cannot put another person into possession, but must deliver up the premises to his own landlord.

TITLE REQUI-
SITE TO MAIN-
TAIN EJECT-
MENT.

In *Doe d. Bullen v. Mills* (2) it appeared that, premises being in the possession of a tenant under an indenture of lease, a party claimed them by an alleged title adverse to that of the lessor, and prior to the lease, demanded them of the lessee, and ultimately obtained possession by paying him 20*l.*; the landlord afterwards brought ejectment against the party so in possession, the term having been forfeited:—It was held, that the defendant could not set up his adverse title against the landlord, Mr. Justice Patteson observing, I cannot distinguish this case from *Doe d. Knight v. Smythe (Lady)*. (3)

But when a tenant has not received possession from a person, to whom however, under a misrepresentation or by mistake, he has paid rent, such payment of rent will not estop the tenant from setting up the title of the real owner. (4)

Payment of
rent under a
mistake.

Where possession has been fraudulently obtained (5), if the title is to be disputed, the lessor of the plaintiff may insist upon being first put into the situation in which he was before the possession was taken.

Where posses-
sion has been
fraudulently
obtained.

If a copyholder have been admitted to a tenement, and done fealty to his lord, he cannot, in an action by the lord for a forfeiture, shew, that the legal estate was not in the lord at the time of admittance. (6)

Copyholder, if
admitted, can-
not dispute the
lord's title.

It is now settled, though a contrary practice prevailed (7), that where trustees ought to convey to the beneficial owner, it may be left to the jury to presume, that they have conveyed accordingly (8); or when the beneficial occupation of an estate by the possessor, under an equitable title, induces a probability, that there has been a conveyance of the legal estate to the person who is equitably entitled to it. (9) Upon principle, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered, unless there has been an enjoyment inconsistent with the existence of the term, or some act done in order to disavow the tenure under the term, and to bar it as a continuing interest (10): yet, where the facts preclude such a presumption, and that the legal estate is still outstanding in a trustee, the ejectment must be brought in his name, and cannot be maintained in that of the *cestuique trust*. (11)

Where a con-
veyance of the
legal estate will
be presumed.

It even seems, that a trustee may in strictness maintain an ejectment against his own *cestuique trust* (12); and an unsatisfied term, outstanding in trustees, will bar the recovery of the heir at law, even though he claim

(1) *Doe d. Knight v. Smythe, (Lady)* 4 M. & S. 347.

(2) 2 A. & E. 17.

(3) 4 M. & S. 347.

(4) *Fenner v. Duplock*, 2 Bing. 10., vide etiam *England d. Syburn v. Slade*, 4 T. R. 682. *Cornish v. Searell*, 8 B. & C. 471. *Brook v. Biggs*, 2 Bing. N. C. 572.

(5) *Doe d. Johnson v. Baytup*, 9 A. & E. 188.

(6) *Doe d. Nepean (Sir Edward) v. Budden*, 5 B. & A. 626.

(7) *Lade (Bart.) v. Holford*, Bull. N. P. 110. 3 Burr. 1416. 1 W. Black. 428.

(8) *Doe d. Syburn v. Slade*, 4 T. R. 682.

(9) *Roe d. Reade v. Reade*, 8 ibid. 122., et vide *Doe d. Burdett v. Wrighte*, 2 B. & A. 710.

(10) 3 Sug. V. & P. 42. et seq.

(11) *Doe d. Hodsden v. Staple*, 2 T. R. 684.

Doe d. Bowerman v. Sybourn, 7 ibid. 3. 49.

Roe d. Reade v. Reade, 8 ibid. 122. *Doe d.*

Shewen v. Wroot, 5 East, 138. Tidd, 1194.

(12) *Roe d. Reade v. Reade*, 8 T. R. 122.

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only subject to the charge. (1) So an ejectment cannot be maintained by a mortgagee, or a tenant by *elegit* (2), against the tenant in possession, holding under an existing lease or agreement made prior to the mortgage or judgment on which the *elegit* issued. But a mortgagee having the legal estate may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. (3)

Where legal estate not evicted by lessor's acceptance of rent and costs.

Where a landlord brings an ejectment for non payment of rent and executes his *habere*, the legal estate granted by the lease is not evicted, if, within the period allowed for redemption, the landlord accept from any person deriving under that lease, the rent and costs. By such acceptance the legal estate, and all interests carved out of it, are set up for the benefit of all persons deriving under the lease. (4)

Setting up an outstanding term in a terre tenant.

In *Frawley (Lessee of) v. Bastable* (5) it appeared, that A. having sued out a *scire facias* to revive a judgment against the heir and terre tenants of the conusor, they appeared by B., their attorney, and put in a plea of confession. An *elegit* having been sued out, an ejectment was brought thereupon, with which B. was served, and to which he alone took defence. Upon the trial he set up an outstanding term in a terre tenant: — It was held, that he was not estopped from so doing.

RIGHT OF ENTRY.

An ejectment being a possessory remedy, the lessor of the plaintiff must have a right of entry on the day of the demise (6); and therefore an ejectment will not lie when the right of entry is taken away, as by the discontinuance of an estate tail (7), &c. by a descent cast (8), or by the Statute of Limitations. (9)

Immediate right of entry must exist at the time of the demise.

In consequence of its being necessary for the lessor of the plaintiff to have an immediate right of entry at the time of the demise in the ejectment, a remainder man or reversioner cannot maintain ejectment during the continuance of the particular estate.

A lease contained a clause that, if the rent should be in arrear, and if there should be no sufficient distress on the premises, it should be lawful for the lessor, his heirs and assigns, without any demand made, to re-enter. The rent being in arrear, I. H., the assignee of the reversion, brought an ejectment for non payment of rent to evict the lease, which was vested in five coheiresses, but served only the husbands of two of them with the ejectment, and having obtained judgment, he was put into possession under an *habere*, there being no sufficient distress on the premises. The five coheiresses and their husbands afterwards brought an ejectment on the title to recover back the possession under the lease, on the ground of the invalidity of the proceedings in the ejectment for non payment of rent: — upon which it was held, that although I. H. entered into possession with the intention of proceeding under the statutes relating to ejectment for non payment of rent, and although that proceeding was invalid, yet there being an arrear of rent then due, and no sufficient distress on the premises, he had at that time a right to re-enter for condition broken at common law, without any demand, and that his entry under the ejectment for non payment of rent

(1) *Doe d. Hodsdon v. Staple*, 2 T. R. 684.

(2) *Doe d. Da Costa v. Wharton*, 8 *ibid.* 2.

(3) *Tidd*, 1194.

(4) *Sheridan v. Dawson*, 1 Jones (Irish), 256.

(5) 1 Hayes (Irish), 189.

(6) *Runnington on Ejectment*, 44.

(7) *Tidd*, 1194.

(8) *Runnington on Ejectment*, 44, 45.

(9) *Tidd*, 1194.

might be referred to such right of re-entry for condition broken, and was therefore valid. (1)

At common law a right of entry was not assignable, nor as it seems devisable (2); and by stat. 32 Hen. 8. c. 9. s. 2., no person shall buy or sell any pretended right or title to land, &c. unless the vendor or his ancestors, or those under whom he claims, have been in actual possession of the same, or of the reversion, or remainder, or taken the rents or profits thereof for the space of one whole *year* next before the sale, on pain that the buyer and seller shall each forfeit the value of such land to the king and the prosecutor. An ejectment cannot, therefore, be maintained under a conveyance made by a person who is out of possession.

Ejectment being founded on a right of entry, must under stat. 21 Jac. 1. c. 16. s. 1. be brought within *twenty* years after the right or title of entry accrued, or, in case of an adverse possession, it may be barred by that statute; and as it is an action relating to real property, it will be governed by stat. 3 & 4 Will. 4. c. 27., by which, after the 31st day of December 1833, no person shall bring an action to recover any land but within *twenty* years next after the time at which the right to bring such action shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within *twenty* years next after the time at which the right to bring such action shall have first accrued to the person bringing the same. (3)

By stat. 7 Will. 4. & 1 Vict. c. 28. to amend the act of 3 & 4 Will. 4. c. 27. it is enacted, that "it shall and may, be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry, or bring an action at law, or suit in equity, to recover such land at any time within *twenty* years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twenty* years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued, any thing in the said act notwithstanding."

In stat. 21 Jac. 1. c. 16. s. 2. there is a *proviso* that, "if any person or persons that hath or shall have such right or title of entry, be, or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of *one* and *twenty* years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said *twenty* years be expired, bring his action or make his entry as he might have done before this act, so as such person and persons, or his or their heir and heirs, shall, within *ten* years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said *ten* years."

And it is provided by stat. 3 & 4 Will. 4. c. 27. s. 16. that, "if at the

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Right of entry not assignable.
Stat. 32 Hen. 8. c. 9. s. 2.

LIMITATION OF ACTION.
Stat. 21 Jac. 1. c. 16. s. 1.

Stat. 3 & 4 Will. 4. c. 27.

Stat. 7 Will. 4. & 1 Vict. c. 28.

Stat. 21 Jac. 1. c. 16. s. 2.

Proviso in favour of an infant or a feme covert, and of persons *non compos mentis*, imprisoned, or beyond the seas.

Stat. 3 & 4 Will. 4. c. 27. s. 16

(1) *Warrington (Lessee of) v. Hodgins*, 1 552. 8 East, 552. 1 Taunt. 578. Tidd, Batty (Irish), 311. 1194.

(2) *Doe d. Perry v. Jones*, 1 Hen. Black. (3) *Respecting the Law of Inheritance*, 32. *Goodright d. Fowler v. Forrester*, vide stat. 3 & 4 Will. 4. c. 106.

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time at which the right of any person to make an entry, or bring an action, to recover any land shall have first accrued, such person shall have been under any of the disabilities thereafter mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of *twenty* years thereinbefore limited shall have expired, make an entry, or bring an action to recover such land, at any time within *ten* years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died, which shall have first happened."

Stat 3 & 4
Will. 4. c. 27.
s. 15.

Where posses-
sion not ad-
verse.

By stat. 3 & 4 Will. 4. c. 27. s. 15., "that when no such acknowledgment (of title) as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act."

Requisites in
order to entitle
a party to the
exceptive pro-
visions in stat.
21 Jac. 1. c. 16.

To entitle a party to the benefit of the exceptions in stat. 21 Jac. 1. c. 16. it is necessary, that the disability to enter should exist at the time when his title accrued; for if he had the power to enter but for an instant, no subsequent disability will be sufficient to arrest the operation of the statute. (1)

And the principle is the same where a disability, existing at the time of the commencement of the title, is afterwards removed, and a subsequent disability ensues, the statute continuing to run, notwithstanding the second disability. (2)

Construction of
stat. 3 & 4 Will.
4. c. 27. s. 15.

It has been holden in an ejectment on the title by one coparcener against another, that if the possession of the defendant be adverse to the title of the lessor of the plaintiff at the time of the passing of stat. 3 & 4 Will. 4. c. 27., though it has not been so for the period of twenty years before, the case is not within the fifteenth section of the act. Adverse possession within the meaning of that section, is not adverse possession for the period of twenty years antecedent to the passing of the act.

Judgment of
Mr. Baron
Pennefeather in
O' Sullivan
(*Lessee of*) v.
M' Sweeney.

And if the possession be adverse at the time of the passing of the act, and it appear that the defendant has been in the sole and exclusive possession of the lands without acknowledgment or account for more than twenty years before the ejectment was brought, the title of the lessor of the plaintiff is barred. Thus, in *O' Sullivan (Lessee of) v. M' Sweeney* (3) Mr. Baron Pennefeather observed, "It has been contended that the legislature intended, by this fifteenth section, to give to every person, whose right would otherwise have been affected by the act, five years within which he might bring his action. I do not think that such is the meaning of that section; in my opinion it applies to those cases only, where there has been a possession for twenty years or upwards, but which was not, at the time of the passing the act, adverse to the title of the party bringing the action; and that an adverse possession at that time, even though it were

(1) *Doe d. Duroure (Count) v. Jones*, 4 T. R. 300.

(2) Tidd, 1196.

(3) 1 Jones & Carey (Irish), 295.

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for a very short period, is sufficient to deprive the party of the benefit of the fifteenth section. In my opinion, that is the true construction to be given to the statute; and I think that the only time given to a person under such circumstances to assert his right in, was the period intervening between the passing of the act, and the 31st of December, 1833. During that interval he might assert his right, not by virtue of any saving contained in the fifteenth section, but because the other sections of the act, which after that period would have barred his right, had not come into operation. Then by the express language of the fifteenth section, it does not apply to cases where the possession at the time of the passing of the act is adverse to the title of the claimant. It does not say that the possession must have been adverse for twenty years before the passing of the act; but that it must have been adverse at that time. I admit that there is a hardship in that construction; but it is probable that those who framed the act did not regard it in comparison with the great object of the statute, that of quieting possessions, and putting an end to this species of non adverse possession; and that they desired to give to a possessor not accounted for by a tenancy, all the rights and privileges of an adverse possession. I think they have done so, and that we must construe the act accordingly. The case of *Nepean (Bart.) v. Doe d. Knight* (1) at least so far as the opinion of Lord Denman goes, is precisely in point; for in that case the jury found, that there was not an adverse possession for twenty years; but the facts of the case warranted the court in assuming, that there had been an adverse possession at the time of the passing of the act, though extending over a shorter period than twenty years. The analogy also to be derived from Lord Tenterden's act is not to be disregarded; and certainly, the construction which has been put upon that statute, gave it an *ex post facto* operation. It was so construed by this court, who, very much against the opinion of one of its members, Sir W. Smith, gave it a retrospective operation, and the same construction was afterwards given to it by the judges in England. For these reasons I am of opinion, that the exceptions should be allowed."

An adverse possession for twenty years, is not only an available defence to the party whilst he continues in possession, but it gives him (unless affected by some of the exceptive provisions in the Statute of Limitations) a complete possessory right to the lands, and is a sufficient title to enable him to maintain an ejectment against any person who ousts him after the expiration of the twenty years (2), in fact, it is like a descent at common law, which tolls the entry.

TITLE AC-
QUIRED BY AN
ADVERSE POS-
SESSION FOR
TWENTY YEARS.

It seems that this doctrine will hold between the party having had the adverse possession for twenty years and the legal owner of the lands, although the party having had the possession afterwards desert the premises, and the right owner peaceably enter thereon. (3)

But if the possession of the party be affected by any of the provisions of stat. 21 Jac. 1. s. 16. c. 2. or if the lands be the property of the crown or of the church, the defendant may avail himself thereof, in answer to the claim arising from the adverse possession, without shewing any title

(1) 2 M. & W. 894.

(2) *Stocker v. Berny*, 1 Ld. Raym. 741.

(3) *Doe d. Burrough v. Reade*, 8 East,

358.

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MENT.

Stat. 9 Geo. 3.
c. 16.

POSSESSORY
TITLE WHEN
SUFFICIENT.

Adverse pos-
session how
negatived.

Ejectment at
the suit of the
crown.

Entry by heir
in right of his
ancestor.

in himself. If, indeed, the lands are crown lands, and the claimant has been ousted by a wrong-doer, after an uninterrupted possession for more than twenty years, a grant of them from the crown will be presumed in his favour, unless the crown be incapable of making such grant; but if such incapacity exist, a grant of course cannot be presumed, and no possession for less than sixty years will then be sufficient to enable him to maintain an ejectment. And indeed, as stat. 9 Geo. 3. c. 16. only bars the *suit* of the crown after a continuing adverse possession of sixty years, but does not also give a *title* to the adverse possessor, it may be doubted, whether *any* length of possession of crown lands not grantable by the crown, will be a sufficient title to support an ejectment. (1)

In ejectment for rooms it appeared, that H. and the lessor of the plaintiff were placed in a house by the proprietor, whose servants they had been, and occupied it in distinct portions; H. having the rooms in question to himself. L. came to reside with and attend upon H., who died sometime after, having devised his interest in the rooms to the lessor of the plaintiff. The original proprietor had died before H.: L. continued to occupy the rooms, but was forcibly removed from one by the lessor of the plaintiff and the ejectment brought for the recovery of the others. The declaration being served upon L., defendants (who professed to have a claim under the original proprietor) entered into the consent rule to defend as landlords, but, at the trial, gave no evidence of title in themselves:— It was held, that L. having come in under H., no title in him could be set up against the lessor of the plaintiff; that the lessor of the plaintiff shewed a sufficient title, none being proved by the defendants; and that they could not allege against him, that he did not prove twenty years' adverse possession in himself and H. (2)

Although an adverse possession of twenty years is not only a negative bar to the plaintiff's recovery in ejectment, but takes away his right of possession, and gives a positive title to the opposite party (3), yet an adverse possession will be negatived in the following cases:— 1. When the parties claim under the same title. 2. When the possession of one party is consistent with the title of the other. 3. When the party claiming title has never, in contemplation of law, been out of possession. 4. When the possessor has acknowledged a title in the claimant: and lastly, an adverse possession for twenty years is no bar to a rector or vicar, except as against the same incumbent who submitted to such possession. (4)

It was formerly doubted, whether an ejectment could be maintained by the king, because an ejectment is for an injury done to the possession, and the king cannot be put out of possession. But this reasoning seems only to apply, where the king is made *plaintiff*, and not where he is the *lessor of the plaintiff*. (5)

Where the ancestor to whom the right first accrues dies under a disability, which suspends the operation of the statute, his heir must make his entry within ten years next after his ancestor's death, provided more than twenty

(1) *Goodtitle d. Parker v. Baldwin*, 11 East, 488. *Adams on Ejectment*, 78. (3) *Runnington on Ejectment*, 55.
(2) *Doe d. Willis v. Birchmore*, 9 A. & E. 662. It was held also, that L. was not a competent witness for the defendants. (4) *Runcorn v. Doe d. Cooper*, 5 B. & C. 696.
(5) *Payne's case*, 2 Leon. 205. *Lee v. Norris*, Cro. Eliz. 331. *Doe d. Hayne v. Redfern*, 12 East, 96.

years have in the whole elapsed from the time of the commencement of the ancestor's title to the time of the expiration of the ten years. (1)

Under stat. 3 & 4 Will. 4. c. 27. s. 2. (which limits the time for recovering lands by action to twenty years after the right accrues), sect. 34. (which extinguishes the title at the determination of such period), and sect. 7. (which enacts that, in case of tenancy at will, the right of action shall be deemed to have accrued at the determination or at the end of one year from the commencement of such tenancy), no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed. As against the original landlord, and those claiming under him, such party is without title independently of sect. 15. Nor can he by virtue of the first mentioned clauses recover in ejectment, even against a stranger. (2)

TITLE REQUI-
SITE TO MAIN-
TAIN EJECT-
MENT.

ACCRUER OF
TITLE TO TE-
NANT AT WILL.

3. BY WHOM EJECTMENT CAN AND CANNOT BE MAINTAINED.

In ascertaining the particular persons who, by reason of their estate and interest in the lands, can maintain ejectment, it should be remembered, that a right of entry or possession is supposed to accompany their legal title.

An alien cannot maintain ejectment, for an alien cannot take lands by descent. (3)

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.
ALIENS.

As all the bankrupt's property, real and personal, is vested in the assignees (4), they can maintain ejectment for such property; and the provisional assignee of the Insolvent Debtors' Court, has also the same right action. (5)

ASSIGNEE OF A
BANKRUPT.

By stat. 32 Hen. 8. c. 34., the grantees or assignees of a reversion shall have the same rights and advantages, with respect to the forfeitures of estates, as the heirs of individuals and the successors of corporations had until that time solely enjoyed; and this statute is made most general in its operation, by particularly including the grants from the monarch of those lands which had then recently become the property of the crown by the dissolution of the monasteries.

ASSIGNEE OF
THE REVERSION
UPON A RIGHT
OF RE-ENTRY
FOR A CONDI-
TION BROKEN.
Stat. 32 Hen. 8.
c. 34.

The words of the statute grant the privilege of re-entry to the assignees "for non payment of rent, or for doing of waste, or *for other* forfeiture;" but these latter words have been limited in their interpretation to "*other forfeiture of the same nature*," and extend to the breach of such conditions only as are incident to the reversion, or for the benefit of the estate. Thus, the assignee may take advantage of covenants for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, or such like (6), but not of collateral covenants, as for the payment of a sum in gross, or for the delivery of corn or wood; and it has upon this principle been doubted, whether the assignee can re-enter, if the lessee break a covenant not to assign without license. (7)

The assignee of part of the reversion in all the lands demised is an

(1) Doe d. *George v. Jesson*, 6 East, 80.

(2) *Thompson v. Thompson*, 6 A. & E. 721.

(3) Co. Litt. 7. (b.)

(4) *Beck d. Hawkins v. Welsh*, 1 Wils. 276., *anté*, tit. BANKRUPTCY.

(5) Doe d. *Clark v. Spencer*, 3 Bing. 203., *post*, 1389.

(6) Co. Litt. 215. (b.)

(7) *Lucas v. How*, Sir T. Raym. 250.

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

Instrument
which does not
operate as a
grant of the
reversion.

assignee within this statute; but the assignee of the reversion in part of the lands is not, for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. (1)

Where A. B. by indenture, in consideration of a sum of money, and of the yearly rents and covenants therein reserved, demised to C. D. in these words, "hath demised, granted, set, and to farm let; and by these presents doth demise, grant, set, and to farm let unto the said C. D. all that and those, &c. now in the possession of J. C.," *habendum* for three lives:—It was held, that this instrument did not operate as a grant of a reversion, as it could not be inferred, that the grantor's estate was a reversion, there not being any apparent privity between J. C. and him, nothing being recited in the instrument but a bare possession in J. C., and nothing beyond that possession having been shewn in evidence. (2)

A *cestuique use* and bargainee of the reversion are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat (3); nor to an assignee by estoppel only (4); nor to one who is in of another's estate; and therefore, if the reversion expectant on the determination of the term be merged in the reversion in fee, the reversion is no longer within the statute. (5)

This statute is held not to extend to gifts in tail (6), but copyhold lands are within its intention and equity. (7)

ATTORNEY.
AWARD.

An attorney cannot be a lessor in ejectment. (8)

An award, under a submission to arbitration, will give a good title on which to maintain this action; for, although the award cannot have the operation of conveying the land, yet the defendant has bound himself, by his own agreement, from disputing the title of the lessor of the plaintiff in ejectment. (9)

BARGAINER
UNDER A FIAT.
CHURCHWAR-
DENS AND
OVERSEERS.

Stat. 59 Geo. 3.
c. 12. s. 17.

A bargainer under a fiat of bankruptcy can maintain ejectment. (10)

The stat. 59 Geo. 3. c. 12. s. 17. empowers churchwardens and overseers to take lands and hereditaments (11) in the nature of a body corporate, and declares, that in all actions brought in respect thereof, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and where a declaration in ejectment by churchwardens and overseers contained two sets of counts, one describing them by their office without their names, and the other by their names without their office, it was held, that the objection, if any, was cured after verdict. (12)

This statute extends to tenements, the profits of which, are applicable to the purpose for which a church-rate is levied. (13)

(1) Co. Litt. 215. (a.)

(2) Doe d. Kearns v. Sherlock, 2 Fox & Smith (Irish), 79.

(3) Co. Litt. 215. (a.)

(4) Awdler v. Nokes, F. Moore, 419.

(5) Threr v. Barton, ibid. 94. Chaworth v. Phillips, ibid. 876. Webb v. Russell, 3 T. R. 393. 401.

(6) Co. Litt. 215. (a.)

(7) Glover v. Cope, Carth. 205. Adams on Ejectment, 65.

(8) Reg. Gen. K. B. Doug. 466. n.

(9) Doe d. Morris v. Rosser, 3 East, 15. Doe d. Chawner v. Boulter, 6 A. & E. 675.

(10) Beck d. Hawkins v. Welch, 1 Wils. 276.

(11) Vide Doe d. Jackson v. Hiley, 10 B. & C. 885.

(12) Doe d. Orleton v. Harpur, 2 D. & R. 708.

(13) Doe d. Jackson v. Hiley, 10 B. & C. 885.

Churchwardens *per se*, without overseers, are not a corporation within the foregoing statute. (1)

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

Payment of rent to parish officers in their character as such, is evidence to shew, that the premises for which it was paid, belonged to the parish within stat. 59 Geo. 3. c. 12., so as to enable the parish officers for the time being to maintain ejectment against the party so paying rent, who held under a lease granted by the parish officers previous to the statute, and therefore void, for they had no right to demise the lands before the statute. (2)

Payment of
rent to parish
officers.

Conusee of a statute merchant or staple can maintain ejectment. (3)

CONUSEE OF A
STATUTE MER-
CHANT OR
STAPLE.

Coparceners can likewise support such action.

COPARCENERS.
COPYHOLDER.

Ejectment can be maintained by a copyholder if wrongly ejected by the lord; and the common consent rule is now sufficient to enable a copyholder to maintain such action.

Surrenderee.

As the surrender (4) and admittance make but one conveyance (5), the legal title does not vest in the surrenderee, and of course he cannot maintain ejectment until after admittance: but when the admittance has been made, the title relates back to the time of the surrender, against all persons but the lord; and, therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the time of trial. (6)

The heir to copyhold lands can maintain ejectment before admittance, against a stranger who obtains possession of the land (7); for his title is complete against all the world except the lord, immediately upon the death of the ancestor. (8) But if the lord seize the land upon the ancestor so dying, and the heir bring an ejectment against him for the seizure, it will be necessary to shew, that he has tendered himself to be admitted at the lord's court, or that the lord has dispensed with such tender. (9)

The heir to
copyhold lands
can maintain
ejectment be-
fore admittance
against a
stranger who
obtains pos-
session of the land.

Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was holden that his devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor. (10)

Devisee.

An assignment of copyhold premises by common law conveyance of lease and release without surrender to the lord of the manor, is not sufficient to support an ejectment by the re-lessee, even against the widow of the re-lessor. (11)

If a copyholder without license make a lease for one year, or, with license, make a lease for many years, and the lessee be rejected, he shall not sue in the lord's court by plaint, but shall have an ejectment at the common law; because he has not a customary estate by copy, but a warrantable estate by the rules of common law. (12)

Lessee.

Corporations aggregate can maintain ejectment (13), and so can corpora-

CORPORATIONS.

(1) *Phillips v. Pearce*, 5 B. & C. 493.

(2) *Doe d. Higgs v. Terry*, 4 A. & E. 274.

(3) Co. Litt. 42. (a.) *Hammond v. Wood*, 2 Salk. 563.

(4) Vide *Doe d. Warry v. Miller*, 1 T. R. 393.

(5) *Roe d. Jeffereys v. Hicks*, 2 Wils. 13. 15.

(6) *Holtfast d. Woollams v. Clapham*, 1 T. R. 600. *Doe d. Bennington v. Hall*, 16 East, 208.

(7) *Roe d. Jeffereys v. Hicks*, 2 Wils. 13.

(8) *Rex v. Rennett*, 2 T. R. 197.

(9) *Doe d. Burrell v. Bellamy*, 2 M. & S. 87.

(10) *Doe d. Vernon v. Vernon*, 7 East, 8. Adams on Ejectment, 65.

(11) *Doe d. North v. Webber*, 3 Bing. N. C. 922.

(12) *Goodwin v. Longhurst*, Cro. Eliz. 535. Adams on Ejectment, 65.

(13) *Patrick v. Balls*, Carth. 390. *Bands and Bodiner*, 12 Mod. 113.

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

DEVISEES.

Devisee can
without posses-
sion maintain
ejectment.

ELEGIT.

Tenant by
elegit can sup-
port ejectment.

Where a claim-
ant under an
elegit subse-
quent to a lease
granted to the
tenant in pos-
session cannot
recover in
ejectment.

EXECUTORS AND ADMINISTRATORS.

Estates *pur
autre vie*, where
there is no
special occu-
pant, go to
executors.

Stat. 29 Car. 2.
c. 3. does not
extend to copy-
holds.

tions sole (1): — but, generally, a corporation cannot make an attorney a bailiff but by deed, nor appear but by making a proper person their attorney by deed.

Where the devise is of freehold interest, the devisee can without possession maintain ejectment for the lands devised (2); but if it be a legacy for a term of years, he must first obtain the assent of the executors to the bequest. (3) Where, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger. (4)

In order to gain actual possession, a tenant by *elegit* can maintain ejectment.

In *Rogers v. Pitcher* (5) it was said by Chief Justice Gibbs, "I am aware that it has in several places been said (6), that the tenant in *elegit* cannot obtain possession without an ejectment; but I have always been of a different opinion. There is no case in which a party may maintain ejectment, in which he cannot enter. The ejectment supposes that he has entered; at least, that he has leased to another, and that, that other has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not, however, consider the present case as now deciding these points, which I only throw out in answer to the argument that has been used."

A plaintiff who claims under an *elegit*, subsequent to a lease granted to the tenant in possession, cannot recover in ejectment, though he give the tenant notice, that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate. (7)

Where an *elegit* creditor brings ejectment against a debtor, whose *prima facie* title to the whole property sought to be recovered is proved, it is incumbent on other parties in possession as under-tenants, or otherwise, to shew their better title (e.g. by tenancy anterior to the judgment or the like), or the *elegit* creditor must recover against all. (8)

The rights of personal representatives is confined to those lands, which the testator or intestate held for a term of years; but it is immaterial whether the ouster be after or before the death of the testator or intestate. (9)

Personal representatives can recover in ejectment under stat. 29 Car. 2. c. 3. s. 12. where there is no special occupant.

But the foregoing statute does not extend to copyholds, and therefore one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, was not permitted to maintain ejectment. (10)

An administrator of a tenant from year to year can maintain an ejectment (11); and an executrix can lay a demise in ejectment before probate granted. (12)

(1) *Read v. Allen*, cit. 1 Esp. N. P. 448. Bull. N. P. 107 (a.)

(2) Co. Litt. 240. (b.)

(3) *Young v. Holmes*, Str. 70.

(4) *Doe d. Say and Sele (Lord) v. Guy*, 3 East, 120.

(5) 6 Taunt. 202.

(6) *Lowthall v. Tomkins*, 2 Eq. Ca. Ab. 380. *Taylor v. Cole*, 3 T. R. 295.

(7) *Doe d. Da Costa v. Wharton*, 8 ibid. 2.

(8) *Doe d. Evans v. Owen*, 2 Tyrw. 149. 2 C. & J. 71.

(9) *Slade's case*, 4 Co. 92. 95. (a.) *Doe d. Shore v. Porter*, 3 T. R. 13.

(10) *Zouch d. Forse v. Forse*, 7 East, 186.

(11) *Doe d. Shore v. Porter*, 3 T. R. 13.

(12) *Roe d. Bendall v. Summerset*, 2 W. Black. 694. 5 Burr. 2608.

Where a tenant died intestate in the possession of certain premises, and his widow after continuing to occupy them for several years, and paying rent to the landlord, married a second time, and her husband entered into possession and paid rent for several years to the landlord, and upon the death of the wife the personal representative of the first husband obtained administration of his estate and effects, and brought ejectment to evict the second husband:—It was held, that the action was maintainable, without giving a formal notice to quit. (1)

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

Grantee of a rent-charge having power to enter upon the lands, if the rent be in arrear, and to retain possession of them until satisfaction, can maintain ejectment (2); but these rights of entry are always taken strictly. (3)

GRANTEE OF A
RENT-CHARGE.

Guardian in socage, or testamentary guardian appointed under stat. 12 Car. 2. c. 24. s. 8., can maintain ejectment. (4)

GUARDIAN IN
SOCAGE.

But as a guardian for nurture cannot make leases for years, either in his own name or in the name of the infant, he cannot maintain ejectment. (5)

As a general principle, the heir can maintain ejectment in all cases where his ancestor could have sustained it.

HEIR.

In 1808 A. mortgaged certain lands. In 1810 he suffered a judgment, and afterwards died. In 1828 a *scire facias* to revive the judgment was sued out, and served upon the defendant his heir, who pleaded payment. The plea was found against him, and the judgment revived. Upon it an *elegit* was sued out, and a finding had of the lands which had been mortgaged, and which mortgage remained still unsatisfied:—It was held, that upon an ejectment on the *elegit* for recovery of these lands, the heir could not set up, the outstanding mortgage as a bar. (6)

Where heir
cannot set up
an outstanding
mortgage as a
bar.

Husband and wife can join in a lease to the plaintiff in ejectment, without saying that it was by deed, though it was formerly held to be necessary. (7)

HUSBAND AND
WIFE.

Both infant and guardian have the power of maintaining ejectment for the same lands; if the former name the plaintiff, it must be one who can be answerable for the costs. (8)

INFANTS.

Joint tenants can maintain ejectment.

JOINT TENANTS.

Legatee of a chattel real can maintain ejectment against executor (9), or a stranger; but the assent of the executor to the bequest must be proved. (10)

LEGATEE.

Where a lessee *pur autre vie* demises the lands for the term of the life of the same *cestuique vie*, reserving a rent, he can support an ejectment for non payment of rent against his lessee. (11)

LESSEE PUR
AUTRE VIE.

Where the tenant of copyhold premises has committed an act by which he forfeits his lands, he who is lord at the time of the forfeiture committed, can maintain an ejectment for the recovery of them; but this right is confined to the lord for the time being, unless the act of forfeiture shall have destroyed the estate, and then the heir of the lord in whose time it was committed, may also take advantage of it. (12)

LORD OF A MANOR.
Copyholder
committing an
act of forfeiture.

(1) *Doe v. Bradbury*, 2 D. & R. 706.

(2) *Jemott v. Cowley*, 1 Saund. 112. (a.)

(3) *Hassell d. Hodgson v. Gouthwaite*, Willes, 500.

(4) *Bedell v. Constable*, Vaugh. 177. *Roe d. Parry v. Hodgson*, 2 Wils. 129.

(5) *Ibid.*

(6) *Cusack (Lessee of) v. Croghan*, 1 Hayes (Irish), 73.

(7) *Wiscot's case*, 2 Co. 61.

(8) *Zouch d. Abbot v. Parsons*, 3 Burr. 1794.

Noke v. Windham, Str. 694. *Maddon d. Baker v. White*, 2 T. R. 159.

(9) *Doe d. Sny and Sele (Lord) v. Guy*, 3 East, 120.

(10) *Young v. Holmes*, Str. 70.

(11) *Walsh (Lessee of) v. Feely*, 1 Jones (Irish), 413.

(12) *Watk. Copyh.* 324. 353. *Roe d. Tarrant v. Hellier*, 3 T. R. 162., *vide tit. COPYHOLDER, ante*, 1385.

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

Forfeiture com-
mitted during
the vacancy of
a bishop's see.

Where right of
action will not
be destroyed by
intermediate
estate in re-
mainder.

LUNATIC.

MORTGAGOR
AND MORT-
GAGEE.

Upon forfeiture
of mortgage, the
mortgagee can
proceed against
the mortgagor.

Where receipt
of interest by
mortgagee, no
recognition that
mortgagor was
in lawful pos-
session.

Assignee of
mortgagee.

Where, however, a copyholder holding of a manor belonging to a bishoprick, committed a forfeiture by felling timber during the vacancy of the see, the succeeding bishop was allowed to maintain an ejectment against him. (1)

The right of the lord to maintain ejectment against his copyholder for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder between the life estate of the copyholder and the lord's reversion; for, if it were, the tenant for life and remainder man by combining together might strip the inheritance of all the timber. (2)

Ejectment can be sustained by the committee of a lunatic, but it must be brought in the name of the lunatic, for his committee is but a bailiff, and the interest and estate remain in the lunatic. (3)

Where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non payment, can eject the mortgagor without notice to quit (4), or demand of possession (5); and a mortgagor cannot defeat his mortgagee's title in ejectment, by setting up the title of a third person. (6)

Where a person is in possession under a lease granted by the mortgagor prior to the mortgage, the mortgagee will be bound by it (7), because the mortgagor has no power to let leases not subject to every circumstance of the mortgage; but a mortgagee can recover in ejectment (without giving notice to quit) against a tenant who claims under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. (8)

The mere fact of a mortgagee having received interest on the mortgage, down to a time later than the day of the demise in the declaration, does not amount to a recognition by him, that the mortgagor was in lawful possession of the premises, till the time when such interest was paid, and consequently it is no defence to the ejectment. (9)

But where the attorney for a mortgagee, who was also the attorney of the mortgagor, applied to the tenant in possession of the mortgaged premises for rent to pay the interest due on the mortgage, and threatened to distrain if the rent were not paid:—It was held, that the mortgagee thereby recognised the possession as legal, and that he could not maintain ejectment on a demise laid previously to such application by his attorney. (10)

If the mortgagee assign the mortgage, and the assignee assign it to another, the last assignee may maintain ejectment for the mortgaged premises. (11)

A second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment against the first mortgagee, if he had no notice of such prior mortgage. (12)

(1) Bull. N. P. 107. (a.)

(2) Doe d. *Folkes v. Clements*, 2 M. & S. 2. 68.

(3) *Drury v. Fitch*, Hutt. 16. *Cocks v. Darson*, Hob. 215. *Knipe v. Palmer*, 2 Wils. 130., *sed vide stat.* 43 Geo. 3. c. 75.

(4) Doe d. *Fisher v. Giles*, 5 Bing. 421. 2 M. & P. 749.

(5) Doe d. *Roby v. Maissey*, 3 M. & R. 107. 8 B. & C. 767.

(6) Doe d. *Bristowe v. Pegge*, 4 Doug. 309. 1 T. R. 760. *n.* S. P. *Goodtitle d. Edwards v. Bailey*, Cowp. 601.

(7) Doe d. *Da Costa v. Wharton*, 8 T. R.

(8) *Keech d. Warns v. Hall*, Doug. 21., et vide *Thunder d. Weaver v. Belcher*, 3 East, 49.

(9) Doe d. *Rogers v. Cadwallader*, 2 B. & Ad. 473.

(10) Doe d. *Whitaker v. Hales*, 5 M. & P. 132. 7 Bing. 322.

(11) *Smartle v. Williams*, 1 Salk. 245.

(12) *Goodtitle d. Norris v. Morgan*, 1 T. R. 755.

Where a lease for years, was assigned by way of mortgage, which was duly registered within six months, and subsequently, by a deed of sale under a decree in a foreclosure clause, the mortgaged premises are conveyed to a purchaser, which deed was not registered:—It was held in Ireland, that such purchaser was not to be considered the assignee of the mortgage within the meaning of the act 8 Geo. 1. (Ir.) c. 2. s. 4. (1)

By whom
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

If A. let a part of a house to a firm consisting of himself and B., for the carrying on of the business of the firm, and the partnership of A. and B. be dissolved, A. may bring an ejectment against B., and recover possession of the part of the house thus let, without giving B. a notice to quit. (2)

Invalid assign-
ment of mort-
gage under
stat. 8 Geo. 1.
(Ir.) c. 2. s. 4.
PARTNERS.

In ejectment for two stamping mills on the demise of C. H., it appeared, that the mills had been let to a mining company by C. H. from year to year, and notice to quit had been given by him to the company. On the day of the demise in the declaration, C. H. was a partner in the company, and the defendant, who was another partner, defended on behalf of the company. At the trial it was ruled, that the defendant was estopped from disputing the title of C. H., although C. H. had admitted in an answer in Chancery, which was in evidence, that he had no legal title:—and, on a bill of exceptions it was held, 1. that the defendant was estopped from disputing C. H.'s title, notwithstanding C. H. was a partner with him in the company; and 2. that C. H. being a member of the company was no objection to an ejectment brought on a demise by him. (3)

Provisional assignee of Insolvent Debtors' Court has an absolute right to maintain ejectment. (4) But the insolvent after the assignment cannot sue in ejectment, although the provisional assignee may not have taken possession, nor a permanent assignee appointed, nor rent withheld from the lessor. (5)

PROVISIONAL
ASSIGNEE.

Where a receiver is in possession, an ejectment cannot be brought without leave of the court. (6) Such receiver is authorised to determine tenancies from year to year by a notice to quit. (7)

RECEIVER.

In Ireland a receiver will not be permitted to proceed by ejectment and attachment, for non payment of the same rent. (8)

But he has authority to determine a tenancy, by serving a tenant with notice to quit. (9)

It has been held, that the rector of a parish, who had demised his rectory and glebe lands, can recover them in ejectment by reason of the lease being void under stat. 13 Eliz. c. 20. by reason of his non residence. (10)

RECTOR.

The plaintiff is entitled to recover in ejectment, although the defendant in possession is the servant of another. (11)

SERVANTS.

A mere servant of a beneficial occupier cannot be made defendant in an ejectment; but where a servant, in the visible occupation of premises,

(1) *Reynard d. Maine (Mary) v. Croker*, 1 Cooke & Alcock (Irish), 12.

(2) *Doe d. Cohnaghi v. Bluck*, 8 C. & P. 464.

(3) *Francis v. Harvey*, 4 M. & W. 331.

(4) *Doe d. Clark v. Spencer*, 3 Bing. 203. 307.

(5) *Doe d. Palmer v. Andrews*, 4 Bing. 348.

(6) *Angel v. Smith*, 9 Ves. 335. *Wynn v. Newborough (Lord)*, 3 Bro. C. C. 87.

(7) *Doe d. Marsack v. Read*, 12 East, 59.

(8) *Pope v. Pope*, 1 Hayes (Irish), 481.

A receiver need not apply to the court for liberty to expend part of the funds in his hands upon the repairs of the premises, prior to the letting, after a recovery in ejectment.

Macartney v. Walsh, 1 Hayes (Irish), 29. n.

(9) *Crosbie (Lessee of) v. Barry*, 1 Jones & Carey (Irish), 106.

(10) *Frogmorton v. Scott*, 2 East, 467.

(11) *Doe d. Cuff v. Stradling*, 2 Stark. 187.

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EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

TENANT IN
COMMON.

assumes the character of tenant in possession, he is liable to be made defendant, and his conduct is evidence to go to the jury to presume, that he is tenant in possession, unless the fact be rebutted by other evidence. (1)

Tenant in common can maintain ejectment against his companion upon an actual ouster. (2)

In *Doe d. Wawn v. Horn* (3)—which was an action of ejectment by one tenant in common against his three co-tenants in common and the Durham and Sunderland Railway Company, to whom the other three defendants had demised the premises in question, the three co-tenants in common defending as landlords, and the company as tenants (4)—it was proved on the trial, that rent had formerly been paid to all the tenants in common by certain other persons, but there was no evidence to shew, that any notice to quit had been given, or that that tenancy had been otherwise determined:—upon such facts it was held, that the railway company, who defended as tenants, were not precluded, by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and therefore, that the legal title was not in the lessor of the plaintiff on the day of the demise. (5)

TENANT AT
SUFFERANCE.

A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may maintain trespass. (6)

TRUSTEES.

Where legal
estate vests in
the trustees,
they can main-
tain ejectment.

In all cases in which the trusts are not executed by the Statute of Uses, the legal estate vests in the trustees, and of course, in such cases, they may maintain ejectment. (7)

A devise to a person in trust to pay over the rents and profits to another, will vest the legal estate in the trustee. (8)

The distinction has however been taken, that if lands are given to trustees to permit and suffer another person to receive the issues, rents, and profits, that there the legal estate is executed in the *cestuique trust*, unless some further and accessory duty is imposed on them, as to do repairs, pay annuities, secure a separate sum for a married woman, or the like; in which cases the legal estate is executed in them: in the former case, therefore, an ejectment on the demise of the *cestuique trust* is good, but not in the latter, in which case the trustees must be joined in the ejectment, as they have the legal estate in them. (9)

If there be a dispute as to the inheritance, the court will not compel the

(1) *Doe d. James v. Stanton*, 1 Chitt. 119. 2 B. & A. 371. *Gulliver v. Swift*, 2 Ld. Ken. 511. A person in occupation of the premises who has been served with a copy of the summons in ejectment, will obtain on application a conditional order for liberty to take defence, though described in the affidavit of service as so served, merely as servant of a third person for him. *Doe d. Cope v. Roe*, 1 Smythe (Irish), 91.

(2) Co. Litt. 199 (b.)

(3) 3 M. & W. 333.

(4) The usual special order had been obtained, admitting the landlords to defend, and to admit ouster in case actual ouster should be proved.

(5) The premises in question (consisting

of houses) had been pulled down by the railway company, and the railroad constructed on their sites. *Semble*, that this was such an occupation as amounted to an actual ouster.

(6) *Doe d. Harrison v. Murrell*, 8 C. & P. 134.

(7) As to the cases in which trustees have been held to take or not to take the legal estate, *vide Adams on Ejectment*, 81., *et etiam ante*, 1377.

(8) Touchst. by Atherley 482. *Shapland v. Smith*, Bro. C. C. 75. *Silvester d. Law v. Wilson*, 2 T. R. 444. *Doe d. Booth v. Field*, 2 B. & Ad. 564.

(9) *Doe, Lessee of Leicester &c.* 2 Taunt. 109.

trustee of an outstanding term attending the inheritance to lend his name to either party in an action of ejectment. (1)

A widow can maintain ejectment for her "Free Bench" without admittance (2), even against the lord; because it is an excrescence which, by the custom and the law, grows out of the estate. (3)

But if the widow's claim be in the nature of dower, an ejectment will not lie before assignment (4), but she must levy a plaint in the nature of a writ of dower in the lord's court.

BY WHOM
EJECTMENT
CAN AND CAN-
NOT BE MAIN-
TAINED.

WIDOW FOR HER
FREE BENCH.
Can maintain
ejectment with-
out admittance.

4. PROPERTY FOR WHICH AN EJECTMENT DOES AND DOES NOT LIE.

Ejectment can generally only be sustainable for the recovery of the possession of real property (5), as for land, or buildings annexed to the land, upon which an entry might in point of *fact* be made, and of which actual possession can be delivered.

PROPERTY FOR
WHICH AN
EJECTMENT
DOES AND DOES
NOT LIE.

Ejectment will lie for after math. (6)

After math.

An ejectment will also lie for a boilary of salt, although, by the grant of a boilary of salt, the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt water well; for by the grant of a boilary of salt, the soil shall pass, inasmuch, as it is the whole profit of the soil. (7)

Boilary of salt.

In *Doe. d. Butcher v. Musgrave* (8) the defendant, who was one of the canons of the Queen's Free Chapel of St. George at Windsor, demised by way of mortgage for ninety-nine years, if he should so long live and continue a canon, to the lessor of the plaintiff, "All that the canonry of him, the said R. A. Musgrave, of the Queen's Free Chapel of St. George at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the said canonry belonging." On ejectment brought on the demise of the mortgagee it appeared in evidence, that there was no property attached to any individual canonry, but that the whole property belonged to the dean and chapter; and that the surplus rents, after payment of certain expenses thereout, were divided equally among the dean and the other members of the chapter; that all the canons had houses assigned to them for their residence, but that no particular house was appropriated to any one canonry; that whenever a vacancy occurred, the canons had a right of choice of the vacant houses according to their seniority; and that the house which was left after the other canons had made their selection, was assigned to the new canon. The defendant had retained possession of the same house which was assigned to him upon his installation:—It was held, that ejectment would not lie either for the

Canonry.

(1) *Doe d. Prosser v. King*, 2 Dowl. P. C. 580.

(2) *Goodwin v. Longhurst*, Cro. Eliz. 535.

(3) *Doe d. Burrell v. Bellamy*, 2 M. & S. 87.

(4) *Jordan v. Stone*, Hutt. 18. *Howard v. Bartlet*, Hob. 181.

(5) *Runninton on Ejectment* 139—157. *Adams on Ejectment*, 18. Tidd, 1190.

(6) *Wheeler v. Toulson*, Hardr. 390.

(7) *Smith v. Barrett*, Sid. 161. 1 Lev. 114.

(8) 1 M. & G. 625.

PROPERTY FOR WHICH AN EJECTMENT DOES AND DOES NOT LIE.	
Chapel.	canonry of the defendant, or for the house assigned to him for his residence as canon ; but that the defendant was not estopped by the mortgage deed from shewing, that the house in question did not belong to the canonry. Ejectment lies for a chapel, but which should be demanded as a messuage. (1)
Church.	Ejectment lies for a church or rectory when demanded as such (2), if the lessor has been presented, instituted, and inducted ; and for this purpose the church is void if the adversary was simoniacally presented. (3)
Close.	An ejectment will not lie for a close (4), nor for the third or other part of a close.
Coal mine.	Ejectment will lie for a coal mine. (5)
Common appendant or appurtenant.	Ejectment can be maintained for common appendant or appurtenant, if demanded as such, with the land in respect of which it is claimed ; for the sheriff, by giving possession of the land, gives possession of the common. (6)
Corporeal hereditaments.	An ejectment is only maintainable for corporeal hereditaments, with the exception of tithes, but the right of maintaining an ejectment for them does not arise from the common law, but under stat. 32 Hen. 8. c. 7. (7)
Fishery.	Ejectment can be sustained for a fishery. (8)
Hay grass.	It will likewise lie for hay grass. (9)
Herbage.	A right to the herbage will also be sufficient to support an ejectment, because, he who has a grant of the herbage has a particular interest in the soil, although by such grant the soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself. (10)
Highway.	The owner of the soil can maintain an ejectment for land, which is part of the king's highway ; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner. He must, however, recover the land, and the sheriff give possession of it, subject to the public easement. (11)
Inclosed waste.	If a person take a farm, and then take a bit of the waste and annex it to the farm, he does not take this in for himself but for his landlord. (12)
Message or tenement.	The description of the property sought to be recovered must be certain : thus, it will not lie for a tenement, because many incorporeal hereditaments are included in that appellation (13) ; nor for a message OR tenement, for the signification of the word tenement being more extensive than that of the word message, it is not sufficiently certain what is intended to be demanded (14) ; nor for a message AND tenement. (15)
Message AND tenement.	

(1) *Harpur's case*, 11 Co. 25. (b.) *Thyn v. Thyn*, Styles, 101. Doc. Plac. 291. In one case it was said in *arg.*, that, after collation, ejectment will lie for a prebendal stall. *Rex v. London (Bishop of)*, 1 Wils. 11. 14.

(2) *Hollingsworth v. Brewster*, 1 Salk. 256.
 (3) *Doe d. Watson v. Fletcher*, 8 B. & C. 25.
 (4) *Savel's case*, 11 Co. 55. *Hammond v. Savill*, 1 Rol. 55. *Knight v. Syms*, 1 Salk. 254. *Joans v. Hoel*, Cro. Eliz. 235.

(5) *Comyn v. Kincto*, Cro. Jac. 150.
 (6) *Newman v. Holdmyfast*, Str. 54. *Baker v. Roe*, C. T. H. 127. Bull. N.P. 99.

(7) 3 Black. Com. 206. Bull. N. P. 99. 2 Saund. 304. n. 12.

(8) *Rex v. Old Alresford (Inhabitants of)*, 1 T. R. 358.

(9) *Wheeler v. Toulson*, Hardr. 330.

(10) *Ibid.*

(11) *Goodtitle d. Chester v. Alher*, Burr. 133. 145.

(12) *Doe d. Harrison v. Murrell*, 8 C. & P. 134.

(13) *Goodtitle v. Walton*, Str. 834. *Copleston v. Piper*, 1 Ld. Raym. 191.

(14) *Ashworth v. Stanley (Sir Thomas)*, Sty. 364. *Wood v. Payne*, Cro. Eliz. 186. *Rochester v. Rickhouse*, Poph. 203.

(15) *Doe d. Bradshaw v. Plowman*, 1 East, 441., *sed vide Goodtitle d. Wright v. Otway*, 8 East, 357.

Ejectment is not sustainable for a *moveable* chattel, such as a stall in a street (1): it is not, in general, sustainable for the recovery of property which, in legal consideration, is *not tangible*; as for an advowson, rent, common in gross, or *pur cause de vicinage*, or other incorporeal hereditament; or a water-course, where the land over which the water runs is not the property of the claimant, &c. (2) A mere right to the pasturage is not enough; because pannage is only the mast which falls from the trees, and not part of the soil itself. (3) An ejectment will not lie for the pasture of a hundred sheep (4); nor for a piece of land, unless the particular contents or number of acres be specified (5); but whether the addition of the name of the close, without mention of the number of acres, would be bad, is questionable. (6) Ejectment can, however, be maintained for the *prima tonsura* of land (7); and for a pool, or pit of water, because these words comprehend both land and water. (8)

PROPERTY FOR WHICH AN EJECTMENT DOES AND DOES NOT LIE.

For what property it does not lie.

Incorporeal hereditament.

Mere right to pasturage.

Piece of land.

Prima tonsura of land.

Pool or pit of water.

5. WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

I. To avoid a Fine.

It is requisite in certain cases to make an actual entry on the premises before an ejectment is brought, as where a fine has been levied with proclamations (9), in which case an actual entry must be made in order to avoid it (10), and the demise laid after such entry. (11)

TO AVOID A FINE.

An actual entry is not necessary to avoid a fine at common law, without proclamations (12); nor a fine with proclamations, if all the proclamations were not made at the time when the ejectment was brought (13); nor a fine which has no operation, as a fine levied by the son of a tenant at sufferance (14), or a fine levied by a tenant for years (15); nor to maintain an ejectment on a clause of re-entry for non payment of rent. (16) So if one

Where an entry is not requisite.

(1) Doe d. Shrewsbury (*Minister &c. of*) v. Cowley, 1 C. & P. 123.

(2) 3 Black. Com. 206. *Challenor v. Thomas*, Yelv. 143. *Runnington on Ejectment*, 131—136. *Adams on Ejectment*, 18—20.

(3) *Pemle v. Sterne*, 1 Lev. 212, 213. 1 Sid. 316. 416.

(4) *Anon.* 2 Dal. 95.

(5) *Palmer's case*, Owen, 18. *Martyn v. Nichols*, Cro. Car. 573. *Jordan v. Cleabourne*, Cro. Eliz. 339. *Pemle v. Sterne*, 1 Lev. 213.

(6) *Adams on Ejectment*, 28.

(7) *Goodtitle d. Chester v. Alher*, 1 Burr. 133. 145.

(8) *Ibid.* *Challenor v. Thomas*, Yelv. 143. Co. Litt. 5. (b.)

(9) By stat. 3 & 4 Will. 4. c. 74. s. 2., fines and recoveries were abolished, and other forms of assurance given; and the cases respecting fines apply only to such

as were levied previously to January 1. 1834.

(10) *Goodright d. Hare v. Cator*, Doug. 484. *Runnington on Ejectment*, 224. *Adams on Ejectment*, 94. 1 Saund. 319. n. 1. *Doe d. Compere v. Hicks*, 7 T. R. 433. 727. *Doe d. Anderson v. Turner*, 1 C. & P. 91. *Doe d. Davis v. Davis*, *ibid.* 130. *Doe d. Duckett v. Watts*, 9 East, 17.

(11) *Berrington v. Parkhurst*, Str. 1086. 13 East, 489. *Willes*, 327. *Doe d. Compere v. Hicks*, 7 T. R. 727.

(12) *Jenkins d. Harris v. Prichard*, 2 Wils. 45.

(13) *Doe d. Duckett d. Ladbroke v. Watts*, 9 East, 17., overruling *Tapner d. Peckham v. Merlott*, *Willes*, 177.

(14) *Doe v. Perkins*, 3 M. & S. 271.

(15) Per Lord Kenyon C. J. in *Peaceable d. Hornblower v. Read*, 1 East, 575.

(16) *Goodright d. Hare v. Cator*, Doug. 477.

WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. (1) When a fine is levied by a tenant for years without any previous feoffment, although it amounts to a forfeiture of his estate, it is, for the want of a freehold interest in the parties, wholly inoperative (2), and consequently does not require an actual entry to avoid it; but the reversioner may recover the premises by ejectment, as upon a right of re-entry for the breach of any condition or covenant in a lease. (3) So likewise a fine levied by a mortgagor is inoperative. (4)

Entry by whom made.

The entry, when necessary, must be made by the party who claims the land, or by some person appointed to enter for him by power of attorney (5); and although the entry to avoid a fine be made by a stranger, in the name of the person who has the right, without any previous command from him, yet if he afterwards assent to the entry, within five years after the fine is levied, such entry will be sufficient. (6) But if the assent be not given within the five years, any subsequent assent will not avail; for the Statute of Fines being made for the purposes of repose and tranquillity, is always taken strictly. (7) A guardian for nurture, or in socage, may enter in the name of his ward, without any command or assent, and such entry shall save his right; so also, the remainder-man or reversioner, or lord of a copyhold, may enter in the name of the tenant for life or years, or copyholder; or these particular tenants, in the name of the reversioner or remainder-man, or lord, without any command or assent, on account of the privity between the parties. (8) So likewise, an entry by a *cestuique trust* will be sufficient (9); and the entry of one joint tenant, coparcener, or tenant in common, will avoid the effect of a fine as to the other joint tenant, coparcener, or tenant in common. (10)

How made.

With respect to the mode of making the entry, it must be upon the lands comprised in the fine, for an entry into other lands claiming those comprised in the fine, will not be sufficient (11); and when all the lands lie in one county, the party may enter into any part of them, making a declaration in the name of the whole; but if the lands be in different counties, there must be a separate entry for each several county. (12) The entry must also be made *animo clamandi*, i. e. with an intention of claiming the freehold against the fine (13); and if upon a special verdict in ejectment, it be found, that a fine has been levied of the premises, and that the lessor of the plaintiff entered thereon, with intent to make the demise mentioned in the declaration, but not for the purpose of avoiding the fine, such entry

(1) *Roe d. Truscott v. Elliot*, 1 B. & A. 85., vide etiam *Doe d. James v. Harris*, 5 M. & S. 326. Selw. N. P. 709.

(2) Touchst. by Atherley, 13, 14. *Hunt v. Bourne*, 1 Salk. 339.

(3) *Fenn d. Matthews v. Smart*, 12 East, 444. *Peaceable d. Hornblower v. Read*, 1 ibid. 568. 574. 1 Saund. 319. (c.)

(4) *Hall v. Doe d. Surtees*, 5 B. & A. 687. Adams on Ejectment, 98.

(5) Co. Litt. 258. (a.)

(6) Tidd, 1199. Co. Litt. 245. (a.) 248. (a.) *Fitchet v. Adams*, Str. 1128.

(7) *Pollard v. Luttrell*, Poph. 108. F. Moore, 450. 9 Co. 106. (a.) *Audley (Lord) v. Pollard*, Cro. Eliz. 561.

(8) *Podger's case*, 9 Co. 106. (a.)

(9) *Gree v. Rolle*, 1 Ld. Raym. 716.

(10) Tidd, 1199. Bro. Abr. tit. ENTRY CONGEABLE, 37. 1 Rol. Abr. Entry (F.) 740. *Doe d. Gill v. Pearson*, 6 East, 173.

(11) *Focus v. Salisbury*, Hardr. 400.

(12) Litt. §. 417. *Runnington on Ejectment*, 168. 232. Tidd, 1199.

(13) *Clarke v. Phillips*, 1 Vent. 42.

will not be sufficient. (1) If the claimant be prevented by menaces or bodily fear from entering on the lands, whereof a fine had been levied, he must make his claim as near the land as he can, which in that case will be deemed as effectual, as if he had made an actual entry. (2) But by stat. 4 Anne, c. 16. s. 16., "no claim or entry to be made of or upon any lands, &c. shall be of any force or effect to avoid a fine levied with proclamations, according to the statute, or a sufficient entry or claim within the Statute of Limitations, unless upon such entry or claim an action be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

Stat. 4 Anne, c. 16. s. 16.

II. *Where the Possession is vacant.*

In the case of a vacant possession, where the premises have been absolutely abandoned by the tenant, his place of residence unknown, and the case not provided for by stat 4 Geo. 2. c. 28., the claimant, if he mean to proceed by ejectment, must make an actual entry, and seal and deliver a lease on the premises in person or by attorney, after which the ejectment is brought by the lessee against the person who ejects him.

WHERE THE POSSESSION IS VACANT.

In order to justify these proceedings the premises must, as previously observed, be actually abandoned; if any one be in possession (3), or in the case of renting ground on which there is no house or barn, if it be known where the tenant lives, he must be served (4); or if any hay in a barn, or any furniture or other property belonging to the tenant be left, the lessor must proceed as in ordinary cases (5); but if actually abandoned, he must treat the premises as such, and cannot proceed in the ordinary course. (6) Thus, where the premises sought to be recovered consisted of three unfinished houses (7), the court directed proceedings as on a vacant possession, and would not permit the affixing of the declaration on the doors of the houses to be deemed a good service. (8)

(1) *Berrington v. Parkhurst*, Str. 1086. Willes, 327. Andr. 125. 13 East, 489.

(2) Co. Litt. 253. (b.) 3 Black. Com. 174. Tidd, 1199.

(3) *Gulliver v. Swift*, 2 Ld. Ken. 511. *Doe d. Atkins v. Roe*, ibid. 179.

(4) *Savage v. Dent*, Str. 1064.

(5) Ibid.

(6) Lush. Pr. 840. *Doe d. Norman v. Roe*, 2 Dowl. P. C. 399. *Doe v. Roe*, 4 ibid. 173. *Doe d. Schovell v. Roe*, 3 ibid. 691. *Doe d. Burrows v. Roe*, 7 ibid. 236.

(7) *Doe d. Showell v. Roe*, 2 C. M. & R. 42.

(8) The following practical suggestions relating to ejectment when the possession is vacant, are embodied in Mr. Archbold's *Practice of Country Attornies*, pp. 329. 333. : —

"First, prepare a lease of the premises on stamped paper from the party claiming to some friend or other person (not being an attorney, R. M. 1654, s. 1. K. B. and C. P.) for any short term, at a pepper-corn rent (*Archb. Forms*, 390.), which must be afterwards executed upon the premises, either by

the claimant himself, or by some agent authorised by him for that purpose by power of attorney. (Ibid. 389.) Secondly, get a blank form of declaration, on a single demise, and fill it up, inserting the name of the real lessee, instead of John Doe, and the name of some third person as the ejector; and at the foot of it, write a notice to appear, addressed to the ejector: thus — 'Mr. , take notice, that unless you appear within the first four days of the next term, in her majesty's court of

at Westminster, at the suit of the above-named plaintiff , and plead to his declaration in ejectment, judgment will thereupon be entered against you by default. Yours, &c. A. B., plaintiff's attorney.'

"Then, upon some day before the first day of term, let the claimant (or such agent as he may have deputed for the purpose by power of attorney, as above mentioned), the lessee, and the ejector, accompanied by the claimant's attorney or his clerk, go to the premises. The claimant or his agent then enters upon the premises, and

WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

PROCEEDINGS IN AN INFERIOR COURT.

Inferior courts have not the power of framing rules for confessing lease, entry, and ouster.

Certiorari and *habeas corpus* are the writs for removing an ejectment from an inferior to a superior court.

III. *Proceedings in an inferior Court.*

Inferior courts have not the power of framing rules for confessing lease, entry, and ouster; nor the means, if such rules were entered into, of enforcing obedience to them; consequently, where an ejectment is brought in an inferior court, there must be an actual entry, lease, and ouster, as in case of vacant possession. (1)

Certiorari or *habeas corpus* are the proper writs for removing an ejectment from an inferior to a superior court (2); and when removed, the tenant in possession has the privilege of confessing lease, entry, and ouster, and defending the action as if the proceedings had been in the first instance instituted in a superior court. (3)

Stat 19 Geo. 3. c. 70. s. 11. does not apply to a judgment in an action of ejectment in an inferior jurisdiction; and if the defendant cease to reside within the jurisdiction, the judgment cannot be removed into a superior court. (4)

IV. *By joint Tenants and Tenants in common—Corporations—Receiver—Landlord and Tenant—Statute of Limitations.*

BY JOINT TENANTS AND TENANTS IN COMMON.

As an ejectment cannot be maintained by a joint tenant or tenant in common against his companion, without proof of an actual ouster or denial of entry, it is still necessary in this case, that an actual entry should be made, or attempted to be made, by the claimant or his attorney, and that there should have been such an ouster or denial of entry by the tenant before the ejectment is brought.

CORPORATIONS.

Where an ejectment is brought by a corporation aggregate, they must execute a letter of attorney to some person, empowering him to enter upon the land; but a verbal notice to quit, given by a steward of a corporation, is sufficient. (5)

takes possession of them: if land, he enters upon any part of it; if a house, he usually stands upon the threshold of the front door, putting his finger into the keyhole, if there be one. *Doe d. Frith v. Roe*, 2 Dowl. P. C. 431. Whilst so in possession, he executes the lease to the lessee, who then executes it also; and the lessee then enters upon the premises and takes possession in a similar way. The ejector then enters and puts the lessee out of possession, whereupon the attorney immediately serves him with the declaration and notice.

"On or after the first day of the next term, enter a rule to plead with the proper clerk at the master's office, which however is not to be served; and at the expiration of this rule, as the ejector of course never pleads, and no other person will be admitted to defend in his stead, you may sign judgment, and sue out execution."

In an ejectment for non payment of rent, where proceedings have been taken under

stat. 15 & 16 Geo. 3. (Ir.) c. 27. against one person as an absconding tenant, by affixing a copy of the declaration, &c. on the premises, and other persons have been served with the declaration in the usual way, the landlord may proceed upon the ejectment as against such other persons, without awaiting the expiration of the month mentioned in the statute. *Long d. Darcy v. Thrustout*, E. T. 8 Geo. 4. 1 Hudson & Brooke (Irish), 99.

(1) *Rex v. Bristow (Mayor of)*, 1 Keb. 690. *Sherman v. Cocke*, *ibid.* 795.

(2) *Doe d. Sadler v. Dring*, 1 B. & C. 253. *Patterson d. Gradridge v. Eades*, 3 *ibid.* 550.

(3) *Gilb. Eject.* 37.

(4) *Doe d. Stansfield v. Shipley*, 2 Dowl. P. C. 408. 1 Stephen's Corporation Acts. 355, 356.

(5) *Roe d. Rochester (Dean and Chapter of) v. Pierce*, 2 Camp. 96.

A receiver of the court of Chancery cannot make an entry without leave of the court. (1)

WHERE AN ACTUAL ENTRY IS REQUISITE BEFORE EJECTMENT BROUGHT.

The landlord having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason or public policy; and if after having annexed a condition to a lease, it becomes forfeited in consequence, an actual entry is not essential. (2)

RECEIVER.
LANDLORD AND TENANT.

No actual entry is requisite to prevent the operation of the Statute of Limitations (3), if the action be commenced within the twenty years.

STATUTE OF LIMITATIONS.

V. Effect of Entry.

An entry upon the estate generally, is an entry for the whole (4); if it be for less, it should be so defined at the time. But it is a sufficient entry to avoid a fine, if the party enter expressly to claim the premises as his own (5); it is not necessary for him to say that he enters to avoid all fines, or to specify what particular act, adverse to his own interest, he means to defeat.

EFFECT OF ENTRY.

In a case where a party had a right of entry upon condition broken, and a stranger entered, and afterwards the plaintiff assented to such entry, and brought an ejectment, laying the demise after the assent, it was holden sufficient.

6 NOTICE TO QUIT.

NOTICE TO QUIT.

I. When requisite.

A notice to quit must be given previously to bringing ejectment, whenever there is an existing tenancy from year to year (6); and payment of rent is *prima facie* evidence of a tenancy from year to year. (7)

WHEN REQUISITE.

A general occupation of land enures as a tenancy from year to year, determinable, and necessarily determinable (8) by a notice to quit; and a holding merely at the will of the landlord, according to the ancient meaning of the term, is an estate at the present day unknown (9), unless when created by express agreement between the parties. (10)

An existing tenancy from year to year.

A defendant in possession, under a lease for fourteen years, assigned the lease, by way of mortgage, to the plaintiff, and then committed a forfeiture,

What is not an existing tenancy.

(1) *Angel v. Smith*, 9 Ves. 335. *Doe d. Marsack v. Read*, 12 East, 59.

(2) *Roe d. Hunter v. Galliers*, 2 T. R. 133.

(3) *Goodright d. Hare v. Cator*, Doug. 477. 485.

(4) *Per Lord Kenyon* in 3 T. R. 170.

(5) *Doe d. Jones v. Williams*, 5 B. & Ad. 783.

(6) *Throgmorton v. Whelpdale*, Bull. N. P. 96. *Doe d. Hollingsworth v. Stennett*, 2

Esp. N. P. C. 717. *Doe d. Martin v. Watts*, 7 T. R. 83. 2 *Esp. N. P. C.* 501. *Doe d.*

Moore v. Lawder, 1 Stark. 308. *Doe d. Warner v. Browne*, 8 East, 166.

(7) *Doe d. Pritchard v. Dodd*, 2 N. & M. 838. *Hall v. Doe d. Surtees*, 5 B. & A.

689., *secus*, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them, *semble*. *Ibid*. The presumption is completely rebutted by shewing that the rent paid and reserved is of the same amount as the rent reserved in an unexpired lease, the premises being at the time of such payment of rent of much greater value than the rent so reserved and so paid. *Ibid*.

(8) *Doe d. Warner v. Browne*, 8 East, 165.

(9) *Timmins v. Rowlison*, 3 Burr. 1603. 1069.

(10) *Richardson v. Langridge*, 4 Taunt.

128.

NOTICE TO QUIT.

for which the lessor brought ejectment; it was then agreed at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to the plaintiff, and that the plaintiff should grant an under-lease to the defendant; the new lease was accordingly granted to the plaintiff, who then delivered the defendant the key, saying, "Go on as usual, pay the money" (due on mortgage), "and when you have done so, you shall have an under-lease"—It was held, that this did not constitute the defendant a tenant from year to year. (1)

Payment of head-rent by the sub-tenants of a mesne landlord.

Payment of head-rent by the sub-tenants of a mesne landlord, to whom they also paid a profit rent, and who continued in possession of part of the premises and in receipt of the profit rent for several years after the determination of his title, will not create a tenancy from year to year between them or the mesne landlord, so as to render a notice to quit or demand of possession necessary, in order to maintain an ejectment by the head landlord. (2)

Party in possession of premises with the privity and consent of the owner, no express tenancy having been created.

An implied tenancy may arise, when a party is in possession of the premises with the privity (3) and consent of the owner, although no express tenancy has been created, nor any act done by the owner expressly acknowledging such party as his tenant: as where he has been let into possession pending a treaty for a purchase or a lease (4), or under a lease or agreement for a lease which is void (5); or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one. (6)

Agreement which cannot be determined but by a notice ending with the year.

In *Brown v. Burtinshaw* (7) it appeared, that by an agreement in writing, dated the 20th of May, 1824, the defendant "agreed to let the plaintiff two upper rooms, and part of a lower room as a workshop and smithy, and to find power for three lathes, &c.; that the defendant agreed to pay rent for the above, 61*l.* per year, to be paid quarterly in cash; and that three months' notice should be required from each party." The plaintiff took possession of the rooms the same day, and the defendant found the power; on the 20th of August, the defendant served the plaintiff with a written notice of that date, to quit the rooms on the 20th of November following; the plaintiff did not then object to the notice, but held over after the 20th of November, from which day the defendant ceased to find the power; on the 19th of January 1825, the plaintiff and the defendant settled their accounts up to the 20th of the November preceding, when the plaintiff agreed to give up the keys of the room; but afterwards refused to do so, saying, "that the notice was bad;" to which the defendant replied, "then there would soon be another quarter's rent due." In an action by the plaintiff for damages for the discontinuance of the power by the defendant it was held, that the agreement was the demise of a tenement creating a tenancy, which could not be determined but by a notice ending with the

(1) *Doe d. Rogers v. Pullen*, 3 Scott, 245. 2 Bing. N. C. 749.

(2) *Jack d. O'Brien v. Tiernan*, 1 Jebb & Symes (Irish), 117.

(3) *Doe d. Knight v. Quigley*, 2 Camp. 505. *Right d. Lewis v. Beard*, 13 East, 210. *Hegan v. Johnson*, 2 Taunt. 148. *Doe d. Leeson v. Sayer*, 3 Camp. 8.

(4) *Goodtitle d. Gullaway v. Herbert*, 4

T. R. 680. *Doe d. Warner v. Browne*, 8 East, 165. *Doe d. Newby v. Jackson*, 1 B. & C. 448.

(5) *Doe d. Hollingsworth v. Stennett*, 2 Esp. N. P. C. 717.

(6) *Denn d. Brune v. Rawlins*, 10 East, 261. *Doe d. Foley v. Wilson*, 11 *ibid.* 56.

(7) 7 D. & R. 603.

current year, except by custom ; and that the plaintiff's agreeing to give up the key when he did, was no acquiescence in the notice served upon him, and no surrender of his tenancy within the Statute of Frauds, though such an acquiescence, if established, would have been a bar to the action.

Notice to quit.

Where A. and B. were co-lessees of a farm for twenty-one years, A. by deed not registered, assigned to B. all his interest in the farm, of which B. had sole permissive possession for four years previously ; and A. afterwards, by a registered deed, assigned the same interest to C., who, without any demand of possession, brought an ejectment against B. :—It was held, that this want of a demand was a fatal omission. (1)

Where want of a demand of possession a fatal omission.

Where a tenant held under a demise from the 26th day of March for one year then next ensuing, and fully to be completed and ended, and so from year to year for so long as the landlord and tenant should respectively please ; and the tenant, after having held more than one year, gave a parol notice to the landlord less than six months, before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice :—It was held on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing or by operation of law, within the meaning of the Statute of Frauds. (2)

Insufficient notice to a yearly tenant.

In these and analogous cases it has been holden, that the party being lawfully in possession cannot be ejected until such lawful possession is determined, either by demand of possession, breaking off the treaty, or otherwise, and the party is called a tenant at will ; but in any of these cases, if the landlord receive rent whilst the party is so in possession, or do any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created thereby. (3)

A party lawfully in possession, cannot be ejected until such possession be determined.

Where a tenant from year to year dies, his personal representatives have the same interest in the land which he had, and are therefore entitled to the same notice to quit. (4)

Where a tenant from year to year dies, his interest in the lands vests in his personal representatives.

If however, by the terms of the agreement, no interest vests in the representative, no notice to quit will be necessary. (5)

Where a tenant from year to year died, and a regular notice to quit was served on the widow who remained in possession :—It was held, that the landlord might recover in ejectment, unless it were shewn, that some other person, and not the widow, was the executor or administrator of the tenant ; and that it was not incumbent on the landlord to shew, that the widow was either executrix or administratrix. (6)

Notice to quit served on the widow of the tenant.

In *Winterscale (Lessee of) v. Newcomen* (7) it appeared, that a lessee for lives, renewable for ever, conveyed all his interest in part of the demised premises to A. and his heirs, and died, leaving the residue to descend on his heirs ; all the lives in the original lease, which were *in esse* when the grant

When demand of possession requisite from devisee of lessee for lives.

(1) *Fleming (Lessee of) v. Neville*, 1 Hayes (Irish), 23.

(2) *Johnstone v. Hudleston*, 4 B. & C. 922. 7 D. & R. 411., *et vide* *Doe d. Hudleston v. Johnston*, 1 M'Clel. & Y. 141.

(3) *Doe d. Rigge v. Bell*, 5 T. R. 471. *Clayton v. Blakey*, 8 *ibid.* 3. *Thunder d. Weaver v. Belcher*, 3 East, 449. 451. *Doe d. Warner v. Brown*, 8 *ibid.* 165.

(4) *Doe d. Shore v. Porter*, 3 T. R. 13. *Parker d. Walker v. Constable*, 3 Wils. 24., *et vide* *Machay v. Mackreth*, *cit.* 3 T. R. 13. *n. Gulliver d. Tasker v. Burr*, 1 W. Black. 596.

(5) *Doe d. Bromfield v. Smith*, 6 East, 530.

(6) *Rees d. Mears v. Perrot*, 4 C. & P. 230.

(7) 1 Jones (Irish), 496.

NOTICE TO QUIT.

was made to A. and his heirs, were dead in 1781. The lessee and his heirs, who always paid the rent of the entire premises, obtained, from time to time renewals of the original lease to themselves. A. and his heirs continued in quiet possession of the premises conveyed to them, but no conveyance of the legal estate therein was made to them by the lessee or his heirs. In 1885 the heirs of the lessee brought an ejectment on the title against the devisee of A.:—It was holden, that the latter was entitled to a previous demand of the possession.

When infants must give a notice to quit.

Notice to quit must be given before an infant, who becomes entitled to the reversion of an estate leased from year to year, can eject the tenant. (1)

Where an ejectment has been brought on the demise of an infant, which has been compromised, and the tenant in possession has attorned to the infant, though the lessor of the plaintiff, on his coming of age, does not accept rent, or do any act to confirm the tenancy, yet, as the former ejectment was brought at his suit, and for his benefit, he will not be allowed to consider the tenant as a trespasser, and bring a new ejectment, without giving notice to quit. (2)

Mortgagor and mortgagee.

If a lease be granted by a mortgagor with the concurrence of the mortgagee; or if a mortgagee, with knowledge that the mortgagor has granted a lease, encourage the tenant to lay out money upon the premises, it may admit of doubt, whether, by such conduct, the mortgagee has not confirmed the lease, or so far at least acknowledged the lessee as his tenant, as to render a notice to quit necessary, before he can maintain ejectment against him. (3)

II. *Where not requisite.*

WHERE NOT RE-
QUISITE.

Where the term of a lease is to end on a precise day, or on the occurrence of a particular event, there is no occasion for a notice to quit previous to bringing an action. (4)

A tenant holding under an agreement for a lease for seven years, which was never executed, is not entitled to a notice to quit at the end of the seven years. (5)

Entering under an agreement for a lease, and continuing in possession for the period for which the lease was to be granted.

Where a party occupies under an agreement for a lease during the whole term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy, as well as of the other terms of the holding. (6)

(1) *Maddon d. Baker v. White*, 2 T. R. 159. *Doe d. Miller v. Noden*, 2 Esp. N. P. C. 530.

(2) *Doe d. Miller v. Noden*, 2 Esp. N. P. C. 530.

(3) *Doe d. Sheppard v. Allen*, 3 Taunt. 78. *Adams on Ejectment*, 109.

(4) *Cobb v. Stokes*, 8 East, 358. *Messenger v. Armstrong*, 1 T. R. 54. *Right d. Flower v. Darby*, *ibid.* 162. *Roe d. Jordan v. Ward*, 1 Hen. Black. 97.

(5) *Doe d. Tilt v. Stratton*, 4 Bing. 446. 1 M. & P. 183. 3 C. & P. 164., *et vide* *Doe d. Bromfield v. Smith*, 6 East, 530. 2 Smith, 570. 2 T. R. 486.

(6) As to the words of instruments

operating as a lease, or only as an agreement for one, *vide* 4 Bac. Abr. Leases (K, L.), 816—843. *Baxter d. Abrahall v. Browne*, 2 W. Black. 973. *Sturgion v. Painter*, Noy. 128. *Goodtitle d. Estwick v. Way*, 1 T. R. 735. *Phillips v. Hartley*, 3 C. & P. 121. *Tempest v. Rawling*, 13 East, 18. *Doe d. Coore v. Clare*, 2 T. R. 739. *Roe d. Jackson v. Ashburner*, 5 *ibid.* 163. *Doe d. Bromfield v. Smith*, 6 East, 530. *Dunk v. Hunter*, 5 B. & A. 322. *Morgan d. Dowding v. Bissell*, 3 Taunt. 65. *Poole v. Bentley*, 12 East, 168. *Doe d. Walker v. Groves*, 15 *ibid.* 244. *Pinero v. Judson*, 6 Bing. 206. *Adams on Ejectment*, 112—119.

A party who has been let into the possession of land in a contract of sale which has not been completed, is a tenant at will to the vendor. (1)

NOTICE TO QUIT.

Party let into possession under contract of sale.

If an agreement be made to let premises so long as both parties like, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year but a tenancy at will, strictly so called: and though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified. (2) Where a minister of a dissenting congregation, was placed in possession of a chapel and dwelling-house by persons, in whom the legal fee was vested, in trust, to suffer the chapel to be used for the purposes of religious worship:—It was held, that he was a mere tenant at will to those persons, and that his interest was determinable *instantly* by a demand of possession, without any previous notice to quit. (3)

Where a tenant held under an agreement for a lease for six years, containing a clause requiring him to give six months' notice in case he intended to give up possession at the end of the six years, and also a *toties quoties* clause of renewal for six years on the landlord's part, but the tenant did not give such notice:—It was held, that the landlord might bring an ejectment at the end of the six years, without having served a notice to quit. (4)

Holding under an agreement for a lease for six years, requiring a six months' notice from the tenant previously to giving up possession.

In *Hamerton v. Stead* (5) Mr. Justice Littledale said, "Where parties enter into a mere agreement for a future lease, they are tenants at will; but if rent is paid under the agreement, they become tenants from year to year."

An agreement for a future lease.

Where the possession of the tenant is adverse, a notice to quit is not requisite. (6)

Adverse possession.

A notice is not necessary where the tenant does an act which amounts to a disavowal of the title of the lessor. (7) But refusal to pay rent to the devisee under a will, which is contested, is not such a disavowal. (8)

Lessee disclaiming the title of his lessor.

In *Doe d. Calvert v. Frowd* (9) the defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded by the heir at law of the devisor: whereupon the defendant wrote to the attorney of the heir at law, stating, that he held as tenant to J. S. (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him without more satisfactory proof in a legal manner:—It was held, that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against the tenant, without giving him a previous notice to quit.

(1) *Ball v. Cullimore*, 2 C. M. & R. 120. 1 Gale, 96.

(2) *Richardson v. Langridge*, 4 Taunt. 128.

(3) *Doe d. Jones v. Jones*, 10 B. & C. 718. *Doe d. Nicholl v. M'Keag*, *ibid.* 721.

(4) *Jack d. Thompson v. Andrews*, 1 Jebb & Symes (Irish), 543.

(5) 3 B. & C. 483.

(6) *Doe d. Foster v. Williams*, Cowp. 622. *Doe d. Davis, Cheese, &c. v. Creed*, 2 M. & P. 648. S. C. nom. *Doe d. Davies v. Creed*, 5 Bing. 327.

(7) *Doe d. Grubb v. Grubb*, 10 B. & C. 816. *Doe d. Jefferies v. Whittick*, Gow, N. P. C. 195. *Doe d. Clun (Burgesses of) v. Clarke*, Peake's Add. Cas. 239., et vide *Rogers v. Pitcher*, 6 Taunt. 202. 1 Marsh. 54. *Doe d. Dillon v. Parker (Bart.)*, Gow, N. P. C. 180.

(8) *Ibid.* *Doe d. Williams v. Pasquali*, Peake's N. P. C. 259.

(9) 1 M. & P. 480. 4 Bing. 557.

NOTICE TO QUIT.**Attornment of tenant.**

So where the tenant has attorned to some other person, or answered an application for rent, by saying that his connection as tenant with the party applying has ceased (1), a notice is not requisite.

It is not necessary for a mortgagee to give a notice, previous to bringing an ejectment, to a tenant who claims under a lease from a mortgagor, granted after the mortgage without the privity of the mortgagee. (2)

Mortgagee against mortgagor, after forfeiture of the mortgage.

A mortgagee can maintain ejectment against a mortgagor after the forfeiture of the mortgage, without any previous notice to quit, or demand of possession. (3)

Assignees of mortgagee.

The assignees of a mortgagee have also the like privileges with regard to the mortgagor and his under-tenants; and the right of an assignee to maintain ejectment without a notice to quit, or demand of possession, will not be taken away by a tenancy created prior to the assignment, provided such tenancy commenced subsequently to the date of the mortgage, and continued unacknowledged by the mortgagee. (4)

Tenant by *elegit*.

With respect to claimants under writs of *elegit*: if the judgment debtor be in possession, or if the party in possession have been admitted tenant subsequently to the date of the judgment (whether as party tenant, or under a lease), the tenant by *elegit* can maintain ejectment without a notice to quit or demanding possession. Thus, where a tenant came into possession of premises in 1816, it was held, that the lessor of the plaintiff in ejectment, who claimed under an *elegit* and inquisition issued in 1818, but founded on a judgment recovered prior to 1816, need not give a notice previous to bringing the ejectment. (5) But if the tenant claim under a lease or tenancy from year to year, prior in point of time to the judgment, the claimant will be bound in the last case until he has determined the tenancy by a regular notice to quit; in the first, until the determination of the lease. (6)

Co-partners.

If by the terms of a deed of co-partnership, a house is to be used and occupied by the co-partners during the co-partnership, it is not necessary after a dissolution of partnership to give a notice to quit previous to bringing an action of ejectment against a co-partner. (7)

Chaplain of a college not a curate within stat. 57 Geo. 3. c. 99. s. 67.

Where a chaplain of a college, holding a curacy with a dwelling attached thereto, ceased to hold that office, but retained possession of the dwelling:—It was held, that he was not a curate within the meaning of stat. 57 Geo. 3. c. 99. s. 67., and that he might be evicted by a notice to quit forthwith, and was not entitled to the three months' notice required to be given by that statute with the consent of the bishop. (8)

TIME OF GIVING NOTICE.**Incumbent on lessee to shew the commence-****III. Time of giving Notice.**

If a tenant dispute the time when his tenancy commences, and that his notice to quit does not correspond with it, it is incumbent on him, and

(1) Doe d. *Grubb v. Grubb*, 10 B. & C. 816. Doe d. *Beavan v. Boulter*, 1 N. & P. 650.

(2) *Keech d. Warne v. Hall*, Doug. 21. *Thunder d. Weaver v. Belcher*, 3 East, 449. *Birch v. Wright*, 1 T. R. 378. Doe d. *Sheppard v. Allen*, 3 Taunt. 78.

(3) Doe d. *Fisher v. Giles*, 5 Bing. 421. 2 M. & P. 749.

(4) *Thunder d. Weaver v. Belcher*, 3 East, 449.

(5) Doe d. *Putland v. Hilder*, 2 B. & A. 782.

(6) Doe d. *Da Costa v. Wharton*, 8 T. R. 2.

(7) Doe d. *Waithman v. Miles*, 1 Stark. 181. 4 Camp. 373.

(8) *Goodtitle d. Lincoln College (Master and Fellows of) v. Lee*, 2 D. & R. 718.

not on the lessor, to shew the true time of the commencement of the tenancy. (1) **NOTICE TO QUIT.**

Where a tenant, on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he will be bound by the information he so gave, and will not be permitted to shew, that in fact it began at a different time (2); but if notice to quit at Midsummer be given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time when it was served. (3)

ment of his tenancy.

Tenant bound by his statement respecting the termination of his tenancy.

Where the house and land are let together to be entered upon at different times, and it does not appear, from the terms of the demise, from what time the whole is to be taken as let together, it is a question of fact for the jury, which is the principal and which the accessorial subject of demise, in order for the judge to decide, whether the notice to quit the whole were given in time. (4)

Where house and land are let together to be entered upon at different times.

A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise; and the notice to quit must then be given with reference to the substantial time of entry, that is to say, with reference to the time of entry on the substantial part of the premises demised, no notice being taken of the time of entry on the other parts, which are auxiliaries only, though the tenant will be obliged to quit them at the respective times of entry thereon. (5) This substantial time of entry, it has been contended, must be determined by the times when the rent is payable; but it is holden to descend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of the jury to determine. (6)

Notice must be given with reference to the substantial time of entry.

Except where a different time is established, either by express agreement or immemorial custom, the notice necessary to be given to a tenant is a notice for half a year, expiring at the end of the current year of his tenancy (7); and a notice expiring at any other period will not be sufficient; because otherwise, a notice reasonable as to duration might be given, which would notwithstanding operate greatly to the prejudice of the tenant, by ejecting him from his lands immediately before the harvest, or other valuable period of the year. (8)

The notice to be given to a tenant, is a six months' notice.

If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit, expiring at the end of the first year. (9)

"Twelve months certain, and six months' notice to quit afterwards."

Where a remainder-man creates a new tenancy with a tenant in possession, under a void lease granted by a tenant for life, and receives rent on

Remainder-man, creating

(1) Doe d. *Matthewson v. Wrightman*, 4 Esp. N. P. C. 5.

(2) Doe d. *Eyre v. Lambly*, 2 ibid. 635.

(3) *Oakapple d. Green v. Copous*, 4 T. R. 361.

(4) Doe d. *Heapy v. Howard*, 11 East 498.

(5) Doe d. *Strickland v. Spence*, 6 East, 120.

(6) Doe d. *Dagget v. Snowden*, 2 W.

Black. 1224. Doe d. *Strickland v. Spence*, 6 East, 120. Doe d. *Bradford (Lord) v. Watkins*, 7 East, 551. Doe d. *Heapy v. Howard*, 11 East, 498.

(7) *Right d. Flower v. Darby*, 1 T. R. 159., et vide Doe d. *Puddicombe v. Harris*, 1 T. R. 161. n.

(8) 13 Hen. 8. 15. (b.) *Parker d. Walker v. Constable*, 3 Wils. 25.

(9) *Thompson v. Maberly*, 2 Camp. 573.

NOTICE TO QUIT.

new tenancy
under a void
lease.

Agreement for
an increase of
rent, does not
create a new
tenancy.

Notice on Sep-
tember 28. to
quit on March
25.

WHERE A
TENANCY COM-
MENCES AND
EXPIRES AT ANY
OF THE USUAL
FEASTS.

the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise. (1)

No new tenancy is created by a mere agreement for an increase of rent in the middle of the year of a tenancy, consequently a notice to quit after the receipt of the increased rent, must expire at the time when the tenant originally entered. (2)

This notice is frequently spoken of in the books as a six months' notice; and the distinction seems to be, that when the tenancy expires at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer, the notice must be given prior to the corresponding feast, happening in the middle of the year of the tenancy, whilst, if it expire at any other period of the year, the notice must be given six calendar months previous to such expiration.

A notice on the 28th of September to quit on the ensuing 25th of March, is a sufficient half year's notice. (3)

The notice where a tenancy commences at any of the usual feasts may be given to quit at the end of half a year, or of six months from the date of the corresponding feast in the middle of the year, without stating the day when the tenant is to quit, although the intermediate time is not exactly half a year, or six months, from feast to feast being the usual half yearly computation. And, indeed, in a case where the notice was to quit "on or about the expiration of six calendar months from 29th of September" (the tenancy commencing 25th of March), the court ruled the word "calendar" to be *surplusage*, and held the notice good. (4)

Where, under an agreement by a tenant of a farm "to enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same according to the times of entry as aforesaid," and the rent was reserved half yearly at Michaelmas and Lady-day:—It was held, that a notice to quit delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the in-coming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c. (5)

An agreement to take a farm, the arable land from Old Candlemas, the pasture from Old Lady-day, and the meadow from Old May-day, paying rent half yearly at Old Michaelmas and Lady-day, is substantially a taking of the whole from Old Lady-day, and a notice to quit delivered before Old Michaelmas is sufficient to determine the tenancy. (6)

A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly on the usual feast days:—It was held, that in such a case a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given a notice, expiring with the half quarter, it was not necessarily

(1) *Roe d. Jordan v. Ward*, 1 Hen. Black. 97. *Doe d. Collins v. Weller*, 7 T. R. 478.

(2) *Doe d. Bedford v. Kendrick*, Adams on Ejectment, 144., et vide *Doe d. Holcomb v. Johnson*, 6 Esp. N. P. C. 10.

(3) *Roe d. Durant v. Doe*, 6 Bing. 574. 4 M. & P. 391. *Doe d. Harrop v. Green*, 4 Esp. N. P. C. 198.

(4) *Howard v. Wensley*, 6 Esp. N. P. C. 59.

(5) *Doe d. Strickland v. Spence*, 6 East, 120. 2 Smith, 255.

(6) *Doe d. Dagget v. Snowden*, 2 W. Black. 1224.

presumable from thence, that the tenancy was from year to year, commencing with the half quarter. (1) NOTICE TO QUIT.

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas. (2)

But where a tenant held a farm, as to the arable lands, from Candlemas, and as to the buildings and pastures, from May-day, and the rent was payable at Michaelmas and Lady-day, a notice to quit, given six months before Lady-day, but not six months before Candlemas, was held insufficient. (3)

A notice to quit on one of two days, as on Old or New Lady-day, is good, if served six months before the day on which the tenancy commenced. (4)

A notice delivered to a tenant at Michaelmas, 1795, to quit "at Lady-day, which will be in the year 1795," was construed to be a notice to quit at Lady-day, 1796. (5)

Where on a written agreement to demise from the following "Lady-day," a notice to quit "on 6th April" is good, parol evidence having been adduced to shew, that by "Lady-day" the parties meant "Old Lady-day." (6)

The notice may be given to quit upon a particular day, or in general terms at the end and expiration of the current year of the tenancy, which shall expire next after the end of one half year from the service of the notice. (7)

The latter form should always be used where the landlord is ignorant of the period when the tenancy commenced, and is unable to serve the tenant personally; and is also the preferable form where the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. If a particular day be mentioned in the notice, it must be the day of the commencement, and not of the conclusion of the tenancy; for the tenant cannot be compelled to quit whilst his right of possession continues; and this right is not determined until the year is fully completed. It must also be the exact day of such commencement. The next or any subsequent day will not be sufficient. Thus, a notice to quit at Old Michaelmas, though given half a year before New Michaelmas, at which time the tenancy expired, is bad. (8)

A notice served by a landlord on a tenant from year to year, on the 28th of March, to quit on 29th September following, is not a sufficient half year's notice to determine the tenancy, and enable the landlord to sustain an ejectment. (9)

The tenant of a house is entitled to the same privileges with respect to the notice to quit, as the occupier of land. (10) But this rule extends, with respect to houses, to those cases only in which the tenancy enures as a tenancy from year to year, and the notice required will refer to the

Notice can be given to quit upon a particular day, or in general terms at the expiration of the current year.

The tenant of a house is entitled to the same privileges with

(1) *Doe d. Savage v. Stapleton*, 3 C. & P. 275.

(2) *Doe d. Rigge v. Bell*, 5 T. R. 471.

(3) *Doe d. Grey de Wilton (Lord) v. —*, cit. 2 East, 384.

(4) *Doe d. Matthewson v. Wrightman*, 4 Esp. N. P. C. 5.

(5) *Doe d. Bedford (Duke of) v. Kightley*, 7 T. R. 63.

(6) *Den d. Peters v. Hopkinson*, 3 D. & R. 507.

(7) *Doe d. Phillips v. Butler*, 2 Esp. N. P. C. 589.

(8) *Doe d. Spicer v. Lea*, 11 East, 312.

(9) *Kiely (Lessee of) v. Quinn*, 1 Crawford & Dix (Irish), 119.

(10) *Right d. Flower v. Darby*, 1 T. R. 159. *Doe d. Brown v. Wilkinson*, Co. Litt. 270. (b.) n. 1.

NOTICE TO QUIT.

respect to the
notice to quit
as the occupier
of land.

Lodgings.

original letting, and be regulated by the local custom of the district in which the house is situated, whenever it happens that a shorter term than twelve months is intended to be created by the letting, although no particular period be mentioned. This chiefly happens in the case of lodgings; and the custom, for the most part, requires the same space of time for the notice, as the period for which the lodgings were originally taken; as a week's notice (1) when taken by the week, a month's when taken by the month, and so forth. (2)

Upon an agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning, if no default was made in payment of the rent; but which agreement the lessor afterwards refused to execute, and the tenant paid his rent weekly:—It was held, that he was entitled to a month's notice to quit, although the agreement was not executed, and although, if he had been a weekly tenant, a week's notice would have been sufficient. (3)

CUSTOM OF THE COUNTRY.

If the custom of the country where the premises are situated requires or allows a notice for a longer or shorter period than half a year (as for instance, the custom of London, by which a tenant, under the yearly rent of 40s. is entitled to a quarter's notice only) (4), the custom will be admitted by the courts (5); but such custom must be strictly proved, and the witnesses must not speak to *opinion*, but *facts*. (6)

Where premises are let from year to year upon an agreement, that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced. (7)

So where premises are taken under an agreement, by which the tenant is always "to be subject to quit at three months' notice," the notice must expire either at the same time of the year the tenancy commenced, or at any other corresponding quarter-day. (8)

Where a notice was given on the 27th of September to quit "at the expiration of the term, for which you hold the same," Mr. Justice Holroyd permitted evidence of a general custom of the country to let from Lady-day to Lady-day. (9)

QUARTERLY RESERVATION OF RENT.

Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. (10)

But if a quarter's notice be given to the lessor, and the rent paid up to the time when the tenant should quit, and the lessor neither assent nor dissent, it shall be taken as a waiver of the regular notice to quit, and an acquiescence on the part of the lessor. (11)

(1) Questions frequently arise in London between lodging-house keepers and their lodgers respecting the termination of a weekly tenancy. It seems that if a person agree to take lodgings for a week commencing on a Tuesday, he is bound to quit at midnight of the succeeding Monday, for there cannot be two Tuesdays in a week:—he would, however, have a right to enter immediately after midnight of the Monday, because at that time the Tuesday commences.

(2) *Doe d. Parry v. Hazell*, 1 Esp. N. P. C. 94. *Doe d. Campbell v. Scott*, 6 Bing. 362. *Wilson v. Abbott*, 3 B. & C. 89. *Adams on Ejectment*, 140.

(3) *Doe d. Peacock v. Raffan*, 6 Esp. N. P. C. 4.

(4) *Tyley v. Seed*, Skin. 649.

(5) *Roe d. Brown v. Wilkinson*, Co. Litt. 270. (b.) n. 1.

(6) *Roe d. Henderson v. Charnock*, Peake's N. P. C. 6.

(7) *Doe d. Pitcher v. Donovan*, 1 Taunt. 555. 2 Camp. 78.

(8) *Kemp v. Derrett*, 3 Camp. 510.

(9) *Doe d. Milnes v. Lamb*, *Adams on Ejectment*, 316.

(10) *Shirley v. Newman*, 1 Esp. N. P. C. 266.

(11) *Ibid*.

A notice dated 27th and served on the 28th September, requiring a tenant to quit "at Lady-day next, or at the end of this current year, was held to mean a six months' and not a two days' notice to quit (1); because the court will look to the intention of the parties; and where general language is used, which is open to doubt, they will intend if possible that the notice has a sensible meaning, and construe it accordingly; and in this case a two days' notice could not have been intended, because that would be no notice. (2)

NOTICE TO QUIT.
CONSTRUCTION
OF NOTICES.

Upon this principle it has been holden, that notices under the following circumstances were sufficient:—viz. to quit at the end and expiration of "the current year of your tenancy thereof, which shall expire next after the end of one half-year from the date hereof" (3):—to a weekly tenant, whose tenancy commenced on a Wednesday, to quit on Friday, "provided his tenancy expired on Friday, or otherwise, at the end of his tenancy, next after one week from the date of the notice" (4):—and that a notice to quit on Lady-day, was a good termination of a holding either from Lady-day old, or Lady-day new style. (5)

A notice to quit, "or I shall insist upon double rent," is sufficiently certain to support an ejectment. (6)

Notice to quit
at Michaelmas
or Lady-day.

But a notice to quit at Michaelmas generally will be held to mean Old Michaelmas, if the custom of the country be to hold from that time. (7)

IV. *By whom Notice may be given.*

BY WHOM
NOTICE MAY
BE GIVEN.
Must be given
by the person
interested in
the premises,
or his author-
ised agent.

It seems, that where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate, and that a subsequent recognition of the authority of the agent will not make the notice good. (8) Assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, the bringing of an ejectment is not a sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration (9); for as the tenant is to act upon the notice at the time it is given to him, it ought to be certain, so that he may act upon it with security; and if an authority by relation were sufficient, the situation of the tenant must remain doubtful, until the ratification or disavowal of the principal, and he would thereby sustain a manifest injustice. (10)

In ejectment by a corporation against a tenant from year to year, a notice to quit given by a person acting as the steward of the corporation is

Corporations.

(1) *Doe d. Huntingtower (Lord) v. Culliford*, 4 D. & R. 249.

(2) *Ibid.*

(3) *Doe d. Phillips v. Butler*, 2 Esp. N. P. C. 589.

(4) *Doe d. Campbell v. Scott*, 4 M. & P. 20. 6 Bing. 362.

(5) *Denn d. Willan v. Walker*, Peake's Add. Cas. 194.

(6) *Doe d. Matthews v. Jackson*, Doug. 175.

(7) *Furley d. Canterbury (Mayor of) v. Wood*, 1 Esp. N. P. C. 198.

(8) *Doe d. Mann v. Walters*, 10 B. & C. 626.

(9) *Ibid.*

(10) *Right d. Fisher v. Cuthell*, 5 East, 491.

NOTICE TO QUIT. sufficient without evidence that he had an authority under seal from the corporation for the purpose. (1)

Joint tenants. Every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, and it must be predicated that the determination of the tenancy by such notice is for the benefit of the estate (2); therefore a notice to quit signed by one of several joint tenants on behalf of the others, is sufficient to determine a tenancy from year to year, as to all. (3)

A notice to quit by joint tenants to a tenant from year to year must be signed by all the joint tenants at the time it is served, if it be given by one of them; but if such notice be given by an agent on behalf of the joint tenants, it is sufficient, if his authority be subsequently recognised by all of them. (4)

But if four joint tenants jointly demise from year to year, such of them as give notice to quit, may recover their several shares in ejectment on their several demises. (5)

If by the conditions of the tenancy it be rendered necessary for all the parties to concur in the notice, a notice given by some of the parties, without the sanction or authority of their companions, will be invalid. (6)

Partners. Where joint lessors are partners in trade, a notice to quit in the names of all, but signed by one only, is valid. (7)

A., a brewer, demised a public-house to B., under an agreement that he should hold for one year certain, and that, after the expiration of that time, either party might put an end to the tenancy by giving three months' notice to quit, the rent to be payable quarterly; the agreement contained no clause of re-entry; B. took possession, and paid rent to A., who at first gave him a receipt in his own name, and afterwards in the joint names of himself and two partners, who were interested with him in the brewery: after B. had been in possession three years, A. gave him a notice to quit in his own name alone:—It was held, in an action of ejectment, that A. might recover on his own demise, although the latter receipts for rent were given in the names of himself and partners, and that no clause of re-entry was necessary in the agreement. (8)

Receiver. It seems that a receiver appointed by the court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. (9)

Tenant. A tenancy may be determined by the act of the tenant in two several ways, first, by notice to his landlord that he intends to quit the possession; secondly, by the non payment of rent, or breach of a covenant or condition.

The relationship of landlord and tenant is mutual; and the right to give a notice to quit is given by the common law, and is necessarily incidental to a tenancy from year to year; the termination of a tenancy by the

(1) *Doe d. Rochester (Dean) v. Pierce*, 2 Camp. 96., sed vide *Doe d. Plymouth (Mayor of) v. Ellis*, 2 Chitt. 170.

(2) *Right d. Fisher v. Cuthell*, 5 East, 491.

(3) *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135.

(4) *Goodtitle d. King v. Woodward*, 3 B. & A. 689. *Doe d. Jolliffe v. Sybourn*, 2 Esp. N. P. C. 677. Mr. Justice Parke in *Doe d. Mann v. Walters*, 10 B. & C. 634.

expressed dissatisfaction at the decision in *Goodtitle d. King v. Woodward*, 3 B. & A. 689.

(5) *Doe d. Whayman v. Chaplin*, 3 Taunt. 120.

(6) *Doe d. Pitcher v. Mitchell*, 1 B. & B. 11. 3 Moore, 229.

(7) *Doe d. Elliott v. Hulme*, 2 M. & R. 493.

(8) *Doe d. Green v. Baker*, 2 Moore, 189. 8 Taunt. 241.

(9) *Doe d. Marsack v. Road*, 12 East, 57.

non payment of rent, or the breach of a covenant or condition, can only rise under an express agreement between the parties, and seldom occurs but when the tenant has a written lease for a determinate period. NOTICE TO QUIT.

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. (1)

But a tenant who, after having given notice to quit, holds over for a year, paying double rent according to stat. 11 Geo. 2. c. 19. s. 18., may quit at the end of such year without fresh notice. (2)

Where there are three joint trustees of an estate, a notice to quit or discontinue the possession given by two is bad, even though given in the names of the three, and the third trustee afterwards adopts it, and joins in the demise in ejectment. (3) Trustees.

Therefore, where a lease for twenty-one years contained a proviso, that, in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first seven or fourteen years, and should give six months' notice in writing under his or their respective hands, the term should cease:—It was held, that a notice to quit, signed by two only of three executors of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given on behalf of themselves and the third executor, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companions by an act done for his benefit; for *non constat* that the determination of the lease was for the benefit of the co-joint tenant, which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. (4) Executors.

V. To whom Notice should be given.

An ejectment against the bailiffs *pro tempore* of a corporation, cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But such tenancy may be determined by a notice to the corporation to quit, served on its officers. (5)

TO WHOM
NOTICE SHOULD
BE GIVEN.

Corporation
-
aggregate.

When two tenants hold premises in common, notice to quit to one of them, is sufficient to determine the tenancy. (6) At least it is evidence, that the notice reached the other tenant who lived elsewhere. (7)

Joint tenants,
or tenants in
common.

The service as between landlord and tenant should invariably be upon

Landlord and
tenant.

(1) *Rickett v. Tullick*, 6 C. & P. 66.

(2) *Booth v. Macfarlane*, 1 B. & Ad. 904.

(3) *Right d. Fisher v. Cuthell*, 5 East, 491. 2 Marsh. 83. 5 Esp. N. P. C. 149.

(4) *Ibid.*

(5) *Doe d. Carlisle (Earl) v. Woodman*, 8 East, 228.

(6) *Doe d. Macartney (Lord) v. Crick*, 5 Esp. N. P. C. 196.

(7) *Doe d. Bradford (Lord) v. Watkins*, 7 East, 551. 3 Smith, 517.

NOTICE TO QUIT.	the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been underlet by him. And in a case where the service was upon a relation of the under-tenant <i>upon the premises</i> , Lord Ellenborough ruled the service to be insufficient, although the notice was <i>addressed</i> to the original tenant. (1)
Under-tenants.	If a notice to quit be given to a tenant, and he thereupon give notice to his under-tenants to quit at the same time, and at the expiration of the notice he quit so much as is occupied by himself, but his under-tenants refuse to quit, an ejectment may still be maintained against him for so much as his under-tenants have not given up. (2)
Rector and churchwardens.	Notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring him to deliver up the premises to the rector and churchwardens for the time being, is ill. (3)
Assignee.	Where A. has been tenant of certain premises, and upon his leaving them B. took possession :—It was held, that, in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he never paid rent, and that notice to quit was rightly given to B. (4)
Death of tenant.	Where, on the death of a tenant from year to year, his eldest son pays the rent, it is sufficient to serve him with notice to quit. (5)

VI. *Form of Notice.*

FORM OF NOTICE.	<p>The following forms of notices to quit are generally adopted (6) :—</p> <p>No. 1. <i>Notice to quit by the Landlord to a Tenant from Year to Year.</i></p> <p>SIR, I hereby give you notice to quit and deliver up, on the day of next, the possession of the messuage or dwelling-house (or “rooms and apartments,” or “farm lands and premises”), with the appurtenances, which you now hold of me, situate in the parish of , in the county of .</p> <p>Dated the day of , 18 . Yours &c. A. B.</p> <p>To Mr. C. D. (the tenant in possession), or (if it be doubtful who is the tenant) “To Mr. C. D., or whom else it may concern.”</p> <p>No. 2. <i>The like by an Agent for the Landlord.</i></p> <p>SIR, I do hereby, as the agent for and on behalf of your landlord A. B. of , give you notice to quit and deliver up, on &c. (as in No. 1.), which you now hold of the said A. B. situate, &c.</p> <p>Dated, &c. Yours &c. E. F. To Mr. C. D. &c. Agent for the said A. B.</p> <p>No. 3. <i>The like by the Landlord, where the Commencement of the Tenancy is doubtful.</i></p> <p>SIR, I hereby give you notice, &c. (as in No. 1. to “county of ”), provided your tenancy originally commenced at that time of the year, or otherwise, that you quit and deliver up the possession of the said messuage, &c. at the end of the year of your tenancy, which shall expire next after the end of half a year from the time of your being served with this notice. (7).</p> <p>Dated &c. Yours &c. A. B. To Mr. C. D. &c.</p>
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(1) Doe d. <i>Mitchell v. Levi</i> , M. T. 1811, MS. cit. Adams on Ejectment, 131.	(6) Adams on Ejectment, 395. Comyn, L. & T. 544—546. Woodfall by Harrison, 693—965.
(2) <i>Roe v. Wiggs</i> , 2 N. R. 330.	(7) A demise in an ejectment (original tenancy having commenced on November 1.) laid on November 1., was held to have been laid a day too soon, no demand of possession on that day having been proved. <i>Jack d. Lynas v Hampton</i> , 2 Jebb & Symes, 448.
(3) Doe d. <i>Brooks v. Fairclough</i> , 6 M. & S. 40.	
(4) Doe d. <i>Morris v. Williams</i> , 6 B. & C. 41. 9 D. & R. 30.	
(5) <i>Farnan (Appel.) v. Tisdall (Resp.)</i> , 1 Irish Circuit Cases, 5.	

No. 4. *The like by a Tenant from Year to Year, of his Intention to quit.*

NOTICE TO QUIT.

SIR, I hereby give you notice of my intention to quit, and that I shall on the day of _____ next, quit and deliver up the possession of the messuage, &c. which I now hold of you, situate, &c.

Dated &c.

To Mr. A. B.

Yours &c. C. D.

A parol notice to quit by a tenant under a parol lease is sufficient (1), though given by a person acting as steward of a corporation. (2) Parol notice.

When the landlord intends to enforce his claim to double value, in consequence of the tenant holding over, under stat. 4 Geo. 2. c. 28. s. 1., it is necessary, that the notice to quit should be in writing; but for the purposes of an ejectment, a parol notice is sufficient, unless the notice is required to be in writing by express agreement between the parties. (3) It is customary to address the notice to the tenant in possession; and it is perhaps most prudent to adhere to this form, though, if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary. (4) And when a notice was addressed to the tenant by a wrong Christian name, and the tenant did not return the notice, or object to it, and there was no tenant of the name mentioned in the notice, it was ruled at Nisi Prius to be sufficient. (5)

Notice to tenant when landlord intends to enforce double value under stat. 4 Geo. 2. c. 28. s. 1.

A subscribing witness to a notice to quit is unnecessary; and it is prudent not to have one, as it may occasion difficulties in the proof of the service, and cannot be of the slightest advantage to the landlord. (6)

Subscribing witness to notice to quit unnecessary. Language of notice should be unambiguous.

The language of the notice should be clear and decisive, without ambiguity, or giving an alternative to the tenant; for although the courts will reluctantly listen to objections of this nature, yet if the notice be really ambiguous, or optional, it will be sufficient to render it invalid, as far at least as the action of ejectment is concerned.

The notice, however, will not be invalid, unless it contain a real and *bond fide* option, and not merely an apparent one; for if it appear clearly, from the words of the notice, that the landlord had no other end in view, than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment upon, notwithstanding an apparent alternative.

Notice will not be invalid, unless it contain a real and *bond fide* option.

A misdescription of the premises in a notice to quit is not fatal, if they are otherwise sufficiently designated, so that the party to whom the notice has been given, has not been misled. (7)

DESCRIPTION OF PREMISES.

Where a farm was leased for twenty-one years at a rent of 180*l.* *per annum*, consisting, as described in the lease, of the Town Barton, and its several parcels described by name, at the rent of 83*l.*, other closes named, at other rents of 5*l.*, 5*l.* and 1*l.*, the Shippen Barton and its several parcels, described by name, at 86*l.*, with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice:—It was held, that a notice by the landlord to his tenant to quit

Notice will not be invalidated on account of ambiguity, if the intention be sufficiently clear.

(1) *Timmins v. Rowlison*, 3 Burr. 1603. N. P. C. 196. *Roe d. Rochester (Dean of)* 1 W. Black. 533. *Doe d. Macartney (Lord)* v. *Pierce*, 2 Camp. 96.
v. *Crick*, 5 Esp. N. P. C. 196.

(2) *Roe d. Rochester (Dean of) v. Pierce*, 2 Camp. 96. (4) *Doe d. Matthewson v. Wrightman*, 4 Esp. N. P. C. 5.

(3) *Legg d. Scot v. Benion*, Willes, 43. (5) *Doe v. Spiller*, 6 ibid. 70.
Timmins v. Rowlison, 1 W. Black. 553. (6) *Doe d. Sykes (Sir F.) v. Durnford*, 2 M. & S. 62.

Doe d. Macartney (Lord) v. Crick, 5 Esp. (7) *Doe d. Cox*, 4 Esp. N. P. C. 185.

NOTICE TO QUIT. "Town Barton, &c. agreeably to the terms of the covenant between us, on the expiration of the fourteenth year of your term," given in due time, was sufficient. (1)

Under what words "tithes" will be included. Where a house, lands, and tithes, are held under a parol demise at a joint rent, a notice to quit "the house, lands, and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy. (2)

To quit a part only of premises leased together. And it seems, that although tithes are let by parol, the tenant is entitled to a notice to quit. (3)

A notice, to quit a part only of premises leased together, is bad. (4)
It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him at the proper time. (5)

MODE OF SERVICE.

VII. Mode of Service.

Where it should either be a personal service, or a delivery to some member of the household. With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver it to the tenant personally; but if personal service cannot be effected, the service will be sufficient, if the notice be left with the wife or servant of the tenant at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time. (6)

Service of a notice to quit upon the tenant's wife, at the house demised, is a good service. (7)

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence, that the master received the notice. (8)

The mere leaving of a notice to quit at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, is not sufficient. (9)

WAVER OF NOTICE.

VIII. Waiver of Notice.

Acceptance of rent after expiration of notice. If a landlord receive rent accrued due after the expiration of a notice to quit, it is a waiver of that notice (10); but the acceptance of such rent is not *per se* absolutely a waiver, but evidence to be left to the jury to determine with what views, and under what circumstances, the rent is paid and received.

Money taken *nomine pœnæ*. If the money be taken *nomine pœnæ*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be

(1) Doe d. Rodd v. Archer, 14 East, 245. 7 East, 553. Doe d. Neville v. Dunbar, M. & M. 10.
(2) Doe d. Morgan v. Church, 3 Camp. 71.
(3) Ibid.
(4) Doe d. Rodd v. Archer, 14 East, 245.
(5) Doe d. Matthewson v. Wrightman, 4 Esp. N. P. C. 5.
(6) Jones d. Griffiths v. Marsh, 4 T. R. 464. Doe d. Bradford (Lord) v. Watkins, 71.
(7) Pulteney v. Shelton, 5 Ves. 147. 261. n.
(8) Jones d. Griffiths v. Marsh, 4 T. R. 464.
(9) Doe d. Buross v. Lucas, 5 Esp. N. P. C. 153.
(10) Goodright d. Charter v. Cordwent, 6 T. R. 219.

waved, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion, that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received *as rent*; that is to say, it must be so paid and received, as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force. (1)

NOTICE TO QUIT.

The receipt by an authorised agent of rent due at Michaelmas, is *prima facie* a waiver of a notice to quit at Midsummer. (2)

Receipt of rent by agent.

Where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created. (3)

Effect of money being received by banker on landlord's account.

The notice may also be waved by other acts of the landlord; but they are all open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it. Thus, where a notice to quit on September 29th was given, and a similar notice on the succeeding 25th of March, the latter notice was held to be an absolute waiver of the former, and not a question for the jury. (4) But where a second notice to quit was given after the expiration of the first notice, and also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, it was holden to be no waiver of the notice originally given; because it was impossible for the tenant to suppose, that the landlord meant to wave a notice upon the foundation of which he was proceeding to turn him out of his farm. (5)

Effect of second notice to quit.

Where after the expiration of a regular notice to quit, the landlord gave a second notice in these words:—"I do hereby desire you to quit the premises which you *now* hold of me, within fourteen days from this date, or I shall insist upon double value," it was ruled, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy *at will*, having for its object merely the recovery of double value; and the lessor of the plaintiff recovered upon a demise, anterior to the expiration of the second notice. (6) So also, where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy. (7)

In *Doe d. Brierly v. Palmer (Sir Charles)* (8) it appeared, that the defendant was lessee by assignment of certain tithes, under an agreement, which only operated to create a tenancy from year to year, and the impropiator, in March 1810 (some days after the assignment), gave the original lessee a notice to quit at the Michaelmas following, and afterwards, in March 1811, gave the assignee a notice to quit at the then next Michaelmas:—the court held, that such second notice was a waiver as to the assignee of the former

(1) Adams on Ejectment, 149.

(2) *Doe d. Ash v. Calvert*, 2 Camp. 387.

(3) *Ibid.*

(4) *Longan v. Walsh*, 1 Irish Circuit Cases, 32.

(5) *Doe d. Williams v. Humphreys*, 2 East.

236., et vide *Messenger v. Armstrong*, 1 T. R.

53.

(6) *Doe d. Digby v. Steel*, MS. cit. Adams on Ejectment, 151. 3 Camp. 115.

(7) *Doe d. Godsell v. Inglis*, 3 Taunt, 54.

(8) 16 East, 53.

NOTICE TO QUIT. notice given to the original lessee. And, in answer to an argument in support of the efficacy of the first notice, that the original tenancy, having expired at Michaelmas 1810, could not be set up again by another notice to the defendant in 1811, inasmuch as the giving of a person notice to quit does not operate to create a tenancy in him, Lord Ellenborough observed, "It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy; and if the party obey the notice, how can he be deemed a trespasser, on account of a prior notice to another person? Nothing appears to shew, that the defendant had knowledge of any other notice to quit than the one which was served upon him:" and Mr. Justice Bayley said, "The second notice gives the defendant to understand, that if he quit at Michaelmas 1811, he will not be considered as a trespasser."

Promise by landlord after delivery of a notice to quit, that tenant should not be turned out until the place was sold.

Where a landlord, after the delivery of a notice to quit, promised the defendant, that he should not be turned out until the place was sold, and after the sale of the premises brought an ejectment upon a demise anterior to the time of the sale, it was contended, that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day, when the contract for the sale was made. But the court held, that the permission did not amount to a waiver, Mr. Justice Bayley observing, "The fair meaning of the letter (of license) is, that the landlord would not bring ejectment to turn the tenant out of possession upon the notice to quit, unless the premises were sold; but that he did not mean to dispossess himself of the legal right to turn him out on the notice to quit." (1)

Acceptance by the landlord of the double value of the premises given by stat. 4 Geo. 2. c. 28.

The acceptance by the landlord of the *double value* of the premises, given by the stat. 4 Geo. 2. c. 28., when the tenant wilfully holds over after the expiration of a written notice to quit, or the bringing of an action of debt for the same, will not be a waiver of the notice; for the double value is given as a penalty for the trespass, and not as a payment between landlord and tenant. And the mere acceptance of rent by a landlord, for occupation subsequent to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice, but matter of evidence only, to be left to the jury under the circumstances of the case. (2)

Where act of the landlord cannot be qualified, but must be taken as a confirmation of the tenancy.

If the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will be waved (3) But it seems, that a pending action for such use and occupation will not be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a later period. (4) And where a landlord, after a verdict in ejectment founded on a notice to quit, distrained

(1) *Whiteacre d. Boulton v. Symonds*, 10 East, 13.

(2) *Doe d. Cheny v. Batten*, Cowp. 243. 9 East, 314 n. *Timmins v. Rowleson*, Burr. 1603. *Soulsby v. Neving*, 9 East, 310. *Ryal v. Rich*, 10 East, 48. Adams on Ejectment, 154.

(3) *Zouch d. Ward v. Willingale*, 1 Hen. Black. 311.

(4) Per Buller J. in *Birch v. Wright*, 1 T. R. 378., et vide *Roe d. Crompton v. Minshall*, Bull. N. P. 96.

for rent due subsequently to the expiration of the notice, and the party submitted and paid the rent, it was held to be no ground for staying the subsequent proceedings in the ejectment; for the distress was wrongful, and might have been disputed by the tenant. (1) A distress for rent accruing at the time of the expiration of the notice to quit, if made within the six months, will be no waiver thereof. (2)

NOTICE TO QUIT.

7. THE DECLARATION.

THE DECLARATION.

The rule of court, Michaelmas Term, 3 Will. 4., that every declaration shall be intituled of the day of the month and year on which it is filed and delivered, does not apply to declarations in ejectment; and the court have refused to set aside a declaration in ejectment, in which the notice was dated of a day after the service of declaration (3); but to found a motion for judgment against the casual ejector, a declaration intituled thus, "In the Common Pleas, June 12th, 1834," will suffice, notwithstanding the fifteenth rule of Michaelmas Term, 3 Will. 4., does not apply to actions of ejectment. (4)

How INTITULED.

Rule of court, M. T. 3 Will. 4., does not apply to ejectments.

If the title to a declaration be wrong, but the notice to appear thereto be correct, the defect in the title is cured. (5)

Wrong title, but correct notice.

A declaration in ejectment, intituled by mistake of Trinity Term, 6 Will. 4., instead of 5 Will. 4., dated August 1st, 1835, was held sufficient to warrant a rule for judgment against the casual ejector. (6)

Declaration intituled of the wrong year, T. T. 5 Will. 4.

But a declaration in ejectment, being intituled as of "Trinity Term, in the fourth year of the reign of Queen Victoria," instead of the third year, was held irregular, and the court refused to allow judgment to be signed against the casual ejector, although it was sworn that service was effected on the 29th of October, with notice to appear in the "next" Michaelmas Term. (7)

The court granted a rule for judgment against the casual ejector, where the declaration was intituled by mistake of a wrong term, as Hilary instead of Michaelmas. (8)

Wrong term.

But where a declaration in ejectment, was intituled of Trinity Term, 4 Vict., such term not having arrived, and no date being affixed to the notice at the foot of the declaration, the court refused to grant a rule for judgment against the casual ejector (9), although actual service had been effected on the tenant. (10)

(1) Doe d. *Holmes v. Darby* (Clerk), 8 Taunt. 538.

(2) Stat. 8 Anne, c. 14. ss. 6 & 7.

(3) Doe d. *Evans v. Roe*, 2 A. & E. 11.

(4) Doe d. *Ashman v. Roe*, 1 Scott, 165. 1 Bing. N. C. 253.

(5) Ibid. Doe d. *Crooks v. Roe*, 6 Dowl. P. C. 184. Doe d. *Gore v. Roe*, 3 ibid. 5. Doe d. *Wills v. Roe*, 5 ibid. 380. Doe d. *Brook v. Roe*, 9 ibid. 347.

(6) Doe d. *Smithers v. Roe*, 4 Dowl. P. C. 374.

(7) Doe d. *Vincent v. Roe*, 9 ibid. 43., vide etiam Doe d. *Gowland v. Roe*, 5 ibid. 273.

(8) *Anon.* 2 Chitt. 173.

(9) Doe d. *Newman v. Roe*, 9 ibid. 131.

(10) Doe d. *Giles v. Roe*, 7 ibid. 579.

THE DECLARATION.

On an application for judgment against the casual ejector it appeared, that the declaration was wrongly intituled of Michaelmas Term 1840, with notice to appear in the "next Michaelmas Term." The declaration was served before the commencement of the term, and the tenant then said, that he knew that no step could be taken till the following March: — the court refused to grant the rule. (1)

Omitting name of the court.

The declaration should be intituled in the court in which the action is brought; but the omission of the name of the court in entitling a declaration in ejectment, is immaterial, if the notice at the foot of the declaration contain the requisite information. (2)

Demise of the crown.

If the sovereign die during a term, a declaration in ejectment may be intituled as of the first year of the successor's reign. (3)

VENUE.

Ejectment being a local action, the venue must be laid in the county where the land or premises are situate.

The venue in the margin in the declaration in ejectment is immaterial, if the venue in the body of the declaration be correct. (4)

In support of an application to enter a suggestion to try a cause in Nottinghamshire instead of Lincolnshire, upon the ground that the lessor of the plaintiff could not have a fair and impartial trial in the former county, an affidavit was produced, alleging that two attorneys whom the lessor of the plaintiff had successively employed to conduct the cause, had abandoned his interest, the one on account of a bribe paid to him by the defendant, the other on account of an intimacy which existed between him and the defendant, and also that the defendant was a person of large property, and possessing great influence in the county, and that he had said he would "do as he liked at Lincoln," more especially as the lessor of the plaintiff was a poor man: — It was held to be insufficient. (5)

PARTIES.**Name of tenant in possession, inserted in the declaration, instead of casual ejector.**

Where the name of the tenant in possession was inserted at the commencement of a declaration by mistake, instead of that of the casual ejector (the proceedings in other respects being regular), the court of King's Bench granted the rule for judgment upon the common affidavit of service, and suggested that, if the tenant did not appear, an application should be made to amend. (6)

Inaccurate statement of the lessors' names.

Where a declaration was intituled "Doe on the demise of A. and B. v. B.," and the affidavit of service was intituled "Doe on the demise of B. and A. v. B.;" the court, notwithstanding the variance between the arrangement of the lessors' names, gave judgment against the casual ejector. (7)

And where to a declaration containing a joint demise by A., B., and C., and also a several demise by B. and another by C., defence was taken, intituled "Lessee of A., also of B., also of C.:" — It was held, not to be irregular. (8)

But an affidavit of service of a declaration in ejectment, where the declar-

(1) Doe d. *Channell v. Roe*, 9 Dowl. P.C. 67.

(2) Doe d. *Tattersall v. Roe*, 8 *ibid.* 612.

(3) *Anon.* 1 *ibid.* 4.

(4) Doe d. *Goodwin v. Roe*, 3 *ibid.* 323.

(5) Doe d. *Hickman v. Hickman*, 9 *ibid.* 364.

(6) Doe d. *Cobbey v. Roe*, Adams on Ejectment, 198. S. C. nom. *Anon.* 1 Chitt. 573. n. 2 *ibid.* 173.

(7) Doe d. *Worthington v. Butcher*, 2 *ibid.* 174.

(8) *Lad d. Fitzpatrick v. Thrustout*, 1 Hudson & Brooke (Irish), 208.

ation is on several demises, is wrong, if only intituled, "Doe on the demise of *Cousins v. Roe*," without mentioning the others. (1)

THE DECLARATION.

If a person be named in a declaration as one of the lessors of the plaintiff, without his authority, the party served with the declaration may, before appearance, move the court to have such party's name struck out of the declaration. (2)

Insertion of a person's name, as defendant without authority.

Where the plaintiff obtained a verdict on a count on a supposed demise by a party, without his authority, and without his concurring in the action, the court set aside the verdict. (3)

The court of Common Pleas will not, at the instance of the defendant, in an ejectment, interfere against a plaintiff who laid a demise by the assignees of a bankrupt, without their permission, they having given up the property to the bankrupt, and the plaintiff claiming under him. (4)

The demise declared upon by the plaintiff, although fictitious, must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made, as would, if actually made, have transferred the right of possession to the lessee. Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shewn at the trial, as would enable each of them to demise the whole; because, if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them. (5)

THE DEMISE.
The demise declared upon must be consistent with the title of his lessor.

It seems that describing property as being under an equitable article, instead of a legal demise, though the terms of both are the same, is bad. (6)

Describing property under an equitable article instead of a legal demise.

If it be doubtful in whom the legal title is vested, several distinct demises can be declared upon by the several persons concerned in interest, and the claimants will not then be confined at the trial to one particular demise, but can resort to any included in the declaration, under which they may be able to prove a title to the premises. (7)

Where doubts exist as to the party in whom the legal title is vested.

A declaration in ejectment on the demise of the churchwardens and overseers of a parish to recover parish property, containing two sets of counts, one specifying the names of the individuals, and the other not: the court ordered one set to be struck out. (8)

CHURCHWARDENS AND OVERSEERS.

Where the lessors of the plaintiff are a corporation, the demise must be stated to be by deed, but it need not be proved. (9)

CORPORATIONS AGGREGATE AND SOLE.

If a corporation be aggregate, the demise may be set forth in the declaration, without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted. The reason of this is, that, in the first case, the name solely consists of its character, but in the last, in its person; therefore, there cannot be a sufficient specification of that person, without mentioning his name. (10)

(1) Doe d. *Cousins v. Roe*, 4 M. & W. 68.
(2) Doe d. *Shepherd v. Roe*, 2 Chitt. 171.
(3) Doe d. *Hammek v. Fillis*, *ibid.* 170.
(4) Doe d. *Vine v. Figgins*, 3 Taunt. 440.
(5) *King v. Bery*, Poph. 57. *Treport's case*, 6 Co. 15. Adams on Ejectment, 209.
(6) *Coffee (Lessee of) v. Rahilly*, 1 Jones (Irish), 274.

(7) Doe d. *Vine v. Figgins*, 8 Taunt. 440.
(8) Doe d. *Llandesilio (Churchwardens, &c. of) v. Roe*, 4 Dowl. P. C. 222.
(9) *Furley d. Canterbury (Mayor of) v. Wood*, 1 Esp. N. P. C. 199.
(10) *Carter v. Crumwel*, *cit.* Dyer, 86.

THE DECLARATION.

INFANT.

If a demise be laid by an infant, his father or guardian should be made plaintiff instead of a nominal person, in order to save the trouble and expense of giving security for the costs, which he would otherwise be compelled to do. (1)

JOINT TENANTS OR PARCENERS.

Joint tenants or parceners can make a joint demise of their premises, but tenants in common cannot. (2)

Joint tenants or parceners are not bound to allege a joint demise; for if a joint tenant or parcener bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land. And if all the joint tenants or parceners join in the action, but declare upon separate demises by each, they may recover the whole premises; because, by the several demises, the plaintiff has the entire interest in the whole subject-matter, although the joint tenancy is severed by the separate letting. (3)

TENANTS IN COMMON.

When two or more tenants in common are lessors of the plaintiff, a separate demise must be laid by each, or they must join in a lease to a third person, and state the demise to the plaintiff to have been made by their lessee. And each demise may be alleged generally to be of the whole premises demanded, for under a demise of the whole, an undivided moiety may be recovered. (4)

THE DAY OF THE DEMISE.

Where an entry is necessary, the demise must be laid after it (5); for if the lessor have not a right to enter, he cannot have a right to demise the lands, and consequently the plaintiff must be nonsuited at the trial; for his lessor cannot *be supposed* to have made an illegal demise. (6) The demise should be laid as far back as the lessor's title will admit, because the judgment in ejectment is conclusive evidence as to the title of the lessor, for all the mesne profits accruing subsequently to the day of the demise (7); and when there are any doubts as to the period when the lessor's title accrued, it is customary to state the different demises by him on different days.

But where the assignees of a bankrupt are the lessors of the plaintiff, so as to enable them to recover the freehold lands of the bankrupt, upon a demise subsequently to the issuing of the fiat, the doctrine of relation does not apply, for the freehold remains in the bankrupt, though not beneficially, until taken out of him by the issuing of the fiat. (8)

Where the plaintiff's lessor entered, afterwards levied a fine, and then brought an ejectment, it was decided, that the demise might be laid before the fine. (9)

ADMINISTRATOR.

In an ejectment by an administrator, the demise may be laid on a day after the intestate's death, and before the grant of the letters of administration. (10)

(1) *Noke v. Windham*, Str. 694. *Anon.* 1 Wils. 130.

(2) *Moore v. Fursden*, 1 Show. 342. *Milliner v. Robinson*, F. Moore, 682. *Boner v. Juner*, 1 Ld. Raym. 726. *Mantle v. Wollington*, Cro. Jac. 166. *Morris v. Barry*, 1 Wils. 1. *Heatherley d. Worthington v. Weston*, 2 ibid. 232.

(3) *Doe d. Gill v. Pearson*, 6 East, 173. *Roe d. Raper v. Lonsdale*, 12 East, 39. *Doe d. Marsack v. Read*, ibid. 57. *Doe d. Lulham v. Fenn*, 3 Camp. 190.

(4) *Doe d. Bryant v. Wippell*, 1 Esp. N. P. C. 360.

(5) *Doe d. Compere v. Hicks*, 7 T. R. 433. 727.

(6) *Goodtitle d. Gallaway v. Herbert*, 4 T. R. 680.

(7) *Aslin v. Purkin*, 1 Burr. 665.

(8) *Doe d. Esdaile v. Mitchell*, 2 M. & S. 446. As to insolvent debtors, vide *Doe d. Whatley v. Telling*, 2 East, 256.

(9) *Musgrave d. Hilton v. Shelley*, 1 Wils. 214.

(10) *Patten (Lessee of) v. Patten*, 1 Alcock & Napier (Irish), 493.

In ejectment on the demise of an heir by descent, the demise was laid on the day his ancestor died, which was deemed sufficient after verdict. (1) THE DECLARATION.

A lease contained a covenant, enabling the landlord at any time during its continuance to enter and plant forest trees, giving previous notice of his intention to the tenant. A year and an half's rent having been due in September, the landlord in the next November served a notice of planting: — It was held, that an ejectment for non payment of rent was maintainable although the day of the demise, was prior to the service of the notice of planting. (2) HEIR.
LANDLORD.

Where a pauper has been let into possession of premises by the overseers of a parish, the demise should be laid by the overseers for the time being when the ejectment is brought, if the pauper has done any act recognising a holding under them; but otherwise by the overseers who let him into possession, or the last set of overseers whom he has acknowledged as his landlords. (3) PAUPER.

Where a notice given by a rector to the tenant of his glebe land expired previous to the time when a sequestration was read, it was held, that the rector might, after receiving a weekly allowance from the tenant, still maintain an ejectment, laying the demise between the time of the expiration of the notice, and the reading of the sequestration. (4) RECTORS.

When an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when possession is demanded, that is to say, subsequently to the determination of the will. TENANT AT WILL.

When an ejectment is intended to be brought against a tenant from year to year, and the time of the commencement of the tenancy is unknown, there should be delivered a general notice to quit "at the expiration of the current year of the tenancy thereof, which shall expire next after the end of one half year from the date of the notice," and to lay the demise eighteen months after the delivery of such notice. TENANT FROM YEAR TO YEAR.

The length of the term during which the premises are alleged in the declaration to have been demised to the plaintiff, is wholly unconnected with the title of the claimant, and may be of longer duration than his interest in the land. (5) THE LENGTH OF TERM DURING WHICH THE PREMISES HAVE BEEN DEMISED.

Seven years is the term usually declared upon; and the term should be of a sufficient duration to admit of the lessor's recovering possession of the land before its expiration.

When the premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the parishes of A. and B., or in A. and B., respectively. SITUATION OF THE PROPERTY DEMANDED.
Premises lying in different parishes.

It is not requisite to state in the declaration, that the premises are situated in a parish, hamlet, &c.: it is sufficient to mention the name of the place in which they are situate, without also describing it by the name of

(1) *Roe d. Wrangham v. Hersey*, 3 Wils. 274.

(2) *Dawson (Lessee of) v. Coghlan*, 1 Hayes (Irish), 509.

(3) *Doe d. Grundy v. Clarke*, 14 East, 488.

(4) *Doe d. Morgan (Clerk) v. Bluch*, 3 Camp. 447.

(5) *Doe d. Shore v. Porter*, 3 T. R. 13.

THE DECLARATION.

its ecclesiastical or civil division (1); and if the name of a place be omitted, but it can be collected from other parts of the declaration, such description will be sufficient. (2)

Thus, where the declaration stated, that one M. S. "at Haswell, in the county of B.," demised to plaintiff two messuages, from which messuages defendant at *Haswell aforesaid* ousted plaintiff:—It was held, that the statement of the ouster being at Haswell, amounted to a sufficient certainty that the lands demised lay at Haswell.

Where the premises were described as situate "*in the parish of West Putworth and Bradworthy*," and it appeared that *West Putworth* and *Bradworthy* were separate parishes:—It was holden, that the description was sufficiently certain, rejecting the word *parish* as surplusage, and considering the demise as of lands in *West Putworth* and *Bradworthy* (3); and where the premises were laid to be at the parish of *Farnham*, and were proved to be in the parish of *Farnham Royal*, it was held not to be a fatal variance, unless it could be proved that there were two *Farnhams*. (4)

Sufficient description of premises being situate in a barony.

In an ejectment for non payment of rent, the declaration described the premises as situate in the barony of M. The lease described them as in the barony of Upper M.; and it was conceded, that there were two baronies in the county, one called Upper M., the other Lower M.:—It was held, that the defendant could not object to this ambiguity of description in the declaration. (5)

Improper description of the locality of the disputed property.

When, however, the premises are described as lying in a parish, hamlet, &c. such description must be a correct one, and an uncertain or improper description will be fatal. Thus, where the premises were described as situate "*in the united parishes of St. Giles in the Fields and St. George Bloomsbury*," and it appeared, that those two parishes were united together by act of parliament for the maintaining of their poor, but for no other purpose, the variance was held fatal; for, by the description, the parishes were stated, as if they were completely blended together, and formed only one parish, when, in truth, they remained entirely distinct, except as to the maintenance of the poor. (6)

In an ejectment for lands "in the parishes of A. and B., or one of them," the judgment was arrested for the uncertainty, although it appeared, that the parishes had originally been one, and lately been divided by an act of parliament, and that the boundaries were not settled. (7) But if the words "or one of them" had been omitted, it seems the description would have been sufficient, though all the lands were contained in one of the parishes. (8)

In this case the ejectment was "for a tenth part of a messuage in D. and F.," and the whole messuage appearing in evidence to lay in D., and no part in F., the description was held ill, because it was "precisely of the tenth part of an entire thing;" though it was said by the court, that if the eject-

(1) *Goodtitle d. Bremridge v. Walter*, 4 Taunt. 671.

(2) *Goodright d. Smallwood v. Strother*, 1 W. Black. 706.

(3) *Goodtitle d. Bremridge v. Walter*, 4 Taunt. 671.

(4) *Doe d. Tollet v. Salter*, 13 East, 9.

(5) *Tyrrell (Lessee of) v. Quinlan*, 1 Alcock & Napier (Irish), 135. The court will allow

an amendment, before defence is taken, of the engrossment of a declaration in ejectment on the title. *Jack d. O'Brien v. Casual Ejector*, 2 Jebb & Symes, 397.

(6) *Goodtitle v. Pinsent d. Lammiman*, 2 Camp. 274. 6 Esp. N. P. C. 128.

(7) *Cottingham v. King*, 1 Burr. 624. Adams on Ejectment, 219.

(8) *Goodwin v. Blackman*, 3 Lev. 334.

ment had been of an acre of land in D. and F., and it appeared that the whole acre was in D., it would be well enough. The reason for this diversity seems to be, that *the acre* being the whole thing demanded, the description is sufficiently certain, although it be all in one parish, whereas, when only a *tenth part* is demanded, it is uncertain which tenth part is meant; and therefore, as no tenth part answers the description, the sheriff could not give execution. (1)

THE DECLARATION.

The same precision and exactness is not necessary in a declaration in ejectment, as in a *præcipe* (2): thus, a demise of 50 messuages, 100 acres of land, in all that and those one moiety or full half of the lands or town of C. is sufficiently certain. (3)

DESCRIPTION OF THE PROPERTY.

Necessary to describe with some degree of certainty, the nature of the property in the pleadings. Premises twice demanded in the same demise.

It is however necessary to describe with some degree of certainty the nature of the property in the pleadings; and the word "tenement," except by way of reference to an antecedent specification of particular descriptions, is too general (4); and if a water-course, where the ground also belongs to the plaintiff, is sought to be recovered, it must be described as so many acres of land *covered* with water. (5)

It is no objection to a description, that the premises are twice demanded in the same demise. (6)

The number of messuages, acres, &c. mentioned in the demise need not correspond with the number to which the lessor claims title. He may declare for an indefinite number, as a hundred messuages, a thousand acres of arable land, &c.; and care should be taken that the number specified in the demise be larger than the number claimed; because, although a lessor can declare for *more* than he is entitled to, and recover less—the reverse will not hold. (7) Upon the same principle, if the lessor of the plaintiff be entitled to a moiety or other part, of an entire thing, as the half or third part of a house, he may recover such moiety or third part on demand for the whole. (8) In an ancient case it is said, that if an ejectment be brought for an acre of land, and the metes and bounds be described in the declaration, and the jury find the defendant guilty in half an acre of land, the verdict will be bad, because of the uncertainty of which part or moiety the plaintiff is to have execution. (9)

Number of messuages, acres, &c. in the demise, need not correspond with the number to which the lessor claims title.

In an ejectment brought in the county of Durham, the plaintiff declared "for coal mines in Gateside" generally, not specifying the particular number; and it appearing on a writ of error, that such was the customary

Coal mines.

(1) *Denn d. Burges v. Purvis*, 1 Burr. 330. Adams on Ejectment, 22. 192.

(2) *Connor v. West*, 5 Burr. 2672.

(3) *Loveland d. Coynes v. Bartley*, 1 Alcock & Napier (Irish), 301.

(4) *Doe d. Bradshaw v. Plowman*, 1 East, 441. *Goodtitle v. Walton*, Str. 834. Where, however, ejectment was brought for twenty messuages, twenty *tenements*, &c. the court of C. P., after verdict and writ of error, allowed the record to be amended by striking out "twenty tenements;" and it was held, that the declaration being for a "messuage and tenement" was no ground of error. 1 M. & P. 330. *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70. Adams on Ejectment, 26.

(5) *Challenor v. Thomas*, Yelv. 143. Co.

Litt. 4. (b.) Where premises are too indefinitely described in an ejectment, the proper course in Ireland is to rule the lessor of the plaintiff to amend, by declaring for lands in the possession of the party served; but he cannot be called upon to make any further alteration in the description of the premises. *Jack d. Corbet v. Casual Ejector*, 1 Jebb & Symes (Irish), 671., vide etiam *Elliott v. Casual Ejector*, 1 Alcock & Napier (Irish), 142.

(6) *Warren v. Wakeley*, 2 Rol. 482.

(7) *Denn d. Burges v. Purvis*, 1 Burr. 326. *Guy v. Rand*, Cro. Eliz. 13.

(8) *Ablett v. Skinner*, 1 Sid. 229. *Goodwin v. Blackman*, 3 Lev. 334.

(9) *Winkworth v. Man*, Yelv. 114.

THE DECLARATION.

Furze and heath.

Gorse and furze.

House.

Land — pasture, meadow, and arable.

Land built upon.

Manor.

Messuage or burgage.

Messuage or tenement.

Mills.

Moor and marsh.

Mountain.

Passage-room.
"Ten acres of pease."Provincialisms.
Lands will be sufficiently described by provincial terms.

mode of declaring in that county, the judgment for the plaintiff was affirmed. (1)

"Fifty acres of furze and heath" (2) is sufficiently certain.

"Fifty acres of gorse and furze" (3) has also been held sufficiently certain in ejectment, without specifying the particular quantity of each.

"House" is amply descriptive in a declaration of ejectment; so, also, "part of a house in A." will answer. (4)

In ejectment for land, the particular species should be mentioned in the description, whether *pasture*, *meadow*, &c. because land, in its legal acceptation, signifies only *arable* land. (5)

If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named. (6)

It seems that an ejectment may brought for a manor, or for a moiety of a manor, generally, without any description of the number of acres or species of land contained therein; and that, under such general description, the jury may find a verdict for the plaintiff for a messuage, or for so many acres "parcel of the said manor;" and for the defendant for the residue of the manor; but it is said in the old cases, not to be safe to bring an ejectment for a manor without describing the quantity and species of the land. (7)

So also an ejectment for a messuage or burgage is good, because both signify the same thing in a borough. (8)

But an ejectment for a messuage or tenement with other words expressing its meaning is good, as a messuage or tenement called "*The Black Swan*;" for the addition reduces it to the certainty of a dwelling-house. (9)

An ejectment for four corn-mills, without saying of what kind, whether wind-mills or water-mills, is good. (10)

"Fifty acres of moor and marsh" (11) is sufficiently definite.

But an ejectment in England for a hundred acres of mountain, has been held to be bad for uncertainty, because both waste and mountain comprehend in England many sorts of land. (12)

Ejectment of a place called a passage-room is certain enough. (13)

An ejectment for "ten acres of pease" will be construed to mean ten acres of land covered with pease. (14)

Lands will be sufficiently described by the provincial terms of the counties in which they lie. Thus, an ejectment may be maintained for "five acres of alder carr" in Norfolk — alder carr in that county signifying land covered with alders. So also in Suffolk for a beast-gate, and in Yorkshire for cattle-gates. (15)

(1) *Whittingham v. Andrews*, 4 Mod. 143. 1 Show. 364. 1 Salk. 255. Carth. 277. Comb. 201.

(2) *Connor v. West*, 4 Burr. 2672.

(3) *Fitzgerald v. Maskall*, 1 Mod. 90.

(4) *Sullivan v. Seagrave*, Str. 695. *Rawson v. Maynard*, Cro. Eliz. 286.

(5) *Massey v. Rice*, Cowp. 346. *Savel's case*, 11 Co. 55.

(6) *Goodtitle d. Chester v. Alker*, 1 Burr. 133, 134.

(7) *Warden's case*, Het. 146. *Cole v. Ayloott*, Litt. 299, 301. *Hems v. Stroud*, Latch. 61.

(8) *Danvers v. Wellington*, Hardr. 173. *Rochester v. Rickhouse*, Poph. 203.

(9) *Burbury v. Yeomans*, 1 Sid. 295.

(10) *Fitzgerald v. Maskall*, 1 Mod. 90.

(11) *Connor v. West*, 5 Burr. 2672.

(12) *Hancock v. Price*, Hardr. 57.

(13) *Bindover v. Sindercombe*, 2 Ld. Raym. 1470.

(14) *Odingsall v. Jackson*, 1 Brown, 149.

(15) *Barnes v. Peterson*, Str. 1063. *Bennington v. Goodtitle*, *ibid.* 1084.

The same principle applies to ejectments in Ireland, and terms used in that country will be sufficiently certain, when writs of error are brought therefrom in this kingdom. Thus, an ejectment will lie in Ireland for a township, for a kneave (1) or quarter of land, or for so many acres of bog or of mountain (2), the word mountain being, in that kingdom, rather a description of the quality than the situation of land. (3)

THE DECLARATION.

Irish ejectments.

"A certain place called the rectory" has also been held sufficiently descriptive. (4)

"The rectory."

A declaration in respect of a room and of a chamber in the second story is sufficient. (5)

Room and chamber.

An ejectment will lie for a stable and cottage. (6)

Stable and cottage.
Tithes.

Where the plaintiff declared on a lease for tithes in R. belonging to the rectory of D., and that the defendant entered upon him, and took *such* tithes severed from the nine parts in R., without saying, that the tithes so taken belonged to the rectory of D.; the description was held ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in R., which did not belong to the rectory of D. (7)

The particular species of tithe demanded, should be specified in the declaration, as of hay, wheat, &c. or the description will be bad for uncertainty (8); but it is not also necessary to mention the precise quantity of each species, because tithe is in its nature uncertain, the quantity entirely depending on the fruitfulness of the season; and it is, therefore, enough to say, "of certain tithes of hay, wool, &c." (9)

An ejectment for ten acres of underwood has been held good (10), because underwood is so well understood in law, that the sheriff has certainly enough to direct him in the execution.

Underwood.

"Hundred acres of waste" has been held to be bad for uncertainty. (11)

Waste.

It is not requisite to allege the entry of the plaintiff on the land as having been made on any particular day. It is sufficient if it be declared generally, that the plaintiff entered by virtue of the demise. (12)

THE ENTRY.

The day upon which the ouster of the plaintiff by the casual ejector is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry. This is requisite, in order to support the consistency of the fiction; because, as the title of the plaintiff is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own shewing, he had any claim to be possessed. But it does not seem absolutely necessary, that this consistency should be preserved; for, as the words "*afterwards, to wit,*" are always used immediately before mentioning the

THE OUSTER.

(1) *Cottingham v. King*, 1 Burr. 623—630.

(2) *Barnes v. Peterson*, Str. 1063. *Bennington v. Goodtitle*, ibid. 1084.

(3) *Kildare v. Fisher*, ibid. 71., vide contra, *Macdonnogh v. Stafford*, Palm. 100. 2 Rol. 166. 189. *St. John v. Commyn*, Yelv. 117.

(4) *Hutchinson v. Puller*, 3 Lev. 95.

(5) *Anon.* 3 Leon. 210.

(6) *Hill v. Giles*, Cro. Eliz. 818. *Lady Dacre's case*, 1 Lev. 58. *Hamond v. Ireland*, Sty. 215.

(7) *Badwyn v. Wine*, Sir W. Jones, 321., et vide *Goodwright d. Smallwood v. Strother*, 2 W. Black. 706.

(8) *Harper's case*, 11 Co. 25. (b.) *Worrall v. Harper*, 1 Rol. 65. 68.

(9) *Anon.* Dyer, 116. (b.)

(10) *Warren v. Wakeley*, 2 Rol. 482.

(11) *Hancock v. Price*, Hardr. 57.

(12) *Wakeley v. Warren*, 2 Rol. 466., sed vide *Douglass v. Shank*, Cro. Eliz. 766.

THE DECLARATION.

day of the ouster, it is most probable, upon the principles by which ejectments are at present regulated, that the courts would in all cases consider an ouster laid previously to the day of the entry "as impossible and repugnant," and as such reject it. (1)

Actual ouster does not mean putting out by force of hand proved in evidence; but holding over by such possession as must have been adverse to the tenancy, is full presumptive evidence of actual ouster. (2)

INTRODUCTION OF AN ATTORNEY'S NAME, IN DECLARATION NOT REQUISITE.

It is no objection to a declaration in ejectment, that an attorney's name has not been introduced into it. (3)

The omission of the allegation that John Doe is indebted to the queen, and the "*quo minus*" in a declaration of ejectment, is immaterial. (4)

ALLEGATION OF BEING INDEBTED TO THE QUEEN AND THE "QUO MINUS," NOT REQUISITE.

NOTICE SUBSCRIBED TO THE DECLARATION.

8. NOTICE SUBSCRIBED TO THE DECLARATION.

The notice at the foot of the declaration should be given, either by the casual ejector for the tenant to appear, and be made defendant in his stead, or by the lessor of the plaintiff for the tenant to appear, and find bail, &c. under stat. 1 Geo. 4. c. 87.

By whom to be given.

In ordinary cases, the notice to appear should regularly be given by and subscribed with the name of the casual ejector; but when it was subscribed with the name of the nominal plaintiff, instead of the casual ejector, the court of King's Bench refused to set aside the proceedings. (5)

To whom and how directed.

This notice should be directed to the tenant in possession by name (6), a notice directed to the personal representatives of a deceased tenant having been deemed insufficient. (7)

The Christian and surname of the tenant in possession are also usually prefixed to the notice (8); but when a part of the Christian name was abbreviated, as where it was written John B. Jones, instead of John Benjamin Jones, the notice was deemed sufficient. (9)

If the service be regular, the substitution of "Jacob" for "Sarah" in the notice is immaterial. (10)

A notice at the foot of a declaration in ejectment, directed to R. Newton, and served on "R. A. Newton," is sufficient, if it be sworn that the latter is the person intended. (11)

If in the notices attached to declarations in ejectment, each tenant be rightly named in his own notice, it is sufficient; and therefore an alteration in the name of a tenant in the notices served on the others is immaterial, if it be sworn that the same person was meant. (12)

A notice to appear, addressed to "personal representatives" without naming them, is bad. (13)

(1) *Adams v. Goose*, Cro. Jac. 96. *Merrell v. Smith*, *ibid.* 311. Bull. N. P. 106.

(2) *Taylor v. Fisher*, Loft. 766.

(3) *Doe d. Simpson v. Roe*, 6 Dowl. P. C. 469.

(4) *Doe d. Bloxham v. Roe*, *ibid.* 388.

(5) *Hazelwood d. Price v. Thatcher*, 3 T. R. 351.

(6) *Doe d. — v. Badtittle*, 1 Chitt. 215.

(7) Tidd, 1207.

(8) *Doe d. — v. Roe*, 1 Chitt. 573.

(9) *Ibid.*

(10) *Doe d. Folkes v. Roe*, 2 Dowl. P. C.

567.

(11) *Doe d. Smart v. Roe*, 9 *ibid.* 340.

Doe d. Frost v. Roe, 3 *ibid.* 563.

(12) *Doe d. Peach v. Roe*, 6 Dowl. P. C. 62.

(13) *Anon.* 1 Chitt. 162.

Where the notice at the foot of the declaration in ejectment contains the names of many tenants, it is sufficient that the copy served on each should contain the name of that one only. (1)

NOTICE SUB-
SCRIBED TO THE
DECLARATION.

And in the Common Pleas, where, when several tenants had been duly served with copies of the declaration, judgment was allowed to be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants (2): but if the notice to appear be personally addressed to only one of the joint tenants, it is irregular, and will not entitle the lessor of the plaintiff to move for judgment against the casual ejector. (3)

Where there
are several te-
nants.

The notice should require the tenant or tenants to appear. The time when the defendant should be required to appear, in order to be admitted to defend instead of the casual ejector, is, except where the proceedings are under stat. 1 Geo. 4. c. 89. (4), regulated by the locality of the premises.

When to ap-
pear.

Where the premises are situated in London or Middlesex, the notice should be for the tenant to appear "on the first day," or "within the first four days" of the term next after the delivery of the declaration.

Premises situ-
ated in London
or Middlesex.

If the premises be situated in any other county than London or Middlesex, the notice should require the tenant to appear generally in the term next ensuing. (5)

Premises situ-
ated in the
country.

If the date of the notice convey sufficient information to the tenant, the title is immaterial. (6)

It is no objection to a notice at the foot of a declaration in ejectment, that it omits the word "Term" after the word "Hilary." (7)

If a declaration be duly served before the essoign day, the omission in the notice of the term in which the tenant is to appear is immaterial. (8)

A declaration not intituled of any term, delivered before the essoign day of Hilary Term, with a notice dated 1st January, to appear within the first four days of the next term, was held sufficient. (9)

Where a declaration was intituled of Michaelmas Term, 54 Geo. 3., instead of 55 Geo. 3.; but the notice was dated on 11th January 1815, requiring the tenant to appear "in next Hilary Term:"—It was held to be sufficient. (10)

The court granted a rule for judgment, where the notice was in "Trinity Term next," instead of "Hilary Term next." (11)

A declaration delivered in Hilary Vacation, intituled of Easter Term, with a notice to appear on the first day of next term, was held good for an appearance as of Easter Term. (12)

In a country ejectment the notice may be to appear in the next issuable term; and judgment against the casual ejector may be moved for in that term. (13)

Where in the notice the tenant was required to appear in eight days of

(1) Doe d. *Field v. Roe*, 1 H. & W. 516.

(2) Tidd, 1208. Doe d. *Pearson v. Roe*, 5 Moore, 73.

(3) Doe d. *Williamson v. Roe*, 10 Moore, 493.

(4) *Vide post*, 1483. EJECTMENT UNDER STAT. 1 GEO. 4. C. 87. 11 GEO. 4. & 1 WILL. 4. C. 70. 1489.

(5) 2 Chitt. Pl. 627. Archb. by Chitt. 769., *et post*, 1442. tit. TIME OF APPEARANCE.

(6) Doe d. *Evans v. Roe*, 5 Dowl. P.C. 508.

(7) Doe d. *Dimond v. Roe*, 8 *ibid.* 308.

(8) Doe v. *Roe*, 1 Tyrw. 280. 1 C. & J. 330.

(9) *Goodtitle d. Price v. Badtitle*, Adams on Ejectment, 207.

(10) *Goodtitle d. Ranger v. Roe*, 2 Chitt. 172.

(11) Doe v. *Greaves*, *ibid.* 172.

(12) *Anon.* Adams on Ejectment, 207.

(13) Doe d. *Clarke v. Roe*, 4 Taunt.

**NOTICE SUB-
SCRIBED TO THE
DECLARATION.**

St. Hilary, instead of as of Hilary Term generally, the court would not allow final judgment to be signed, but left the party to bring a fresh action, as the notice was irregular and void. (1)

A notice advising the tenant to appear and defend in due time is insufficient. (2)

And it is not sufficient to state in the notice at the foot of a declaration in ejectment, that the tenant is "to appear in due time." (3)

9. AMENDMENT OF DECLARATION.

**AMENDMENT OF
DECLARATION.**

If the declaration be defective, the plaintiff may in general have leave to amend it, even after plea pleaded. (4)

A notice at the foot of a declaration in ejectment, omitting to state, that the consequence of the action not being defended will be turning the tenant out of possession, is defective, but may be amended on terms. (5)

Where the lessor of the plaintiff has amended the declaration in ejectment without the leave of the court, such practice amounts to an irregularity only; and an application to set aside the proceedings on the ground of such irregularity, comes too late after verdict. (6)

Where a mistake has been made in the christian name of the lessor of the plaintiff, and no one has appeared, the court will not allow the declaration to be amended by altering the name. (7)

The court will not amend a declaration in ejectment, after defence taken, by striking out the notice at the foot, that it was brought on account of non payment of rent. (8)

If the declaration in ejectment for non payment of rent, contain denominations of land included in the summons in ejectment, the variance is fatal. (9)

10. SERVICE OF DECLARATION.

**SERVICE OF
DECLARATION.**

The declaration in ejectment is a species of process to bring the party interested into court: its delivery to the tenant, resembles the service of a writ, rather than the delivery of a declaration; and, as it is the only warning which the tenant in possession receives of the proceedings of the claimant, the courts are careful that a proper delivery be made, and that the nature and contents of the declaration be explained at the time to the party to whom it is delivered: this delivery and explanation are generally termed the service of the declaration.

If there be any special circumstances in the mode of service, the court must be acquainted with them on moving for judgment against the casual ejector;

(1) *Lackland d. Dowling v. Badland*, 8 Moore, 79.

(2) *Doe d. Isherwood v. Roe*, 2 N. & M. 476.

(3) *Doe d. Forbes v. Roe*, 2 Dowl. P. C. 420.

(4) Archb. by Chitt. 777.

(5) *Doe d. Darwent v. Roe*, 3 ibid. 336.

(6) *Frankfort (Lessee of) v. Willett*, 1 Crawford & Dix (Irish), 78. It has been questioned in Ireland, whether the judge at

Nisi Prius can amend the record by adding a new denomination to those already inserted in the declaration in ejectment. *Allen (Lessee of) v. Smith*, 1 Jones (Irish), 279.

(7) *Doe d. Street v. Roe*, 8 Dowl. P. C. 444.

(8) *Blennerhasset (Lessee of) v. Leary*, 1 Hayes (Irish), 378.

(9) *Allen (Lessee of) v. Smith*, 1 Jones (Irish), 279.

and if satisfied that the tenant has had notice of the declaration, they will make the rule for judgment absolute in the first instance; if doubtful, a rule will be granted, requiring the tenant to shew cause why the service should not under the special circumstances be deemed sufficient; and they will prescribe the mode of serving the rule. (1)

SERVICE OF
DECLARATION.

Declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign or first general return day. (2)

TIME OF SER-
VICE.

Reg. Gen. T.
T. 1 Will. 4.

Although the court will sometimes make that a good service under particular circumstances, which otherwise would be imperfect, yet, where the service has been after the proper day, they will not allow it to be ante-dated (3); but under very particular circumstances, the court will sometimes make that a good service which otherwise would be imperfect. (4)

In ejectment it is no defence at *Nisi Prius* that the declaration was irregularly served, as where it was served after the term, in a case not within stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 36. (5)

Service in ejectment on any of the days intervening between the Thursday next before and the Wednesday next after Easter Day, when they fall within Easter Term, is insufficient. (6)

Where the tenant in possession has absconded to another country, or resides abroad, the service of the declaration in ejectment may be effected on his agents on the premises. (7)

UPON WHOM
SERVICE TO BE
MADE.

AGENTS.

ASSIGNEES.

Where the party interested in the premises becomes bankrupt, service on his assignees and the messenger in possession under the fiat, is sufficient to obtain a rule for judgment against the casual ejector. (8) But service, *nunc pro tunc*, on the provisional assignee of insolvent debtors, will not be allowed, if the service be not made until the first day of the term in which the ejectment is sought to be moved on. (9)

A rule *nisi* will be granted, for judgment against the casual ejector, if the service have been made on an attorney, who represented himself to be the agent for the tenants in possession, acknowledged the receipt of the declaration, and consented to appear for them. (10)

ATTORNEY.

An affidavit was considered sufficient for a rule *nisi*, which stated, that the deponent went to the premises, but found the door closed, and knocked, but gained no admission; that he looked through a window, and saw the niece of the tenant in possession; that he again knocked, but could not get in; that he then explained through the door the nature and object of the service, and posted the declaration against the door; that two conversations

Declaration de-
livered to an
attorney by de-
fendant.

(1) *Sprightly v. Dunch*, 2 Burr. 1116. *Fenn v. Denn*, *ibid.* 1181. *Methold (Lessee of) v. Norright*, 1 W. Black. 290. *Gulliver v. Wagstaff*, *ibid.* 317. *Crow d. Derby (Lord) v. Ejector*, 1 Jebb & Symes (Irish), 505.

(2) Reg. Gen. T. T. 1 Will. 4. K. B. C. P. and Exch. 2 B. & Ad. 789. 7 Bing. 784. 4 C. & P. 604. 1 C. & J. 472. 1 Dowl. P. C. 104. 1 Tyrw. 523. 5 M. & P. 816. 4 Bligh, 583.

(3) *Anon. Woodfall* by Harrison, 797.

(4) *Methold (Lessee of) v. Norright*, 1 W. Black. 290. *Gulliver v. Wagstaff*, *ibid.* 317.

(5) *Doe d. Rankin v. Brindley*, 1 N. & M. 1. 4 B. & Ad. 84.

(6) *Doe d. Frodsham v. Roe*, 6 Dowl. P. C. 479.

(7) *Doe d. Robinson v. Roe*, 3 *ibid.* 11. *Doe d. Treat v. Roe*, 4 *ibid.* 278. 1 Har. & Woll. 526. *Doe v. Roe*, 4 B. & A. 653.

(8) *Doe d. Chadwick v. Roe*, 9 Dowl. P. C. 492.

(9) *Lessee Voidal v. Ejector*, 1 Longfield & Townsend (Irish), 107.

(10) *Anon.* 2 Chitt. 181.

**SERVICE OF
DECLARATION.**

afterwards took place between the deponent and the attorney of the tenant, from which it appeared, that the declaration had been brought to that attorney. (1)

**Attorney of
mortgagee in
possession.**

Service on a person described as a mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, is not sufficient, without an acknowledgment by the mortgagee. (2)

**Attorney of one
court accepting
a declaration
brought in an-
other court.**

If an attorney of one court accept a declaration in an ejectment brought in another, it is no ground for a rule, either absolute or *nisi*, for judgment against the casual ejector. (3)

BAILIFF.

Service of a declaration in ejectment on the bailiff of the tenant is sufficient foundation for judgment against the casual ejector, where it appears to have duly come to the hands of the tenant's attorney, who promises to appear. (4)

BROKER.

Where it appeared that the tenant had absconded, leaving the key of the door with a broker, with directions to let the house, the court held, that service of a copy of the declaration on the broker, and by sticking up another copy on the door of the premises, was sufficient for judgment against casual ejector. (5)

**BROTHER OF
TENANT.**

Service on a brother of the tenant in possession will be insufficient, if the tenant do not acknowledge its receipt. (6)

**CHAPEL KEEP-
ER.**

A special service will be allowed, where possession of a chapel is sought to be recovered. Thus, in *Doe d. Somers (Earl) v. Roe* (7), where a service had been effected on the person who was in the occupation of the school room, and on the person who paid the rates and outgoings of the chapel, and likewise a copy put up on the door of the chapel:—It was holden to be sufficient. (8)

Service on the surviving lessees and the sextoness has also been holden sufficient. (9)

Where the tenant in possession had quitted the country, and not being likely to return, service had been effected on the person in whose custody the keys of the chapel were placed, on the wife of the tenant, and on his servant: the court granted a rule absolute for judgment against the casual ejector. (10)

**CLERKS OF
COMPANIES.**

The court granted a rule *nisi* to make service on the clerk of a public body (who was directed to be appointed by an act of parliament) good service. (11)

Service on the book-keeper of a company in possession of part of the premises is sufficient. (12)

Service of a declaration in ejectment on the clerk of an incorporated company (not empowered to sue and be sued in the name of their clerk), on a portion of the premises, is sufficient for a rule *nisi* (13); although he may not reside upon them.

(1) *Doe d. Mortlake v. Roe*, 2 Dowl. P. C. 444.

(2) *Doe d. Collins v. Roe*, 1 *ibid.* 613.

(3) *Doe d. Walker v. Roe*, *ibid.* 569. 2 Tyrw. 459. 2 C. & J. 381.

(4) *Jenny d. Mills v. Cutts*, 1 Scott, 52.

(5) *Doe d. Scott v. Roe*, 8 Dowl. P. C. 254.

(6) *Right d. Freeman v. Roe*, 2 Chitt. 180.

(7) *Ibid.* 292.

(8) Vide etiam *Doe d. Smith v. Roe*, *ibid.* 509.

(9) *Doe d. Kirschner v. Roe*, 7 *ibid.* 97.

(10) *Doe d. Dickens v. Roe*, *ibid.* 121.

(11) *Anon.* 2 Chitt. 181.

(12) *Doe v. Roe*, 1 Dowl. P. C. 23.

(13) *Doe d. Ross v. Roe*, 5 *ibid.* 147.

In an action to recover possession of certain land illegally taken into a road under a private act of parliament, the court refused to grant a rule for judgment against the casual ejector, on an affidavit that service had been effected on one of the commissioners, in whom the road was vested under the provision of the act, and on their clerk (1)

SERVICE OF
DECLARATION.
COMMISSION-
ERS.

Service, in ejectment, on the daughter of the tenant, coupled with the fact of the tenant afterwards calling on the attorney of the lessor of the plaintiffs, and saying that he knew the time was coming "when something must be done," is sufficient for the court to grant a rule for judgment against the casual ejector. (2)

DAUGHTER OF
TENANT.

So service of the declaration, by leaving it with the daughter of the tenant in possession (who was confined by indisposition), coupled with an affidavit that she acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother, the tenant in possession, before the essoign day of the term, was held to be sufficient for a rule *nisi*. (3)

And where the service was on the daughter of a bedridden tenant on the premises, it was held to be sufficient for a rule *nisi* against the casual ejector, although it did not appear that the daughter had explained its meaning. (4)

Service on the daughter of the tenant in possession, with an acknowledgment by the wife before the term, that the declaration has come to the hands of her husband, is sufficient for a rule *nisi* for judgment against the casual ejector. (5)

But service on the daughter on the premises will not suffice, unless it be shewn that the declaration came to the hands of the father, with proper explanation. (6)

Where there was service in ejectment on the daughter of the tenant in possession, and he on the first day of term acknowledged the receipt of the declaration, but not that he had received it before the term, it was held not to be sufficient. (7)

Service on the daughter on the premises is insufficient, even for a rule *nisi*, although there may be reason to believe the wife is aware of the proceeding, and keeps out of the way to avoid being served. (8)

Service on the secretary of the East India Company in respect of premises sought to be recovered from the company is sufficient. (9)

EAST INDIA
COMPANY.

Service on the executors of the late tenant in possession is bad, if it do not appear that they were the tenants in possession. (10)

EXECUTORS.

If there be representatives who had taken possession, they should be addressed by name; if not, the lessor of the plaintiffs should proceed as in the case of a vacant possession. (11)

In an ejectment for non payment of rent, the court will not allow a sub-

HEIR.

- | | |
|-----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
| (1) Doe d. <i>White v. Roe</i> , 8 Dowl. P. C. 71. | (7) Doe d. <i>Harris v. Roe</i> , 1 H. & W. 372. |
| (2) Doe d. <i>Agar v. Roe</i> , 6 <i>ibid.</i> 624. | (8) Doe d. <i>George v. Roe</i> , 3 Dowl. P. C. |
| (3) Doe v. <i>Roe</i> , 2 D. & R. 12. Doe d. 9. | (9) Doe d. <i>Coopers' Comp. v. Roe</i> , 8 <i>ibid.</i> |
| <i>Cockburn v. Roe</i> , 1 Dowl. P. C. 692. | 134. |
| (4) Doe d. <i>Frost v. Roe</i> , 8 <i>ibid.</i> 301. | (10) Doe d. <i>Paul v. Hurst</i> , 1 Chitt. 162. |
| (5) Doe d. <i>Chaffey v. Roe</i> , 9 <i>ibid.</i> 100. | (11) Doe d. <i>St. Margaret, Westminster v.</i> |
| (6) Doe v. <i>Roe</i> , 2 <i>ibid.</i> 414. Doe d. <i>Brittlebank v. Roe</i> , 4 M. & Sc. 562., <i>sed vide</i> | <i>Roe</i> , 1 Moore, 113., <i>et vide</i> <i>Hazelwood d.</i> |
| <i>antè</i> , Doe d. <i>Frost v. Roe</i> , 8 Dowl. P. C. 301. | <i>Price v. Thatcher</i> , 3 T. R. 351. |

SERVICE OF
DECLARATION.

stitution of service as to the heir at law of the deceased tenant on an affidavit stating, that though diligent enquiry had been made, the heir could not be discovered. (1)

LUNATIC.

Judgment cannot be signed against the casual ejector, in respect of the service on the daughter carrying on the business of the tenant in possession who is a lunatic, and confined away from the premises. (2)

Judgment may be entered up, where the service was made on a person who had the care of the tenant in possession (a lunatic), and the management of his affairs, though not appointed by a regular committee; and the rule *nisi* in such a case should be generally to shew cause, without being directed to any party in particular. (3)

Service upon the servant of an insane person is bad; it should be on his committee. (4)

MESSENGER
AND OFFICIAL
ASSIGNEE.

When the tenant in possession is a bankrupt, service on the messenger in possession of the premises and the bankrupt's goods under the fiat, and on the official assignee, is sufficient service on which to ground the rule for judgment against the casual ejector. (5)

MOTHER OF
TENANT.

Service upon the mother of the tenant in possession is not sufficient. (6)

NEPHEW OF
TENANT.

Service on the nephew of the tenant in possession, on the premises where the latter refuses to be seen, is sufficient for a rule *nisi*. (7)

OVERSEERS.

Where property in possession of parish overseers is sought to be recovered in ejectment, service on one is not sufficient to obtain judgment against all. (8)

PRISONER.

A prisoner in the Marshalsea can be served with ejectment process. (9)

RAILWAY COM-
PANY.

Service of a declaration in ejectment upon a railway company, according to the mode prescribed in their act, is absolute in the first instance. (10)

RECEIVER.

Service on a person appointed by the court of Chancery to manage an estate for an infant is insufficient. (11)

SERVANT.

Service on the servant of the tenant in possession, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, is sufficient for a rule *nisi* against the casual ejector. (12)

Where the tenant was not to be found, the court held that a service upon a servant upon the premises, who was desired to deliver it to his master, and afterwards stated that he had done so, was a good service. (13)

Where after several ineffectual attempts made to serve a tenant in possession, on occasion of the last of which, his servant admitted that he was in the house, but refused to permit the person applying to see him, and the declaration was then delivered to the servant, the court of Exchequer made an order, that the service should be sufficient. (14)

(1) *Jack d. Blesington (Earl of) v. Thrustout*, 1 Hudson & Brooke (Irish), 42.

(2) *Doe d. Brown v. Roe*, 6 Dowl. P. C. 270.

(3) *Doe d. Aylesbury (Lord) v. Roe*, 2 Chitt. 183.

(4) *Anon.* Lofft, 401.

(5) *Doe d. Baring v. Roe*, 6 Dowl. P. C. 456., *vide ante*, 1427. tit. ASSIGNEES.

(6) *Doe d. Smith v. Roe*, 1 *ibid.* 614.

(7) *Doe d. Moody v. Roe*, 8 *ibid.* 306.

(8) *Doe d. Weeks v. Roe*, 5 *ibid.* 405.

(9) *Nugent d. Chatterton v. Casual Ejector*,

2 Jebb & Symes, 387. The deputy marshal will upon application accompany the process-server to see the process executed. (*Ibid.*)

(10) *Doe d. Bromley v. Roe*, 8 Dowl. P. C. 858.

(11) *Goodtitle d. Roberts v. Badtitle*, 1 B. & P. 385.

(12) *Doe d. Messer v. Roe*, 5 Dowl. P. C. 716.

(13) *Doe d. James v. Roe*, 1 M. & Sc. 597.

(14) *Doe d. Hervey v. Roe*, 2 Price, 112.

Service on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for a rule *nisi*. (1)

SERVICE OF
DECLARATION.

Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavour to get possession; and if he resist, such servant may be treated as tenant, and the declaration may be served on him as such; and if he do not resist, it seems that the lessor may treat it as a vacant possession. (2)

Servant of deceased tenant remaining in possession.

In ejectment for a close of land, proof of service of a copy of the declaration, and notice, at the house of the tenant in possession, on a female, who, on the papers being explained to her, says she knows what they are, for that the lessor of the plaintiff had already been endeavouring to effect service but could not, and by sticking another copy on the door of the house, is sufficient for a rule *nisi* for judgment against the casual ejector; and where the affidavit of service of the rule states the same person to have been served in a yard attached to the tenant's house, and that she is his servant, the rule will be made absolute. (3)

Service of a declaration in ejectment on a servant in the care of the premises, is insufficient to obtain a rule in the first instance; and in order to obtain a rule *nisi*, some probable ground must be shewn for believing that the tenant has notice of the service (4), and service under the following circumstances has been held insufficient: —

Insufficient service on servant.

Where the affidavit alleged a service upon a servant upon the premises, the tenant being absent, and that the servant had subsequently stated that he had given the declaration to his master. (5)

Service upon a servant of the tenant, whose wife subsequently admitted that she had received them, and had given them to her husband. (6)

Service on a servant, the deponent swearing to the belief that the tenant kept out of the way to avoid being served. (7)

Service upon the servant on a Saturday, with an acknowledgment by the tenant on a Sunday. (8)

And service on a servant of the tenant on the premises, though the deponent serving it subsequently converses with the tenant, and explains the nature of the declaration. (9)

Service of a declaration in ejectment upon the sister of the tenant in possession, who says that she receives it on behalf of her sister, will not be good, unless agency be shewn. (10)

SISTER OF TENANT.

Where three sisters lived together, and the service that was made of a declaration in ejectment by delivery to two on the premises, and a copy left for the third with the usual explanation the day before the term commenced, the court granted a rule *nisi* for judgment against the casual ejector. (11)

(1) Doe d. *Teverell v. Snee*, 2 D. & R. 5.

(2) Doe d. *Atkins v. Roe*, 2 Chitt. 179.

(3) Doe d. *Wright v. Roe*, 6 Dowl. P. C. 455.

(4) Doe d. *Read v. Roe*, 5 *ibid.* 85. Doe d. *Halsey v. Roe*, 1 Chitt. 100. Doe d. *Pugh v. Roe*, 1 Scott. 464. Doe d. *Dinorben (Lord)*, 2 M. & W. 374.

(5) Doe d. *Thomas v. Roe*, 1 M. & Sc. 435.

(6) Doe d. *Tucker v. Roe*, 4 *ibid.* 165. 2 Dowl. P. C. 775.

(7) Doe d. *Jones v. Roe*, 1 Chitt. 213.

(8) *Goodtitle d. Mortimer v. Notille*, 2 D. & R. 232. S. C. nom. *Doe v. Roe*, 5 B. & C. 764. *Doe v. Roe*, 8 D. & R. 592.

(9) Doe d. *Gingerv. Roe*, 9 Dowl. P. C. 336.

(10) Doe d. *Tibbs v. Roe*, 3 *ibid.* 380.

(11) Doe d. *Grimes v. Roe*, 4 *ibid.* 86. 591. 1 H. & W. 369.

SERVICE OF
DECLARATION.SON OF TE-
NANT.

Service of a declaration in ejectment on the son of the tenant on the premises, is sufficient for a rule *nisi* for judgment against the casual ejector, where it seems reasonable to suppose, that the declaration has come to the tenant's hands (1); particularly where the affidavit of the tenant, on shewing cause, did not deny having received the declaration from his son. (2)

If a tenant in possession be clearly keeping out of the way to avoid being served, the court will grant a rule *nisi* for judgment, if the son be regularly served on the premises. (3)

The court of King's Bench granted a rule to shew cause why the service of the declaration on a son of the tenant in possession (who said that his father was unable to attend to any business, and a subsequent admission by a person, whom the deponent believed was the wife of the tenant in possession, that her husband had received it) should not be deemed good service. (4)

An affidavit was held to be sufficient, which stated, that the party making it had gone to the premises where he found the son of the tenant in possession, to whom he explained the nature of the declaration, and left a copy with him, having learned from him, that the father was not at home, and would not return before midnight; and that he called again next day and saw the wife, who informed him that her husband had gone out, but she did not know where. (5)

Service in ejectment on the son of the tenant in possession on the premises is insufficient, unless it be shewn, that he is living with his parent, and composes part of the family. (6)

Service upon a son who accepted it, and said he knew what it was for, and would deliver it over to his father, was held bad, although it appeared that both the father and son were attorneys. (7)

TENANT.
Mistake in
name.

If the name of a tenant in possession has been introduced into a declaration of ejectment instead of "Richard Roe," it is sufficient service to obtain a rule *nisi* for judgment. (8)

The service of a declaration in ejectment, the notice of which is directed to D. S., is not good on E. B., although E. B. is tenant of a part of the premises. (9)

Where there are thirteen tenants in possession, and they have all been personally served, it is no objection for a rule for judgment against the casual ejector being granted, that the Christian names of two of them have been omitted in all the notices. (10)

If the name of one tenant be improperly spelt in the notice served on another, it is immaterial for the service on the latter. (11)

Refusing to
receive notice.

So an affidavit was held sufficient, which stated, that the deponent had gone to the premises and seen the tenant, to whom he offered the declaration, but who refused to take it; that he then laid it on a chair, and explained

(1) Doe d. *Timmins v. Roe*, 6 Dowl. P. C. 765.

(2) Doe d. *Watts v. Roe*, 1 H. & W. 199.
Doe d. *Protheroe v. Roe*, 4 Dowl. P. C. 385.

(3) Doe d. *Luff v. Roe*, 3 ibid. 575.

(4) *Anon.* 2 Chitt. 182.

(5) Doe d. *Wetherell v. Roe*, 2 Dowl. P. C. 441.

(6) Doe d. *Emerson v. Roe*, 6 ibid. 736.

(7) *Anon.* Woodfall by Harrison, 791.

(8) Doe d. *Dickinson v. Roe*, 9 Dowl. P. C. 363.

(9) Doe d. *Smith v. Roe*, 5 ibid. 254.

(10) Doe d. *Smith v. Roe*, 6 ibid. 629.

(11) Doe d. — v. *Roe*, ibid.

the nature and object of the service; that the tenant then left the room, saying that he would not take any paper from the deponent or any other person on the part of the lessor. (1)

SERVICE OF
DECLARATION.

If the tenant in possession fraudulently prevent a complete and regular service of the declaration in ejectment, judgment may still be obtained against the casual ejector. (2)

Preventing service by fraud.

The court will only grant a rule *nisi* for judgment against the casual ejector, where the motion is grounded on an affidavit of the defendant's acknowledgment, that he had endeavoured to avoid the service of the declaration. (3)

Where tenants lock themselves up in the premises sought to be recovered, and access cannot be had to them, it is sufficient service for a rule *nisi* to put the declaration under the door, and explain it aloud outside. (4)

Rendering premises inaccessible.

Where the tenant in possession had rendered the premises inaccessible, and had evaded personal service of a declaration in ejectment, service by leaving it at the counting-house of the tenant in possession was held to be sufficient. (5)

The court granted a rule *nisi*, which was afterwards made absolute, where the house was shut up and no tenant was in possession, and the declaration was affixed on the most conspicuous part of the premises. (6)

No tenant in possession.

Personal service on one of two joint tenants is sufficient (7), if such joint tenancy appear on the affidavit of service. (8)

Where a service on one tenant is a service on his co-joint tenant or tenants.

And service on an under joint tenant is good service on him and a joint tenant. (9)

The court have granted a rule *nisi*, where the service was on one of three tenants in possession, although the affidavits did not state them to be joint tenants (10); but notwithstanding service on one of several defendants is not sufficient to fix the other defendants, judgment may be obtained against the one served (11)

Service on one of several tenants in possession is good service on both (12); but not unless the affidavit shews that they are all in possession. (13)

Service on one of two joint tenants, who were also copartners in trade, is not sufficient to entitle the plaintiffs to judgment against the casual ejector in the first instance, but there must be a rule to shew cause. (14)

Where a surviving joint tenant, who is the sole person in possession, has been served, the court will only allow judgment to be signed against him, although the name of the deceased joint tenant has been introduced into the proceedings. (15)

The tenant or tenants in possession may be served with a copy of the

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|----------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| (1) <i>Doe d. Visger v. Roe</i> , 2 Dowl. P. C. 449. | 291. <i>Sullivan (Lessee of) v. Walsh</i> , 1 Jones (Irish), 264. |
| (2) <i>Doe d. Frith v. Roe</i> , 3 <i>ibid.</i> 569. | (9) <i>Doe d. Hutchinson v. Roe</i> , 2 Dowl. P. C. 418. |
| (3) <i>Anon.</i> 2 Chitt. 186. | (10) <i>Right d. — v. Wrong</i> , 2 Chitt. 175. |
| (4) <i>Doe d. Summers (Lord) v. Roe</i> , 5 Dowl. P. C. 552. | (11) <i>Doe d. Murphy v. Moore</i> , <i>ibid.</i> 176. |
| (5) <i>Doe d. Barrow v. Roe</i> , 1 M. & G. 238. | (12) <i>Doe d. Bailey v. Roe</i> , 1 B. & P. 369. |
| (6) <i>Doe d. Hele v. Roe</i> , 2 Chitt. 178. | (13) <i>Doe d. Bromley v. Roe</i> , 1 Chitt. 141. |
| (7) <i>Doe d. Williamson v. Roe</i> , 10 Moore, 493., et vide <i>Anon.</i> Lofft, 301. | (14) <i>Doe d. Field v. Roe</i> , 2 <i>ibid.</i> 174. S. P. <i>Anon.</i> <i>ibid.</i> 176. |
| (8) <i>Doe d. Gaskell v. Roe</i> , 3 Tyrw. 84. | (15) <i>Doe d. Hewson v. Roe</i> , 5 Dowl. P. C. 404. |
| <i>Doe d. Clothier v. Roe</i> , 6 Dowl. P. C. | |

**SERVICE OF
DECLARATION.**

Where tenant
has gone out of
the country.

declaration personally at any place; and where premises demised on lease to one person, who has underlet to others, it is necessary to serve all the under-tenants with a copy. (1)

Where the tenant goes abroad, and it does not appear that he will return, the court will grant a rule *nisi* for judgment against the casual ejector, when the service has been effected at the premises on a servant of the tenant. (2).

Judgment may be signed against the casual ejector, where the service was upon the wife of the tenant in possession who had left this kingdom, and was settled abroad. (3)

In an ejectment for non payment of rent, the court will allow a substitution of service as to A. B., the heir at law of the deceased tenant, A. B. having gone to America, and the ejectment having been served upon his mother, who had remained in possession of the premises and paid rent after the death of the tenant (4)

Where a person appearing to have an interest is resident abroad, the court will not make a rule, that affixing a copy of the declaration, &c. on the premises shall be deemed good service, unless it be shewn that there is no person acting as his agent, or managing his property in this country, on whom it may be served for him. (5)

In ejectment, personal service upon a tenant who resides abroad, is sufficient to obtain judgment against the casual ejector. (6)

If a tenant in possession leave this country and reside abroad for the purpose of avoiding his creditors, and the premises be charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell, judgment cannot be obtained against the casual ejector on an affidavit, that a declaration was duly served on the premises, and a copy thereof affixed to the outer door; nor can the service of the declaration on the solicitor of such tenant be deemed good, unless he resided abroad for the express purpose of avoiding such service. (7)

Tenant ab-
sconding or
keeping out of
the way.

Where the tenant has absconded, the affidavit must state that a copy of the declaration was left, as well as affixed, on the premises, and that the deponent had used due means to find out such tenant's residence, and that he verily believes he has absconded. (8)

Where service of a declaration in ejectment was made at a house where it was sworn it was believed the tenant was, but was denied for the purpose of avoiding the service, the court granted a rule *nisi* for judgment against the casual ejector. (9)

Where a tenant in possession keeps out of the way to avoid being served,

(1) Doe d. *Darlington (Lord) v. Cock*, 4 B. & C. 259. In ejectment on the title, where other parties besides the defendant are in possession, against whom a judgment by default has been obtained, it is not requisite to prove the service of the declaration in ejectment on those parties, in order to recover against the defendant. Doe d. *Leslie v. Eccles*, 2 Jebb & Symes (Irish), 463.

(2) Doe d. *Mather v. Roe*, 5 Dowl. P. C. 552:

(3) *Doe v. Roe*, 1 D. & R. 514.

(4) *Loveland d. Colclough v. Thrustout*, 1 Hudson & Brooke (Irish), 44.

(5) *Ridge d. Darnley (Earl) v. Thrustout*, *ibid.* 408.

(6) Doe d. *Daniell v. Woodroffe*, 7 Dowl. P. C. 494.

(7) *Roe d. Fenwick v. Doe*, 3 Moore, 576. In order to bar the rights of a tenant by an ejectment for non payment of rent, a summons in ejectment ought to be served on him, though he be not resident on the lands. *Supple (Lessee of) v. Raymond*, 1 Hayes (Irish), 6.

(8) Doe d. *Tarluy v. Roe*, 1 Chitt. 506.

(9) *Doe d. Turncroft v. Roe*, 1 H. & W. 371.

a rule *nisi* for judgment may be obtained by a service on the agent of the tenant on the premises. (1)

SERVICE OF
DECLARATION.

A rule for judgment was made absolute on an affidavit which stated, that service had been made on a person believed to have been left in possession by the tenant, who was out of the way, and also on his attorney; and that a letter was sent by the twopenny post, according to the attorney's direction, to the tenant's last place of abode. (2)

Where the tenant in possession absconds, and there is no person at the house, service by affixing it to the door is good. (3)

A declaration stuck up in the gateway of the tenant's premises is not sufficient, unless it be sworn that the defendant kept out of the way to avoid being served (4); and in order to obtain a rule *nisi*, it is not sufficient to shew that the lessor of the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling-house, and had therefore stuck up the declaration on the premises. (5)

Where it does not sufficiently appear, that there are no tenants in possession of premises held under a lease, and although service may have been effected on a servant at the house of the lessee, not part of the premises in dispute, and a copy stuck on the premises in question, the court will not grant judgment against the casual ejector. (6)

Where it does not sufficiently appear that there are no tenants in possession.

Where a tenant in possession was personated at the time of service by another, who accepted the service in her name, it was held to be a good service on the tenant herself. (7)

Personation.

Service of a declaration in ejectment on a person not named therein as tenant in possession, is not sufficient. (8)

On a person not named as tenant.

Service on a person whom the deponent believed to be the tenant in possession is bad, if the notice be not addressed to such person. (9)

Service on one of two tenants in possession, with another service on that tenant for the other, and an explanation given, is not good. (10)

Where a tenant in possession was very unwell, and afterwards died, and a declaration in ejectment was served on a person at the house where he was staying on the day of his death, it was held not to be a good service. (11)

Tenant dying after service on his servant.

On motion for judgment against the casual ejector, if service of declaration is to be proved by the tenant's acknowledgment made in term, it must appear by such acknowledgment, that the service was made before term. (12)

Acknowledgment of service by tenant.

The court granted a rule for judgment against the casual ejector, where the service had been by leaving the declaration with the turnkey of the prison in which the tenant in possession was confined, with directions to give it to him, and the tenant had acknowledged that he had received it before the first day of the term. (13)

(1) *Doe d. Morpeth v. Roe*, 3 Dowl. P. C. 577.

(2) *Anon.* 2 Chitt. 179.

(3) *Sprightly d. Collins v. Dunch*, 2 Burr. 1116. *S. P. Anon. Lofft*, 266. 273. *Doe d. Hindle v. Roe*, 3 M. & W. 279.

(4) *Anon.* 1 Chitt. 505. n.

(5) *Ibid.*

(6) *Doe d. Burrows v. Roe*, 7 Dowl. P. C. 326.

(7) *Fenn d. Tyrrell v. Denn*, 2 Burr. 1181. *Doe d. Walker v. Roe*, 1 Price, 399.

(8) *Doe v. Roe*, 2 Tyrw. 280.

(9) *Doe v. Badtitle*, 1 Chitt. 215.

(10) *Doe d. Elwood v. Roe*, 3 Moore, 578.

(11) *Doe d. Hartford v. Roe*, 1 H. & W. 352.

(12) *Doe d. Marshall v. Roe*, 2 A. & E. 588. 4 N. & M. 553. *Doe d. Finch v. Roe*, 5 Dowl. P. C. 225. *Doe d. Martin v. Roe*, 1 H. & W. 46.

(13) *Doe d. Harris v. Roe*, 2 Dowl. P. C. 607.

**SERVICE OF
DECLARATION.**

Service of a declaration in ejectment upon the tenant's daughter before the term, and an acknowledgment by the tenant within the term, was held sufficient to ground a motion for judgment against the casual ejector. (1)

Service in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledges an appraisal of the service, is sufficient to obtain judgment against the casual ejector. (2)

Service on a person who asserts that he is owner, and that there is no tenant in possession, is insufficient. (3) Nor will the court on such service grant a rule to shew cause. (4)

Where the service is on a servant of the tenant in possession, and the latter afterwards acknowledges the receipt, the affidavit to ground the motion for judgment should state, when such acknowledgment was made. (5)

**TRUSTEES OF A
DISSENTING
MEETING-
HOUSE.**

In an ejectment to recover a dissenting meeting-house, service on the trustees and at the house is sufficient for a rule *nisi*, and service of the rule on the trustees is sufficient for a rule absolute. (6)

**WIFE OF TE-
NANT.**

Service on the wife of the tenant in possession is good (7); and it may be served on the wife, either on the premises, or at the husband's house elsewhere (8); but it should appear she is living with her husband at the time. (9)

**Wife of the
brother of the
tenant.**

Where there was service of a declaration in ejectment on the wife of the brother of the tenant on the premises, who afterwards said she should go and see the tenant, and she next day left the premises, the court granted a rule *nisi* for judgment against the casual ejector. (10)

Service on the wife of the defendant "near the premises" (11), in a shed, where the husband carried on his business, although not forming part of the premises sought to be recovered, but closely adjoining them (12); service at the dwelling-house, to recover possession of stables (13); on the premises, although a copy of the declaration is not left with her, she refusing to take it (14); and when she prevented the person serving it from giving an explanation, or reading it over (15), have respectively been held to be good service.

Where the service is on the wife on the premises it is sufficient, though it be not shewn, that the husband and wife were living together. (16)

**Service on a
woman repre-
senting herself
to be the wife
of the tenant in
possession.**

Service on the premises on a woman, representing herself to be the wife of the tenant in possession, and so reputed to be, and who was living with the tenant, was held sufficient for a rule *nisi*. (17)

- (1) Doe d. *Smith v. Roe*, 4 Dowl. P. C. 265.
- (2) Doe d. *Walker v. Roe*, 1 Price, 399.
- (3) Doe d. *Davis v. Roe*, 1 Price's P. C. 11.
- (4) Ibid.
- (5) *Anon.* 2 Chitt. 187.
- (6) Doe d. *Gray v. Roe*, 7 Dowl. P. C. 700.
- (7) *Goodright d. Waddington v. Thrustout*, 2 W. Black. 800.
- (8) Doe d. *Morland v. Bayliss*, 6 T. R. 765. Doe d. *Wingfield v. Roe*, 1 Dowl. P. C. 693. *Oates d. Chatterton v. Coates*, cit. 6 T. R. 765. Doe d. *Baddam v. Roe*, 2 B. & P. 55. Doe d. *Southampton (Lord) v. Roe*, 1 Hodges, 24.

- (9) Doe d. *Boullott v. Roe*, 7 Dowl. P. C. 463.
- (10) Doe d. *Hubbard v. Roe*, 1 H. & W. 371.
- (11) Doe d. *Bath (Marquis of) v. Roe*, 7 Dowl. P. C. 692.
- (12) *Doe v. Roe*, 1 ibid. 67.
- (13) Doe d. *Graef v. Roe*, 6 ibid. 456.
- (14) Doe d. *Nash v. Roe*, 8 ibid. 305.
- (15) Doe d. *George v. Roe*, 3 ibid. 541. Doe d. *Neale v. Roe*, 2 Wils. 263. Doe d. *Courthorpe v. Roe*, 2 Dowl. P. C. 441.
- (16) *Goodtitle d. — v. Badtitle*, 1 Chitt. 499. 4 Taunt. 820.
- (17) Doe d. *Bremner v. Roe*, 8 Dowl. P. C. 135. Doe d. *Walker v. Roe*, 4 M. & P. 11.

Service in ejectment on the wife of the tenant in possession on the premises is sufficient, although, from the conduct of the tenant and his wife, his Christian name is not stated in the notice at the foot of the declaration. (1)

SERVICE OF
DECLARATION.

Christian name
of husband
wrongly spelt.

Wife of the son
of the tenant.

Service of a declaration in ejectment on the wife of the son of the tenant of the premises was held to be sufficient to grant a rule *nisi* for judgment against the casual ejector, where it appeared, that the tenant was in America, and that his son managed his business. (2)

Insufficient service on wife.

The mere acknowledgment of the wife of the tenant in possession that she had received a declaration in ejectment, will not bind the husband. (3)

A declaration and notice in ejectment having been nailed upon the door of the premises, the tenant's wife called upon the person who had attempted to serve the ejectment, and requested to know what she was to do with the paper; he explained it to her, and recommended her to go to the plaintiff's attorney; she replied, she would see her husband immediately, and recommend him to do so:—It was held, that this was not a good service. (4)

Service in ejectment on the wife of the tenant in possession, it not being sworn that it was on the premises, or at her husband's house. If the service be *not made* on the premises, it is not sufficient unless it is stated that she was living with her husband (5); and service on a woman representing herself to be the wife, not stating deponent's belief that she was so, was held insufficient. (6)

The court will not allow a wife's declaration, with respect to her husband being out of the way to avoid being arrested or annoyed, to be used for the purpose of obtaining judgment against the casual ejector. (7)

11. AFFIDAVIT OF SERVICE.

AFFIDAVIT OF
SERVICE.

The affidavit must state the period at which the declaration was served; on whom; and the mode in which the service was made.

MATERIAL AL-
LEGATIONS.

It is essentially requisite, that the affidavit be positive; because no one should be evicted from possession without a positive affidavit, on which, if it be *false*, the person who made it may be legally and effectually subjected to the penalties of perjury. (8)

After the declaration is delivered, the person who delivered it must make an affidavit, except in the case of a vacant possession, that he delivered to the tenant or his wife, &c. a true copy of the declaration, and read or explained to him the notice annexed thereto.

BY WHOM TO
BE MADE.

- | | |
|---------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1) Doe d. <i>Warne v. Roe</i> , 2 Dowl. P. C. 517. | 2 C. & J. 202. 2 Tyrw. 211. <i>Jenny d. Preston v. Cutts</i> , 1 N. R. 308. Doe d. <i>Mingay v. Roe</i> , 6 Dowl. P. C. 182. <i>Right d. Bonisall v. Wrong</i> , 2 D. & R. 84. |
| (2) Doe d. <i>Potter v. Roe</i> , 2 Scott, 378. | (6) Doe d. <i>Simmons v. Roe</i> , 1 Chitt. 228. |
| (3) <i>Goodtitle d. Read v. Badtitle</i> , 1 B. & P. 384. 1 Chitt. 499. | (7) Doe d. <i>Wilson v. Smith</i> , 3 Dowl. P. C. 379. |
| (4) Doe d. <i>Briggs v. Roe</i> , 2 C. & J. 202. 2 Tyrw. 211. 1 Dowl. P. C. 312. | (8) <i>Anon.</i> 1 Barnard. 330. <i>Goodtitle v. Davis</i> , <i>ibid.</i> 129. |
| (5) Doe d. <i>Williams v. Roe</i> , 2 Dowl. P. C. 89. S. P. Doe d. <i>Briggs v. Roe</i> , 1 <i>ibid.</i> 312. | |

AFFIDAVIT OF SERVICE.

If the affidavit be made by a person who saw the declaration served, and heard it explained to the tenant in possession, it is sufficient. (1)

In *Doe v. Roe* (2) a rule *nisi* was granted, where the affidavit was jointly made by the person who served the declaration and the housekeeper of the tenant in possession, the former stating a service on the latter with the proper explanation, and the latter stating that she had delivered the declaration to her master.

HOW ENTITLED.

The affidavit should be entitled in the court where it is sworn.

The affidavit should not be intituled in the real names of the defendants (3), but with the names of the nominal plaintiff, on the demise of his lessor, or several demises of his lessors, if more than one, against the casual ejector. (4)

Where the declaration was entitled "*Doe on the demise of A. and B. v. B.*," and the affidavit of service was entitled "*Doe on the demise of B. and A. v. B.*," it being a clerical mistake: a rule for judgment against the casual ejector was granted. (5)

Where the declaration in ejectment contains both joint and several demises, it is sufficient to entitle the affidavit on motion for judgment as being on the several demises of all the lessors of the plaintiff, without noticing which are joint and which several. (6)

But if on several demises an affidavit of service be entitled "*Doe d. C. v. Roe*," it is insufficient. (7)

The period at which the service was made must be shewn. Thus, an affidavit of service in ejectment omitting the year, is insufficient. (8)

In an affidavit of service of a declaration in ejectment, the word "served" is not indispensably necessary, if it appear from the affidavit, that it has been duly served. (9)

If the declaration be served on the tenant, it must appear clearly from the affidavit that the person who was the object of the service was the tenant in possession (10); but judgment against the casual ejector may, under special circumstances, be obtained on an affidavit swearing the service to have been on the tenant in possession, "as the deponent believes." (11) An affidavit of service on the tenant, without shewing him to be in possession, or a service on the "person in possession," or "who appeared to be in possession," or "occupier," or that he has paid rent, "and therefore" is the tenant in possession, is insufficient. (12)

Omitting the year when service was made.

The word "served" not essentially necessary.

MODE OF STATING THE SERVICE ON TENANT, OR ON THE MEMBERS OF HIS FAMILY, &c.

Personal ser-

An affidavit stating the deponent to have "personally served J. T.,

(1) *Goodtitle d. Wanklen v. Badtitle*, 2 B. & P. 120.

(2) 2 Dowl. P. C. 198. If the facts of the case are special, the usual course is to move for a rule to shew cause why the service should not be deemed good. The motion may be made even before the service, on an affidavit stating the circumstances that are likely to occur, and applying for a rule to shew cause, why service of such a nature should not be sufficient. *Adams on Ejectment*, 243. *Methold v. Noright*, 1 W. Black. 290. *Gulliver v. Wagstaff*, *ibid.* 317.

(3) *Tidd*, 1215.

(4) *Anon.* 2 Chitt. 181.

(5) *Doe d. Worthington v. Butcher*, *ibid.* 174.

(6) *Doe d. Barles v. Roe*, 5 Dowl. P. C. 447.

(7) *Doe d. Cousins v. Roe*, 7 *ibid.* 53.

(8) *Doe d. Foster v. Roe*, 8 *ibid.* 784.

(9) *Doe d. Jenkins v. Roe*, 5 *ibid.* 155.

(10) *Doe d. Walker v. Roe*, 1 Price, 399. *Anon.* 1 Chitt. 118. (a.) *Doe d. Talbot v. Roe*, 1 H. & W. 36.

(11) *Doe d. George v. Roe*, 3 Dowl. P. C. 22.

(12) *Doe v. Roe*, 1 Chitt. 575. *Tidd*, 1215. *Doe d. Jackson v. Roe*, 4 Dowl. P. C. 609. *Doe v. Roe*, 2 C. & J. 45.

W. E., J. E., and C. T., the four tenants in possession, with true copies of the declaration," is not sufficient, but each should be sworn to have been personally served. (1)

AFFIDAVIT OF SERVICE.

vice should be sworn to.

Administra-
trix.

The affidavit of service of a declaration in ejectment on an administratrix must call her tenant in possession, and state that the property was leasehold. (2)

Executors.

Where the lessors of the plaintiff are described to be executors, the affidavit of service need not, in stating the name of the cause, notice the character of the lessors stated in the declaration. (3)

If the affidavit, upon which the rule to shew cause is grounded, states that the instrument of demise was executed by the tenant, it is sufficient. (4)

Instrument of demise executed by tenant.

If the declaration has been served on several tenants, in possession of *different* parts of the premises, there should be one or more affidavits stating the service on each of them.

Service on tenants in possession of different parts of the premises.

If they were all served by one person on the same day, a single affidavit of service is sufficient, stating generally that he personally served A., B., C., D., &c. tenants in possession, &c.; but otherwise there should be several affidavits, stating the service on each particular tenant.

Where the declaration has been served on one of several persons in possession of the *same* premises, as joint tenants, &c. or co-partners in trade (5), the affidavit must state that they are all tenants in possession (6), though it does not seem to be necessary to describe them as joint tenants or tenants in common. (7)

Where the declaration is served on the wife of the tenant, it must appear by the affidavit that she was his wife, or at least that the party believed her to be so: an affidavit of the service of the declaration upon a *woman* on the premises, who represented herself to be the wife of the tenant in possession, without adding that the deponent believed her to be so, is insufficient. (8) An affidavit that deponent did serve A. B. tenant in possession, *or* C. his wife, is not sufficient, it not being certain as to either. (9)

When served on wife.

The affidavit must also state, that the wife was served on the premises, or at her husband's dwelling-house; or, if served off the premises, that she and her husband were living together as man and wife at the time of service. (10)

Where the tenant or his wife cannot be found, the affidavit should state that a copy of the declaration was delivered and explained to a relation or servant, or other person on the premises, and that the tenant afterwards

Where tenant or his wife cannot be served.

(1) Doe d. *Levi v. Roe*, 7 Dowl. P. C. 102.

(2) Doe d. *Rigby v. Roe*, 1 H. & W. 368.

(3) Doe d. *Jenks v. Roe*, 2 Dowl. P. C. 55. S. C. nom. *Doe v. Roe*, 3 Tyrw. 602.

(4) *Jack d. Spollen v. Thrustout*, 1 Hudson & Brooke (Irish), 354. Where an action of ejectment is brought against several tenants, on a motion for judgment against the casual ejector, the names of all the tenants, should be introduced into the copy of the declaration and notice which are attached to the affidavit of service. Doe d. *Ludford v. Roe*, 8 Dowl. P. C. 500. The

affidavit of the process-server stating that a true copy of the declaration in ejectment had been served on a party cannot be controverted on motion. *Long d. Enniskillen (Earl of) v. Thrustout*, 1 Hudson & Brooke (Irish), 359.

(5) Doe d. *Field v. Roe*, 2 Chitt. 174.

(6) Tidd, 1217.

(7) Ibid. Doe d. *Field v. Roe*, 2 Chitt. 174.

(8) Doe d. *Simmons v. Roe*, 1 ibid. 228.

(9) Tidd, 1216.

(10) *Goodtitle d. — v. Badtitle*, 1 Chitt. 499. (a.)

AFFIDAVIT OF SERVICE.

Where tenant or his wife refuses to accept the declaration.

Tenant keeping out of the way to avoid being served.

EXPLANATION OF NOTICE.
When served on tenant.

Affixing copy of declaration on premises.

Where affidavit appears defective.

THE JURAT.

acknowledged the receipt of it (1), an acknowledgment by the wife not being sufficient to bind her husband. (2)

In case the tenant or his wife refuse to accept a copy of the declaration when tendered, the affidavit should state the tender and refusal, and that the notice was read over and explained to them, and a copy of the declaration and notice left on the premises, or put through a window.

Where the tenant absconds, or keeps out of the way to avoid being served, it is not sufficient to state in the affidavit that the defendant called at the tenant's house, and, not finding him at home, affixed the declaration on the most conspicuous part of the premises; but it should be shewn, that the deponent made diligent inquiry after the tenant without effect, and that he verily believes he has absconded, or keeps out of the way, to avoid being served with a declaration (3); and it must also be stated, that a copy of the declaration has been *left* as well as affixed on the premises. (4)

If the tenant in possession reads over and says he understands the nature and object of a declaration in ejectment, it is not necessary for the person serving it to read it over or explain it (5); but the notice should be read over and explained to the tenant (6): but where it appeared by the affidavit, that the declaration was not read over or explained to the tenant, but that he subsequently acknowledged he had received it, and knew what it was, it was held to be sufficient. (7)

It is now held, that it will suffice to read it over without explaining it, or to explain it without reading it over (8), either to the tenant or to his wife.

Explanation of the notice will be dispensed with if the party go away and refuse to hear the process-server (9), or that he turned him out of the house. (10)

Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the declaration in ejectment, but who was not upon oath: — It was held, that the explanation was sufficient to entitle the lessor of the plaintiff to sign judgment. (11)

An affidavit stating the affixing of a copy of the declaration on the premises is insufficient, if it be not shewn that the copy was affixed upon the most conspicuous part of the premises; and where it was not affixed upon a dwelling-house, that there is no dwelling-house on the premises. (12)

Where an affidavit of service in ejectment appears defective, a party who has been served cannot take advantage of the defect before judgment is marked. (13)

The jurat of this, like that of other affidavits, must state the day on which it was sworn; and if the affidavit be sworn before a commissioner, and the day omitted, the jurat must either be amended by inserting it, and the affidavit re-sworn, or an affidavit produced on the part of the commissioner, as to his recollection of the day when it was sworn. (14)

Affidavits may be sworn before the attorney in the cause. (15)

(1) *Doe d. Halsey v. Roe*, 1 Chitt. 100.
Right d. Freeman v. Roe, 2 *ibid.* 180.

(2) Tidd, 1211.

(3) *Doe d. Lovell v. Roe*, 1 Chitt. 506.

(4) *Doe d. Tarluy v. Roe*, *ibid.* Tidd, 1217.

(5) *Doe d. Jones v. Roe*, 1 Dowl. P. C. 518.

(6) *Doe d. Wade v. Roe*, 6 *ibid.* 51.

(7) *Anon.* 2 Chitt. 184.

(8) *Doe v. Roe*, 1 Dowl. P. C. 428. *Doe d. Downes v. Roe*, 4 *ibid.* 565.

(9) *Doe d. Neale v. Roe*, 3 Wils. 263.
Doe d. George v. Roe, 3 Dowl. P. C. 541.

(10) *Doe d. Frith v. Roe*, 3 Dowl. P. C. 569. *Doe d. Forbes v. Roe*, 2 *ibid.* 452.

(11) *Doe d. Probert v. Roe*, 3 *ibid.* 335.

(12) *Ridge d. Darnley (Earl) v. Thrustout*, 1 Hudson & Brooke (Irish), 408.

(13) *Gabbett (Lessee of) v. Ejector*, 1 Alcock & Napier (Irish), 184.

(14) *Doe v. Roe*, 1 Chitt. 228.

(15) *Doe d. Cooper v. Roe*, 2 Y. & J. 284.

12. JUDGMENT AGAINST CASUAL EJECTOR.

If the tenant upon whom the declaration and notice were served, do not make himself a party to the action, that is, unless he in due time enter into the common consent rule to confess lease, entry, ouster, and possession, the plaintiff becomes entitled to judgment by default against the casual ejector.

JUDGMENT
AGAINST CA-
SUAL EJECTOR.

In order to obtain this object, the lessee of the plaintiff moves upon affidavit for "judgment against the casual ejector." (1)

By the terms of the rule for judgment against the casual ejector, unless the tenant in possession appear, and plead within a certain time therein specified, judgment can be entered for the plaintiff, John Doe, against the defendant, Richard Roe, by default.

It is not served upon the tenant, he having already sufficient notice by the service of the declaration; but still it must be drawn up, and must be taken away from the office within two days after the term in which it was moved, otherwise it shall not be drawn up or entered, nor shall any proceedings be had in such ejectment. (2)

One rule is sufficient, although there be several tenants (3), and although the copy of the declaration served upon each tenant had his name only prefixed to it. (4)

In order to obtain judgment against the casual ejector, it is necessary to swear to a service on the "tenant in possession;" it is not sufficient to swear to service on a person who appears from facts stated in the affidavit to be in point of law the tenant in possession. (5)

If the judgment against the casual ejector be *irregular*, the court on motion will order it to be set aside with costs: and where the judgment was set aside for irregularity, and possession ordered to be restored, but the lessor of the plaintiff who held the possession absconded, the rule was ineffectual. The court of Common Pleas on motion ordered a writ of restitution on behalf of the late tenants in possession. (6)

WHERE JUDG-
MENT WILL AND
WILL NOT BE
SET ASIDE.

Judgment if irregularly signed will be set aside at the instance either of the tenant in possession, or landlord, in order to let them respectively in to plead (7); but without costs, there being no defendant. (8)

Though the judgment against the casual ejector be *regular*, yet the courts in this, as in other actions, will order it to be set aside upon an affidavit of merits and payment of costs; as where the landlord's attorney had through inadvertence neglected to appear in due time. (9)

Judgment against the casual ejector was set aside, defence having

(1) *Vide* Archb. C. Att. Prac. 321. respecting the practical mode of obtaining the affidavit.

(2) R. M. 31 Geo. 3. K. B. R. E. 48 Geo. 3. C. P. Archb. C. Att. Prac. 322.

(3) *Doe v. Roe*, 2 Tyrw. 724.

(4) *Roe d. Burlton v. Roe*, 7 T. R. 477.

(5) *Doe d. Jones v. Roe*, 5 Dowl. P. C. 226. *Doe d. Fraser v. Roe*, *ibid.* 720.

(6) Tidd, 1224.

(7) *Doe v. Hedges*, 4 D. & R. 393.

(8) *Doe d. Vernon v. Roe*, 7 A. & E. 14.

(9) *Dobbs v. Passier*, Str. 975. *Doe d. Troughton v. Roe*, 4 Burr. 1996. *Doe d. Grocers' Comp. v. Roe*, 5 Taunt. 205. *Doe d. Ingram v. Roe*, 11 Price, 507. *Doe d. Shaw v. Roe*, 13 *ibid.* 260.

JUDGMENT
AGAINST CA-
SUAL EJECTOR.

been entered in the Rules' Office, though not filed, before judgment was signed. (1)

Where an attorney had inadvertently omitted to instruct counsel to appear within the first four days of term, the court waved the irregularity. (2)

But the court of Common Pleas refused to set aside a judgment and execution in ejectment, in order to let in a person to defend, though he made an affidavit setting forth a clear title, and offered to pay costs. (3)

So where plaintiff had obtained judgment and possession in an undefended ejectment, without collusion, and had sold part of the premises, and transferred the possession, that court would not let in the landlord, from whom his tenants had concealed the ejectment, to appear and defend it on payment of costs. (4)

But in *Doe d. Butler v. Roe* (5), after a writ of possession executed and an action for mesne profits commenced, the court set aside the judgment and execution on payment of all the costs incurred, at the instance of the landlord, who, by the mistake of his wife, had not had the copies of the declaration, which had been served on his tenants, delivered to him.

Mode of setting
aside a judg-
ment.

In vacation, a judge at chambers on an affidavit of merits will compel the plaintiff to accept a plea or stay the proceedings, provided he will not wave his judgment on payment of costs.

The mode of setting aside a judgment against the casual ejector is by rule of court, for the party having obtained the judgment to give up the possession; but if the circumstances of the case require it, the courts will order a writ of restitution to be issued. (6)

In a country ejectment the plaintiff may move for judgment in the term after that in which the tenant in possession is required to appear. (7)

13. TIME OF APPEARANCE.

TIME OF AP-
PEARANCE.

Within the time limited by the rule for judgment against the casual ejector, the defendant, unless he has obtained time to appear and plead, which he can do as in other cases, must, if desirous to defend, enter an appearance, sign the consent rule, and deliver it with his plea of "not guilty."

If under stat. 2 Geo. 2. c. 19., the motion to admit the landlord to be defendant instead of the tenant ought regularly to be made before judgment is signed against the casual ejector by the opposite party; and if it be delayed until after that time, the court will grant the motion, or not, at their discretion.

Reg. Gen. H.
T. 4 Vict.

It is ordered by Reg. Gen. Hilary Term, 4 Vict., "that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day after the term in which the tenant is required by the notice to appear; and

(1) *Jack d. Greer v. Ejector*, 1 Jebb & Symes (Irish), 92.

(2) *Doe d. Davies v. Roe*, 6 Dowl. P. C. 461.

(3) *Doe d. Ledger v. Roe*, 3 Taunt. 506., et vide *Goodtitle v. Badtitle*, 4 ibid. 820.

(4) *Goodtitle v. Badtitle*, 4 ibid. 820. *Doe d. Holmes v. Darby (Clerk)*, 8 ibid. 538.

(5) 2 H. & W. 130.

(6) Adams on Ejectment, 252. *Davies d. Povey v. Doe*, 2 W. Black. 892.

(7) *Doe d. Barth v. Roe*, 4 Bing. N. C. 675.

may proceed to compel the plaintiff to reply thereto, or may sign judgment of *non pros.*, notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration; and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment should have been obtained." (1)

TIME OF AP-
PEARANCE.

14. APPEARANCE OF DEFENDANT.

The appearance is either by the tenant in possession, his landlord, or by both.

APPEARANCE
OF DEFENDANT.

Stat. 11 Geo. 2. c. 19. s. 13., after reciting that great inconveniences had frequently happened to landlords by their tenants secreting declaration in ejectment which had been delivered to them, or by refusing to appear to such ejectment, or to suffer their landlords to take upon them the defence thereof, enacts "that it shall and may be lawful for the court in which an ejectment is brought, to suffer the landlord or landlords to make him, her, or themselves defendant or defendants, by joining with the tenant or tenants to whom such declaration in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords of any part of the lands, tenements, or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule, that, by the course of the court the tenant in possession, in case he or she had appeared, ought to have done, then the court where such ejectment shall be brought shall and may permit such landlord or landlords so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein."

Stat. 11 Geo.
2. c. 19. s. 13.
Landlord em-
powered to
make himself
defendant by
joining with
the tenant.

This latter clause of the statute has been construed to extend, not only to landlords, properly so called, who are in receipt of the rents and profits of the premises, but also to all persons claiming title thereto consistently with the possession of the occupier, though they have not previously exercised any acts of ownership over the property, as the heir at law, remainderman or reversioner, claiming under the same title (2), or a devisee in trust. (3)

To whom stat.
11 Geo. 2.
c. 19. extends.

So the court permitted a mortgagee to be made defendant in ejectment with the mortgagor (4); or even, as it seems, to a lord claiming by escheat (5): in fact, the question to be considered is, whether the party applying to defend as landlord be himself interested in the event of the suit, or whether he be merely set in motion for the purposes of some other person; in which latter case he cannot defend (6): thus a mortgagee cannot come in and defend as landlord unless he be interested in the result of the suit. (7)

(1) 7 M. & W. 346., *et antè*, 1425.

(2) *Lovelock d. Norris v. Lancaster*, 3 T. R. 783.

(3) *Ibid.* 4 *ibid.* 122., *et vide* *Doe d. Heblethwaite v. Roe*, 3 *ibid.* 783. n.

(4) *Doe d. Tilyard v. Cooper*, 8 *ibid.* 645.

(5) *Fairclaim d. Fowler v. Shamtitle*, 3 Burr. 1290. 1 W. Black. 357. Tidd, 1228.

(6) *Doe d. Pearson v. Roe*, 6 Bing. 613.

(7) *Ibid.*

APPEARANCE
OF DEFENDANT.

Landlord let in
to defend after
judgment by
default from
tenant.

Judgment
against casual
ejectors set
aside.

Judgment not
set aside.

PERSONS WHO
CANNOT DE-
FEND.

Where a tenant, without giving notice to his landlord, suffered judgment by default in ejectment, the court let in the landlord to defend, upon payment of costs. (1)

A regular judgment against the casual ejector was set aside upon terms, where the tenant had neglected to give notice to his landlord, who was an infant. (2)

A judgment against the casual ejector was set aside after judgment executed, and possession delivered up to the lessor of the plaintiff, on the ground that there had been no notice given to the landlord by the tenant in possession of the proceedings, and consequently no trial of the merits, on the terms of the landlord paying costs to the lessor of the plaintiff, and the possession to be in the mean time retained by the latter. (3)

But the court of Common Pleas have refused, after a plaintiff has obtained judgment and possession in an undefended ejectment, without collusion, and has sold part of the premises, and transferred the possession, to let in a landlord to defend, from whom his tenants had concealed the ejectment. (4)

A parson claiming a right to enter and perform divine service in a chapel was, before stat. 11 Geo. 2. c. 19., holden not to have a sufficient title to be admitted defendant.

Where a person claims in opposition to the title of the tenant in possession, he cannot be considered as landlord.

The court will not permit a devisee, not having been in possession, to be made defendant in ejectment under stat. 11 Geo. 2. c. 19., instead of the tenant as landlord (5); nor a tenant in possession to defend an ejectment brought by a mortgagee to receive the rent (6); nor a third person to defend as landlord, where it appears that the tenant in possession came in as tenant to the lessor of plaintiff, and paid rent to him under an agreement which has expired (7); and where upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent rule, to defend as landlord, the court discharged the consent rule with costs. (8)

Where a landlord defrays the costs of defending an ejectment in the name of an illiterate tenant, who gives a *retraxit* of the plea, and *cognovit* of the action, the court of Common Pleas will set aside the *retraxit* and *cognovit*, and permit the lessor to defend as landlord. (9)

Several ejectments were brought against several tenants, each holding different premises of the same landlord, and on application to set aside the appearance, plea, &c. in one of the actions, and for leave for the landlord to appear and defend for all the ejectments, it was ordered, that the landlord should appear within a fortnight and defend as landlord in all the ejectments; and that, in default thereof, judgment might be signed against the casual ejector. (10)

Where a party defends an ejectment as landlord, and the occupiers

(1) Doe d. *Meyrick v. Roe*, 2 C. & J. 682.

(2) Doe d. *Troughton v. Roe*, 4 Burr. 1996.

(3) Doe d. *Ingram v. Roe*, 11 Price, 507.

(4) *Goodtitle v. Badtitle*, 4 Taunt. 820.

(5) *Lovelock d. Norris v. Dancaaster*, 3 T. R. 783.

(6) *Anon. Lofft*. 564.

(7) Doe d. *Knight v. Smythe (Lady)*, 4 M. & S. 347.

(8) Doe d. *Horton v. Rhys*, 2 Y. & J. 88.

(9) Doe d. *Locke v. Franklin*, 7 Taunt. 9. 1 Chitt. 390. (a.)

(10) *Thrustout d. Jones v. Nixon*, 10 B. & C. 112.

of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the plaintiff. (1)

APPEARANCE
OF DEFENDANT.

In all cases of vacant possession, unless such as are within stat. 4 Geo. 2. c. 28., no person claiming title will be let in to defend; but he who can first seal a lease on the premises must obtain possession, and any other person claiming title may eject him if he can, and no defence can be made on these cases but by the defendant in the ejectment, who is a real ejector; and in *Martin v. Davis* (2) the court refused to let the parson of Hampstead Chapel defend for right to enter and perform divine service only. (3)

If a party should be admitted to defend as landlord, whose title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs. (4)

Party improperly admitted to defend as tenant.

The court of Common Pleas will not set aside a judgment and execution, in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs. (5)

Where a party has with others been made a defendant in ejectment, but is not in possession, his name will be struck out on motion, he undertaking to permit execution for any premises of which he might be possessed. (6)

The court will not allow a lessee to defend (alone) an ejectment against his landlord, or those claiming under him, on a supposed defect of title. (7)

A defence taken to an ejectment by a person not served, is an absolute nullity, and judgment may be marked notwithstanding. (8)

Defence taken by a person not served, is a nullity.

In Ireland leave to take defence to an ejectment will not be granted to a person not in possession of the premises; therefore it will not be granted to an *elegit* creditor, who has not entered on the lands. (9)

In Ireland, a person not served, who wishes to take defence, ought to apply to the court for liberty so to do, grounded on an affidavit of possession. (10)

By stat. 11 Geo. 2. c. 19. s. 12., "every tenant, to whom any declaration in ejectment shall be delivered for any lands, &c. shall forthwith give notice thereof to his or her landlord or landlords, or his, her, or their bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises so demised or holden, in the possession of such tenant, to the person of whom he or she holds, to be recovered by action of debt," &c.

PENALTY ON
TENANT FOR
DISOBEDIENCE
TO STAT. 11
GEO. 2. c. 19.

These penal enactments extend only to those cases in which the ejectment is inconsistent with the landlord's title; therefore a tenant to a mortgagor, who does not give him notice of an ejectment brought by the

(1) *Doe d. Davies v. Creed*, 5 Bing. 327. S. C. nom. *Doe d. Cheese v. Creed*, 2 M. & P. 648.

(2) Str. 914.

(3) Selw. N. P. 732.

(4) *Doe d. Harwood v. Lipencott*, Adams on Ejectment, 260.

(5) *Doe d. Ledger v. Roe*, 3 Taunt. 506.

(6) *Doe d. Snape v. Snape*, 2 Tyrw. 340. 2 C. & J. 214. 1 Dowl. P. C. 314.

(7) *Driver d. Oxenden v. Laurence*, 2 W. Black. 1259.

(8) *Wall (Lessee of) v. Casual Ejector*, 1 Hayes (Irish), 274.

(9) *Jack d. M'Spadden v. Thrustout*, 1 Hudson & Brooke (Irish), 353.

(10) *Wall (Lessee of) v. Ejector*, 1 Hayes (Irish), 275. n. See in note to this case, the practice as to taking defence to ejectments.

**APPEARANCE
OF DEFENDANT.**

Construction of
"three years
improved or
rack rent"
under stat. 11
Geo. 2. c. 19.

mortgagee, to enforce an attornment, is not liable to the penalties of the foregoing statute, because it only extends to cases where ejectments are brought inconsistent with the landlord's title. (1)

The improved or rack rent is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let. (2)

Where in a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised, the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default; the declaration in ejectment did not mention mines at all, but the sheriff in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig:—It was held, that although the latter could not be recovered under the declaration in ejectment, still, that the tenant, by his own act, had estopped himself from taking that objection; and that in an action for the value of three years' improved rent under stat. 11 Geo. 2. c. 19., the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. (3)

15. THE CONSENT RULE.

**THE CONSENT
RULE.**

If the tenant appear, either alone or jointly with his landlord, within the time limited by the rule for judgment, he must enter into the common consent rule to be made defendant, instead of the casual ejector, and to confess lease, entry, and ouster, &c.

**Terms of the
consent rule.**

By the terms of the consent rule, the party applying consents to be made defendant, instead of the casual ejector, to appear at the suit of the plaintiff, to receive a declaration in ejectment, and plead not guilty; and, at the trial of the issue, to confess lease, entry, and ouster, and insist upon the title only; that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit, such party shall pay costs to the plaintiff; and that, if a verdict shall be given for the defendant, or the plaintiff shall not further prosecute his suit, for any other cause than for not confessing lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant.

"In every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant, if he defends his tenant (or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, that no costs shall be allowed for not further

(1) *Buckley v. Buckley*, 1 T. R. 647.

(2) *Crocker v. Fothergill*, 2 B. & A. 652.

(3) *Ibid.*

prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed." (1)

THE CONSENT
RULE.

This rule operates as a notice of the premises for which the tenant means to defend, and supersedes the necessity of the plaintiff's proving him in possession of them at the trial.

Where the tenant appears for the whole of the premises, they may either be described in the consent rule generally, as in the declaration, or as they really are; but where he appears for *part* of the premises only, that part must be particularly specified in the consent rule, and the plaintiff in such case, having obtained the rule for judgment, may sign judgment against the casual ejector for the residue.

Rule for whole
or part of the
premises.

Where there are *several* tenants, they may all unite in the consent rule to defend for the whole of the premises, stating of what they consist; or they may severally defend for different parts, specifying the particular part each of them occupies. (2)

Where there
are various te-
nants.

Where one of four persons who were served as tenants in possession applied to have his name struck out of the appearance and consent rule, upon an affidavit that he was not in possession of any part of the premises, the court granted the application upon his undertaking to permit execution to issue for any part of the premises of which he should be in possession. (3)

Application by
one of four
persons served
as tenants in
possession, to
have his name
struck out of
the appearance
and consent
rule.

Where the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector according to the conditions of the consent rule, in order to enable the claimant to obtain possession of the premises in case the verdict be in his favour; because, as the landlord is not in possession, no writ of possession could issue upon a judgment against him.

Where land-
lord defends.

Where the landlord was admitted to defend alone, and died pending the action, having devised all his real estates to B., the court upon application, and it appearing that the Statute of Limitations would prevent the lessor of the plaintiff from bringing a fresh ejectment, gave him leave to sign judgment against the casual ejector, and to issue execution thereon, unless B. would appear and defend the action as landlord. (4)

Where landlord
defends, and
dies pending
the suit.

Where an ejectment is brought by a tenant in common, joint tenant, or coparcener against his companion, it is necessary for the lessor of the plaintiff to prove, in order to maintain it, an actual ouster or denial of entry by the defendant, unless admitted by the consent rule (5); and therefore, if there has been no actual ouster, the defendant ought to apply to the court for a special rule to confess lease and entry, and also ouster of the nominal

Where eject-
ment brought
by a tenant in
common, joint-
tenant, or co-
parcener against
his companion.

(1) R. M. 1 Geo. 4. K. B. 4 B. & A. 196. R. H. 1 & 2 Geo. 4. C. P. 2 B. & B. 470. R. E. 2 Geo. 4. Exch. 9 Price, 299. The first part of this rule, unfortunately, is not attended to in practice; the consent rule, now, as formerly, usually stating that the party defends for "three messuages, three gardens, &c." enumerating the parcels exactly as in the declaration, whereas the real meaning of the rule was, that each tenant should specify the particular tenements for which he intends to defend, and it

would be a great convenience if the rule were strictly complied with. Arch. C. Att. Pract. 323., vide *Doe v. Hughes*, 4 Dowl. P. C. 412.

(2) Tidd, 1227. *Goodright v. Rich*, 7 T. R. 330. Runnington on Ejectment, 233.

(3) *Doe d. Snape v. Snape*, 1 Dowl. P. C. 314.

(4) *Doe d. Grubb v. Grubb*, 5 B. & C. 457.

(5) Runnington on Ejectment, 219. Tidd, 1227.

**THE CONSENT
RULE.**

plaintiff, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise. (1)

But where the tenant applying was not himself joint tenant, &c. but merely held under a person who was, and he swore that he believed the ejectment would involve a question between joint tenants, an application to dispense with the confession of ouster was refused, because, if the landlord choose to defend, he might, and he might then make his application. (2)

R. G. H. T.
4 Will. 4. does
not extend to
ejectments.

The rule of Hilary Term, 4 Will. 4., which directs that pleas, &c. shall be delivered, and not filed, does not extend to ejectment; and where judgment against the casual ejector was signed, because no plea had been delivered to the plaintiff's attorney, the court set it aside for irregularity, the plea and consent rule having been left at the judge's chambers in due time. (3)

Production of
consent rule.

It is not requisite to produce the consent rule (4), except where the plaintiff, directing his case to certain premises, the other party contends that he does not defend for those; there the rule should be produced to ascertain for what he does defend.

Where cause
at issue.

In ejectment, where the notice of trial was served prior to the filing of the second declaration, but after defence taken; upon motion on behalf of the defendant to set aside the nonsuit, for not confessing lease, entry, and ouster, on the ground that the notice of trial was served before the cause was at issue, it was held, that, by the practice of this court, the cause is at issue when defence is taken. (5)

16. THE ISSUE.

THE ISSUE.

By the terms of the consent rule the defendant, whether tenant or landlord, or whether they jointly appear, must accept a declaration for the premises in question, and plead thereto the general issue.

The issue in ejectment is made up of the term it is joined, as in other cases. In an ejectment by landlord when the tenancy has expired, or the right of entry accrued in or after either of the issuable terms, and the proceedings are under stat. 11 Geo. 4. & Will. 4. c. 70. s. 36., the issue should be entitled of the day on which the declaration is specially intituled.

Of what term,
and how made
up.

In making it up, the name of the tenant or landlord is substituted for that of the casual ejector; and, instead of the notice at the end of the declaration for the tenant to appear, the plea of not guilty is added, with a *similiter* thereto, and an award of the *venire facias*. (6)

Where defend-
ant can plead
specially.

The defendant can plead specially: thus, he can, with leave of the court, plead to its jurisdiction, before a rule *nisi* for judgment against the casual ejector. (7)

(1) Doe d. *Gigner* v. *Roe*, 2 Taunt. 397.

(2) Doe d. *Wills* v. *Roe*, 4 Dowl. P. C. 628.

(3) Doe v. *Williams*, 4 N. & M. 259. Archb. C. Att. Prac. 324.

(4) Doe d. *Greaves* v. *Raby*, 2 B. & Ad. 948.

(5) *Mullan* (Lessee of) v. *Wilton*, 1 Smith & Batty (Irish), 73. In ejectment for non payment of rent, where plaintiff is nonsuited,

for want of defendant's appearance to confess lease, entry, and ouster, the plaintiff is entitled in Ireland to immediate execution under stat. 1 & 2 Will. 4. c. 31. s. 14. *Copperthwaite* (Lessee of) v. *Ford*, 1 Armstrong & Macartney (Irish), 157.

(6) Tidd, 1236.

(7) *Williams* d. *Johnson* v. *Keen*, 1 W. Black. 197.

Ancient demesne may be pleaded with consent of the court, but application to plead it must be made within the first four days of term, and it must be founded upon an affidavit, that the lands are holden of a manor of ancient demesne, and that the claimant has a freehold interest. (1)

Puis darrein continuance cannot be supported in general demurrer, because the lessor of the plaintiff cannot release. (2)

When there are several defendants who appear by different attorneys, or even if they appear by the same attorney, it is usual for them to plead separately, and their pleas should be stated accordingly in making up the issue.

THE ISSUE.

Where there are several defendants who plead separately.

If there be a variance between the issue and the declaration, the court on motion will set it right. (3)

But where there was a variance between the description of the premises in the Nisi Prius record (upon which the plaintiff recovered) and the issue, and it did not appear how the premises were described in the declaration, the court refused to set the verdict aside. (4)

Variance between the record and issue.

If there be any material variance between the issue and the record, it seems that the defendant should nevertheless appear at the trial, and afterwards move to set aside the verdict for the variance (5), because, if he do not appear, he is out of court, and cannot afterwards properly move to set aside the nonsuit; yet, upon a motion of this nature, the court did, in one case, grant the rule upon payment of costs (6), and in another case stayed the proceedings. (7)

Defendant should appear notwithstanding a variance.

17. PARTICULARS OF DEMAND — CONSOLIDATION OF EJECTMENTS — STAY OF PROCEEDINGS UNDER STAT. 7 GEO. 2. C. 20. S. 1. — COGNOVIT — CERTIORARI AND HABEAS CORPUS.

PARTICULARS OF DEMAND — CONSOLIDATION OF EJECTMENTS — STAY OF PROCEEDINGS UNDER STAT. 7 GEO. 2. C. 20. S. 1. — COGNOVIT — CERTIORARI, AND HABEAS CORPUS.

The defendant, if there be any reasonable doubt as to the lands, &c. for which the ejectment is brought, may take out a summons before a judge, and obtain an order, calling upon the plaintiff to give him a bill of particulars. (8)

Where the ejectment is brought for a forfeiture, the court or a judge, upon application, will order the lessor of the plaintiff to give the defendant a particular of the covenants and breaches, &c. on which he means to insist, that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of any thing not contained in those particulars. (9)

Doubts respecting the locality of the premises.

Where ejectment brought for a forfeiture.

The court or a judge may also, under circumstances, order the defendant to give a particular of the premises for which he defends. Where the lessor of the plaintiff is unknown to the defendant, the latter may call for

Where lessee of the plaintiff is unknown.

(1) *Denn d. Wroot v. Fenn*, 8 T. R. 474.
Doe d. Rust v. Roe, 2 Burr. 1046., et vide
Doe d. Morton v. Roe, 10 East, 523.

(2) *Doe d. Byne v. Brewer*, 4 M. & S. 300.

(3) *Bass v. Bradford*, 2 Ld. Raym. 1411.

(4) *Doe d. Cotterill v. Wylde*, 2 B. & A. 472.
Jones v. Tatham, 8 Taunt. 634.

(5) Adams on Ejectment, 323.

(6) *Jones d. Thomas v. Hengest*, 2 Barnard. 175.

(7) *Law v. Wallis*, 1 ibid. 156.

(8) *Doe d. Saunders v. Newcastle (Duke of)*, 7 T. R. 332. n.

(9) *Doe d. Birch v. Phillips*, 6 ibid. 597.
Tenny v. Moody, 3 Bing. 3. Adams on Ejectment, 353. Archb. by Chitt. 787.

**PARTICULARS
OF DEMAND.**

a particular of his residence or place of abode from the opposite attorney, and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court or a judge will stay proceedings, until security be given for costs. (1)

A party served with a declaration in ejectment, cannot compel the lessor of the plaintiff to declare for lands in his possession, unless he have taken defence. (2)

**CONSOLIDATION
OF EJECTMENTS.**

Several ejectments brought for the same premises upon the same demise.

Where several ejectments are brought for the same premises upon the same demise, the court on motion, or a judge at chambers, will order them to be consolidated. (3) And where the lessor of the plaintiff had two actions depending at the same time, for the *same* premises, in different courts, the proceedings in one of them were stayed until the others should be determined. (4)

Ejectments for the same premises in different courts.

Where the ejectments are brought for *different* premises, the court will not, it seems, consolidate them. (5)

Ejectments for different premises.

But where thirty-seven ejectments had been brought against several tenants for different premises on the same demise, Lord Kenyon, on a rule to shew cause, why the proceedings in all the causes should not be stayed, and abide the event of a special verdict in one of them, said, "It was a scandalous proceeding; that they all depended precisely on the same title, and ought all to be tried by the same record;" and the rule was accordingly made absolute. (6)

STAY OF PROCEEDINGS UNDER STAT. 7 GEO. 2. C. 20. S. 1.**MORTGAGOR AND MORTGAGEE.**

By stat. 7 Geo. 2. c. 20. s. 1., where an ejectment is brought by a mortgagee, his heirs, &c. for the recovery of the possession of the mortgaged premises, and no suit is depending in any court of equity for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem having been made the defendant in the action, shall at any time, pending the suit, pay to the mortgagee, or in case of his refusal bring into court all the principal moneys and interest due on the mortgage, and also costs to be computed by the court or proper officer appointed for that purpose, the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly. By the third section, the act is not to extend to any case where the person against whom the redemption is prayed shall insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit.

Where the right of redemption is controverted, or the money due not adjusted.

A first mortgagee brought an action of covenant on the covenant in the mortgage deed, having received notice from a second mortgagee not to deliver up the deed; the mortgagor applied to the court to compel the plaintiff under stat. 7 Geo. 2. c. 20. to reconvey the premises upon payment

(1) Archb. by Chitt. 787.

(2) *Listowell (Earl of), (Lessee of) v. Casual Ejector*, 1 Jones & Carey (Irish), 172.

(3) Tidd, 1232. cit. Barnes, 176.

(4) *Thrustout d. Park v. Troublesome*, Andr. 297.

(5) *Medlicot v. Bruester*, 2 Keb. 524.

(6) Tidd, 1232. cit. Doe ex d. *Pulteney v. Freeman*, T. 30 Geo. 3. K. B. *Smith v. Crabb*, Str. 1149.

of the principal, interest, and costs; and the court held it to be a case within the statute, and made the order. (1)

The defendant is entitled to have the proceedings stayed under stat. 7 Geo. 2. c. 20., without paying any bygone interest, or the expense of preparing the mortgage deed, or any assignment of it. (2)

Where a tenant, having mortgaged his lease, has neglected to pay rent and costs, or file his bill, according to the provisions of the tenantry acts, within six months from the time of execution executed; on an ejectment brought by the landlord, the mortgagee has a further period of three months, within which he may, by payment of rent or costs, or filing his bill, and lodging his money in court, save the lease from forfeiture. (3)

Where there are two or more mortgages, the court will not stay proceedings and compel a redemption of one mortgage only, upon payment of the principal, interest, and costs on that mortgage, without paying the rent. (4)

Where there are two mortgages, a redemption of both must be made.

But the court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, if the latter has agreed to convey the equity of redemption to the mortgagee. (5)

Where, by a mortgage deed, the principal sum was advanced by the mortgagee to the mortgagor for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the payment of the same, the mortgagee might sell the premises assigned. The mortgagor having made default in the payment of one quarter's interest, the mortgagee brought ejectment — the court refused to stay the proceedings on payment of the arrears of interest and costs by the mortgagor, as the case did not fall within the provisions of the statute, the principal sum becoming payable on default of payment of the interest. (6)

The costs are taxed only as between party and party, and not as between attorney and client. (7)

Taxation of costs.

The defendant, after entering into the consent rule, can withdraw his plea and confess the action; and the plaintiff, in such a case, after a *relicta verificatione* entered, may sign judgment in pursuance of the *cognovit*. (8)

Cognovit.

Where a defendant in ejectment, conceiving that he has a good defence in equity, gives a consent for judgment, with stay of execution for a certain period, with a view of exhibiting his bill in equity, and the lessor of the plaintiff dies, the court will not, for the purpose of enabling the defendant to raise, &c. a representative of the lessor of the plaintiff, restrain the attorney of the latter from proceeding to execution on the said judgment, after the expiration of the period of the stay of execution. (9)

Where a defendant in ejectment gives a consent for judgment, and dies

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|-------------------------------------------------------|-----------------------------------------------------------------------|
| (1) <i>Dixon v. Wigram</i> , 2 C. & J. 613. | (6) <i>Goodtitle d. Green v. Notitle</i> , 11 Moore, 491. |
| (2) <i>Doe d. Blagg v. Steel</i> , 1 Dowl. P. C. 359. | (7) <i>Doe d. Capps v. Capps</i> , 3 Bing. N. C. 766. |
| (3) <i>O'Reilly v. Featherston</i> , 2 Dow & C. 39. | (8) Archb. by Chitt. 715. 786. |
| 4 Bligh N. S. 161. | (9) <i>Herd (Lessee of) v. Jones</i> , 1 Crawford & Dix (Irish), 132. |
| (4) <i>Roe d. Kaye v. Soley</i> , 2 W. Black. 726. | |
| (5) <i>Goodtitle d. Taysum v. Pope</i> , 7 T. R. 185. | |

COGNOVIT.

before judgment entered, in Ireland the court will allow judgment to be entered on the consent, as of the term when it was given. (1)

Where the landlord defended the action at his own expense, but in the name of his tenant, the court upon application set aside a judgment entered up on a *cognovit* given by the tenant, and let in the landlord to defend the action in his own name. (2)

In an ejectment for non payment of rent, the defendant gave a consent for judgment, and before the *habere* was executed, though, after it had issued, applied to stay the proceedings on payment of rent and costs:—It was held, that he was not too late. (3)

Effect of cognovit.

Signing judgment in pursuance of a *cognovit* is a final judgment, and has the same effect as a judgment upon verdict.

CERTIORARI
AND HABEAS
CORPUS.

The defendant is entitled to remove an ejectment from an inferior to a superior court, either by writ of *certiorari* (4) or of *habeas corpus* (5); and when removed, the tenant in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court. (6)

The superior court will not grant a *procedendo* where a cause has been so removed, if there be reason for believing that an impartial trial cannot be had in the inferior court, or upon other special grounds; and it is to be inferred from the reasoning of the judges in the only modern case upon the subject, that a writ of *certiorari* is a matter of course, and that a *procedendo* will in no case be granted. (7)

NOTICE OF
TRIAL—RE-
CORD OF NISI
PRIUS—JURY
PROCESS—AND
PROCESS FOR
SUBPENAING
WITNESSES.

18 NOTICE OF TRIAL — RECORD OF NISI PRIUS — JURY PROCESS — PROCESS FOR SUBPENAING WITNESSES.

The time for giving notice of trial is the same as in ordinary cases. (8)

But in an ejectment by a landlord, where the tenancy has expired, or a right of entry accrued in or after either of the issuable terms, and the landlord has delivered a declaration in or after the term, within ten days after his right of entry accrued, and with a notice to appear and plead thereto in ten days, then, at least six clear days' notice of trial before the

(1) Doe d. *Devonshire (Duke of) v. Uniacke*, 1 Hudson & Brooke (Irish), 619.

(2) Doe d. *Locke v. Franklin*, 7 Taunt. 9. 1 Chitt. 390. n. *Payne v. Rogers*, Doug. 407. 2 Hen. Black. 349.

(3) *Gabbett (Lessee of) v. Mulcahy*, 1 Jones (Irish), 28.

(4) Doe d. *Sadler v. Dring*, 1 B. & C. 253.

(5) *Highmore v. Barlow*, 1 Barnard. 421. *Allen v. Foreman*, 1 Sid. 313. *Allen v. Burneye*, 2 Keb. 119.

(6) Gilbert on Ejectment, 37. Ejectment was brought in the manor court of St. Sepulchre, and several parties served; only one of them M. took defence. After notice of trial served, M. sued out a writ of *certiorari* for the purpose of removing the cause from the court below. The court of Queen's

Bench in Ireland ordered the writ of *certiorari* to be quashed under the circumstances. *Seemle*, that *habeas corpus* is the proper mode of removing an ejectment cause from an inferior court, because by *certiorari* the record itself is returned, and that not only removes all things done in the court below between the teste and return of it; while upon a writ of *habeas corpus*, the record itself is never removed but remains below, and the return is only an account or history of the proceedings stated, and sent up to the superior court, to enable them to judge and determine the matter there. — (*Lessee of) v. M'Lowry*, 1 Crawford & Dix (Irish), 104.

(7) *Patterson d. Gradridge v. Eades*, 3 B. & C. 550. Adams on Ejectment, 203.

(8) Archb. by Chitt. 791.

commission day at the assizes must be given; the judge can, however, postpone the trial until the next following assizes. (1)

The defendant by appearing and defending at the trial cures any defect in the notice. (2)

The record of *Nisi Prius*, jury process, and process for subpoenaing witnesses, resemble those of other actions, except that, in the description of the plea or action, it is stated to be "a plea of trespass and ejectment of farm."

But in an ejectment by a landlord under stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 36., where the declaration has been delivered in or after an issuable term specially entitled of the day after the demise, then, in making up the record, the proceedings should be stated accordingly.

In actions by *original*, the issue after stating the term, commences at once with an entry of the declaration. In actions by *bill*, the issue commences with a memorandum, prefatory to the declaration and proceedings. After the pleadings are all copied in their order, the issue concludes, as in ordinary cases, with an award of the *venire facias*. (3)

NOTICE OF TRIAL.

RECORD OF NISI PRIUS—JURY PROCESS AND PROCESS FOR SUBPOENAING WITNESSES.

19. THE TRIAL.

THE TRIAL.

I *Where Defendant does and does not appear.*

If the defendant appear and confess lease, entry, ouster, and possession, according to the terms of the consent rule, the trial proceeds as in other cases.

But if it be intimated to the associate that the defendant will not appear, he will order the crier to call him, and the defendant is accordingly called three times to come forth and confess lease, entry, and ouster; and if he do not appear, the plaintiff is then called and nonsuited, and the associate makes a memorandum on the record, that he is nonsuit by reason of the defendant's not appearing to confess lease, entry, and ouster.

The lessor of the plaintiff is thereupon, according to the terms of the consent rule, entitled to have judgment against the casual ejector, upon which he may sue out a writ of possession (4); and by the consent rule he is also entitled to his costs from the defendant, which upon the production of the *postea* he may have taxed upon the consent rule; and having served the rule and demanded the costs, he can enforce payment by attachment. (5)

It seems, that the defence taken by a party served with a copy of the declaration in ejectment, two days after service of notice of trial, no judgment having been entered into against the casual ejector, is valid. (6)

WHERE DEFENDANT DOES AND DOES NOT APPEAR.

Where defendant appears and confesses lease, entry, and ouster.

Where defendant does not appear.

(1) Stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 36. *post*, 1489.

(2) Doe d. *Antrobus v. Jepson*, 3 B. & Ad. 402.

(3) Archb. by Chitt. 791.

(4) Doe d. *Davies v. Roe*, 1 B. & C. 118.

(5) Archb. C. Att. Prac. 326., *vide post*, 1477. EJECTMENT BY LANDLORD AGAINST TENANT.

(6) *Jack d. Thompson v. Andrews*, 1 Jebb & Symes (Irish), 547.

THE TRIAL.

II. *Right of Counsel to begin.*RIGHT OF
COUNSEL TO
BEGIN.

With respect to the right of counsel to begin, Mr. Tidd (1) observes, in *ejectment* by the heir at law against a devisee, if the defendant will admit the lessor of the plaintiff to be heir, he has a right to begin, and is entitled to the reply. (2) So, if the lessor of the plaintiff prove his pedigree, and there stop, and the defendant set up a new case in his defence, which is answered by evidence on the part of the lessor of the plaintiff, the defendant is entitled to the general reply (3); which is also the case, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will. (4) So in *ejectment* by lessors claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin. (5)

But where, in *ejectment*, each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, and who proposed to admit, that, unless he were legitimate, the lessor of the plaintiff was the heir at law:— It was holden that this admission did not give him the right of beginning. (6) And the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff. (7) Therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and the counsel for the latter proved the seisin of the ancestor by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff:— It was holden, that the defendant's counsel was not entitled to the general reply. (8)

NEW TRIAL.

III. *New Trial.*Time allowed
for moving for
a new trial.

Unless where stats. 1 Geo. 4. c. 87. and 1 Will. 4. c. 70. provide otherwise, the same time is allowed to the other party to move for a new trial or an arrest of judgment, in *ejectment*, as in other actions.

Disinclination
to grant a new
trial when ver-
dict for de-
fendant.

The courts will seldom grant a new trial in *ejectment* when the verdict is given for the defendant, because all parties remaining in the situation they were, previously to the commencement of the action, the claimant may bring a second *ejectment* without subjecting himself to additional difficulties;

(1) N. P. 506., *et etiam* Tidd, 859.

(2) *Per* Bayley J. in *Jackson v. Hesbeth*, 2 Stark. 519.

(3) *Goodtitle d. Revett v. Braham*, 4 T. R. 497., *sed vide* *Doe d. Pile v. Wilson*, 6 C. & P. 301. 305, 306.

(4) *Doe d. Corbett (Bart.) v. Corbett*, (Clerk), 3 Camp. 368. *Jackson v. Hesbeth*, 2 Stark. 520.

(5) *Per* Lord Denman C. J. in *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 386.

(6) *Doe d. Warren v. Bray*, M. & M. 166.

(7) *Doe d. Tucker v. Tucker*, *ibid.* 536.

(8) *Doe d. Pile (or Pill) v. Wilson*, 6 C. & P. 301. 305, 306. 1 M. & Rob. 323.

Doe d. Wollaston v. Barnes, *ibid.* 386.

but this principle does not apply where the verdict is given against the defendant. (1) The possession is then changed. The defendant in the first ejectment becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point of material consequence to him, "the courts," as observed by Lord Mansfield in *Clymer v. Littler* (2), "rather lean to new trials on behalf of defendants in the case of ejectments, especially on the footing of surprise."

A new trial in ejectment will not be granted where its only effect will be to enable the defendant to set up a temporary bar. (3)

An ejectment brought for close A. and close B. was referred at Nisi Prius to an arbitrator, together with an action for trespass upon the close B., brought by the lessor of the plaintiff against the same defendant. In an action of trespass there were special pleas justifying on the ground of title to close B. in defendant. The arbitrator ordered a verdict on all the issues except one issue on a plea of not guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.:—It was held, that though there appeared a repugnancy, the *postea* in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict. (4)

Where the lessor of the plaintiff in ejectment has been nonsuited at the trial, in default of the defendant's appearance to confess lease, entry, and ouster, the latter may have a new trial on the merits on payment of costs as between party and party, not as between attorney and client. (5)

New trial will not be granted to enable plaintiff to set up a temporary bar. VERDICT.

COSTS.

Where lessor of the plaintiff has been nonsuited at the trial in default of defendant's appearance.

20. THE DAMAGES.

In the ordinary cases of ejectment, the damages given are merely nominal, the damages actually sustained by the detention of the property, being usually recovered in an action of trespass for mesne profits. (6)

In an ejectment for the recovery of premises conveyed for the purposes of stat. 1 & 2. Will. 4. c. 38. (the act for the building of additional churches), the jury who try the ejectment, or the jury under a writ of inquiry, are by sect. 18. to ascertain the value of the premises &c. (7)

THE DAMAGES.

Damages under stat. 1 & 2 Will. 4. c. 38.

21. THE COSTS.

THE COSTS.

The party who is entitled to costs in ordinary action is, generally speaking, entitled to costs in ejectment.

WHO ENTITLED TO COSTS.

(1) Adams on Ejectment, 326.

(2) 1 W. Black. 345. 348.

(3) *M'Gouldrick (Lessee of) v. M'Gouldrick*, 2 Jones (Irish), 196.

(4) *Doe d. Oxenden v. Cropper*, 10 A. & E. 197.

(5) *Doe d. Cooling v. Appleby*, 9 Dowl. P. C. 556.

(6) *Vide post*, 1490. tit. MESNE PROFITS.

(7) Respecting damages under stat. 1 Geo. 4. c. 87. s. 2., *vide post*, 1487.

THE COSTS.

Where no person appears to defend.

If no person appear to the ejectment, and judgment be consequently entered against the casual ejector, the plaintiff has no other remedy for his costs, than by an action for mesne profits, when they can be recovered as consequential damages.

Where defendant appears.

If there be several defendants, and the plaintiff have a verdict, each of them will be liable for the costs, although they defend severally. If several defend jointly, and succeed, they will be entitled to costs; but the plaintiff may pay the costs to which of them he pleases: if they defend severally, they are entitled to costs if they succeed, as in other cases.

Plaintiff nonsuited on merits.

If the plaintiff be nonsuit on the merits, the defendant is entitled to costs; but if he be nonsuited because the defendant have not confessed lease, entry, and ouster, he is entitled to them from the defendant under the consent rule. The defendant is entitled to costs on a *non pros.*, for the plaintiff's not replying when the lessor of the plaintiff has joined in the consent rule, or for not proceeding to trial according to notice, or on a judgment, as in case of a nonsuit.

Reg. Gen. H. T. 2 Will. 4. r. 74.

By Reg. Gen. Hilary Term, 2 Will. 4. r. 74., the defendant is entitled to costs on those issues on which he succeeds; but it is for the master to refer particular costs incurred at the trial to one issue or the other. (1)

LIABILITY FOR COSTS.

Where pauper defendant.

In some cases, if a mere nominal or pauper defendant be put in by the landlord or other person, for the purpose of trying the latter's right, and evading the costs, the court will make such landlord or other person answerable for the costs; but if a stranger carry on a suit in another name, who has title, and yet is so poor that he cannot pay the costs, in case he fail, the court, on affidavit of the circumstances, will order the person who carried on the suit to pay costs to the defendant.

Insolvent debtor.

A lessor of the plaintiff in ejectment, whose name has been used as such without his privity, is not liable to pay costs to the defendant. (2)

Where in an action of ejectment, an insolvent defendant has been induced to defend the action, by a third person, who employed the attorney, and furnished money to carry on the defence, but who claimed no interest in the property sought to be recovered, the court would not compel the latter to pay the costs of the lessor of the plaintiff. (3)

STAY OF PROCEEDINGS FOR COSTS.

Infants.

Where the lessor of the plaintiff is an infant, the court will stay proceedings until security be given for the costs, unless a responsible person has been made the plaintiff in the suit, or the father or guardian undertake to pay for them. (4)

Lessor resident abroad.

The proceedings will also be stayed until security be given for the costs, when the lessor resides abroad. (5)

And in *Denn d. Lucas v. Fulford* (6), where an ejectment was brought upon the demise of a person resident in Ireland, the court of King's Bench stayed the proceedings until security should be given for the costs, although it was an ejectment brought under the direction of the court of Chancery, where the bill was retained until after the trial of the ejectment, and security had already been given there, to the amount of 40*l*.

(1) Archb. by Chitt, 795.

(2) *Odell (Lessee of) v. Odell*, 1 Jones (Irish), 80.

(3) *Doe d. Wright v. Smith*, 8 Dowl. P. C. 517.

(4) *Noke v. Windham*, Str. 694. *Throg-*

morton d. Miller v. Smith, *ibid.* 932. *Anon.* 1 Wils. 130. *Anon.* Cowp. 128.

(5) Bull. N. P. 111.

(6) 2 Burr. 1177.

If the plaintiff's lessor die pending the action, it seems that the court, although they cannot stay the proceedings *in toto*, will not suffer the suit to proceed, unless security be given for the costs. (1)

Where the residence or place of abode is unknown to the defendant, he can require such information from the lessor's attorney; and if it be withheld, or a false statement made, proceedings will be stayed until security for costs be given. (2)

Proceedings will be stayed when the costs of a prior ejectment upon the same title, or between the same parties, are left unpaid (3):—and the change of the situation in the parties is immaterial. (4)

Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the court will stay proceedings until the costs of the first action are paid. And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non payment of such costs. (5)

The rule will not be granted, whether the merits be decided in the former action, or whether a judgment of nonsuit or of *non pros.* be given; nor is the length of time which elapses between the two actions any bar to the rule; for reasons may exist for such delay, as the poverty of the other party, or a wish to end the controversy. (6)

The court will likewise stay proceedings until the costs of a former ejectment are paid, though there be reason to suppose, that the verdict in the first ejectment was obtained by perjury (7); but not when there is an affidavit containing direct imputations of forgery, which are not specifically answered. (8)

Proceedings will be stayed in a second ejectment until the costs of a former one be paid, if the conduct of the party, against whom the application is made, has been vexatious or oppressive, although he may not be liable to the costs of the first action. Thus, where the lessor of the plaintiff in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although nonsuited for want of a replication, he was exempted from the costs of the defendant's appearance, the court would not let him proceed on the second ejectment, until he had satisfied the defendant for the expenses of such first appearance. (9)

Bringing ejectment, when no question of difficulty or special circumstances exist, in the court of Queen's Bench, when an inferior court has jurisdiction, is an act of oppression, and the court will stay the proceedings upon payment of the rent due, alone. (10)

THE COSTS.

Death of plaintiff's lessor.

Lessor unknown.

Where costs of a prior ejectment upon the same title, or between the same parties, are left unpaid.

Vexatious and oppressive conduct.

Bringing ejectment in a superior court, when redress could be had in an inferior court.

(1) *Thrustout d. Turner v. Grey*, Str. 1056.

(2) *Ante*, 1449. PARTICULARS OF DEMAND.

(3) *Adams on Ejectment*, 355. *Doe d. Hamilton (Duchess of) v. Hatherley*, Str. 1152. *Thrustout d. Williams v. Holdfast*, 6 T. R. 223. *Keene d. Angel v. Angel*, *ibid.* 740. *Doe d. Feldon v. Roe*, 8 *ibid.* 645.

(4) *Thrustout d. Williams v. Holdfast*, 6 T. R. 223.

(5) *Doe d. Heighley v. Harland*, 10 A. & E. 761.

(6) *Dence v. Doble*, Comb. 110. *Keene d. Angel v. Angel*, 6 T. R. 740. *Anon.* 1 Salk. 255.

(7) *Jack d. Gleeson v. Gleeson*, 1 Jebb & Symes (Irish), 271.

(8) *Jack d. Rutledge v. Rutledge*, *ibid.* 687.

(9) *Smith d. Ginger v. Barnardiston*, 2 W. Black. 904. *Doe d. Hamilton (Duchess of) v. Hatherley*, Str. 1152. *Doe d. Carthew v. Brenton*, 6 Bing. 469.

(10) *Jack d. Uniacke v. Thrustout*, 1 Hudson & Brooke (Irish), 45.

THE COSTS.

Costs of an action for mesne profits.

The court have also ordered the proceedings in a second ejectment to be stayed, until the costs of an action for mesne profits (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error) as well as the costs of the first ejectment were paid. (1)

Where the courts will not stay the proceedings.

But the court will not extend the rule to include the damages recovered in such action for the mesne profits, however vexatious the proceedings of the party may have been. (2)

The courts will not stay the proceedings in the second action, where the party against whom the application is made, is already in custody under an attachment for non payment of the costs of the first action (3); nor will they include the taxed costs of a suit in equity, brought by the same party for the same property, as well as the costs of a prior ejectment, in the rule (4); nor will they stay the proceedings if it clearly appear, that the verdict in the first action was obtained by fraud and perjury (5); nor will they in any case in which they stay the proceedings further interfere, so as to compel the claimant to pay the costs by a particular day, or permit the defendant to *non pros.* the action. (6)

Insolvent.

An insolvent who has been served with a declaration in ejectment at the suit of his assignee, will not, unless in a special case, be ordered to give security for costs, prior to his taking defence. (7)

Proceedings will not be stayed from the poverty of the lessor, or from his residence being unknown in a previous ejectment.

Proceedings will not be stayed, founded on the poverty of the lessor (8); and where it appeared, that an ejectment had previously been brought in another court and abandoned, and that the lessor had been obliged to give security in the first ejectment, because his residence was then unknown, the court refused to stay the proceedings. (9)

Mode of recovering costs by plaintiff.

If the plaintiff have a verdict, he recovers his costs against the defendant by a writ of execution or by action, as in ordinary cases; but if entitled to costs under the consent rule, upon his being nonsuit, they are only recoverable by attachment. If the defendant be entitled to costs, either upon verdict, or where the plaintiff is *non prossed.* or nonsuit, his only remedy is by attachment; for, the lessor of the plaintiff, not being a party to the record, cannot have a writ of execution against him, but must proceed upon the consent rule only. (10)

22. THE JUDGMENT.

THE JUDGMENT.

The judgment in ejectment is either for the plaintiff or defendant: for the former, that he recover his term in the tenements demised, with or without damages and costs; and it is either for the actual lessee, against the person who ejects him, on a *vacant* possession, or for the *nominal* plaintiff against the

(1) Doe d. *Pinchard v. Roe*, 4 East, 585.

(2) Doe d. *Church v. Barclay*, 15 ibid. 233,

(3) Ibid.

(4) Doe d. *Williams v. Winch*, 3 B. & A. 602.

(5) Doe d. *Rees v. Thomas*, 2 B. & C. 622., *antè*, 1457. n. 7, 8.

(6) Doe d. *Sutton v. Ridgway*, 5 B. & A. 523.

(7) *Evans (Lessee of) v. Reily*, 1 Jones & Carey (Irish), 152.

(8) *Goodright d. Jones v. Thrustout*, Cas. Pr. C. P. 15. cit. Adams on Ejectment, 355.

(9) Doe d. *Selby v. Alston*, 1 T. R. 491.

(10) Archb. by Chitt. 796.

casual ejector on the non appearance of the tenant or landlord in the first instance, or afterwards, for not appearing at the trial, and confessing lease, entry, and ouster; or judgment may be given against the tenant or landlord on a verdict for the plaintiff.

THE JUDG-
MENT.

The judgment for the defendant is, that the plaintiff take nothing by his writ or bill, but that he and his pledges to prosecute be in mercy, &c.; and it is either on a *non pros.* for not replying, or entering the issue, or as in case of a nonsuit, or on a verdict, or nonsuit on the merits. (1)

Judgment for
defendant.

The plaintiff does not recover the freehold; he recovers *only* possession of the land; execution is of the possession only.

Effect of judg-
ment.

Where a person is in possession *by title* (as every one is, who enters in execution of a judgment in ejectment, because the law does no wrong), the possession and the title unite. Thus, it is a principle of law, that where a man having title to an estate comes to the possession of it *by lawful means*, he will be in possession according to his title: as where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail, the law casting the estate upon him according to his title.

Unity of pos-
session and
title.

A judgment is an act of law, and while it continues in force, destroys the title of the adverse party.

Whilst the judgment stands in force, it removes an intervening estate out of the way, during which time it is the same as if it had never existed; and the recoveror's right to the possession will continue till the judgment be reversed, or falsified in another action.

While the
judgment
exists, an inter-
vening estate
is removed.

The verdict being the ground of the judgment, ought not to be entered for more land, or for different parcels, than the defendant was found guilty of by the verdict. Yet a variance between the verdict and judgment, occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but may be amended by the court even after a writ of error brought. (2)

Variance be-
tween verdict
and judgment.

23. SCIRE FACIAS.

If the plaintiff neglect to sue out his execution for a year and a day after judgment, he must, in general, revive the judgment, as in other cases, else the court will award a restitution *quare erronee emanavit*. If the plaintiff, where he is a real person, die within a year and a day, his executors cannot take out execution without a *scire facias*, for they are not parties to the judgment; though, if execution has been regularly issued out in the lifetime of the testator, the sheriff may execute it after his death, because the authority is from the court, and not from the party. If after judgment, and before execution, the defendant in ejectment dies, and a *scire facias* goes, it must be against the terre tenants of the land, and not against the executor, without naming him terre tenant. (3)

SCIRE FACIAS.

(1) In ejectment on an *elegit* by one judgment creditor against another, the plaintiff whose judgment is puisne, but his requisition prior, is not entitled to judgment in respect of the interval between the inquisitions.

Jones d. M'Donnell v. Grady, 2 Hudson & Brooke (Irish), 537.

(2) *Mason v. Fox*, Cro. Jac. 632.

(3) Archb. by Chitt. 803.

WHERE EQUITY
WILL RESTRAIN
ACTIONS OF
EJECTMENT.

the costs in ejectment, are a recompense for the trouble and expense to which the possessor is put. But that, where the suit begins in Chancery for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a perpetual injunction against the defendant, because there the suit is first attached in that court, and never began at law, and such precedent incumbrances appearing to be fraudulent and inequitable against the possession, it is within the compass of the court to relieve against it."

Equity will interfere where ejectments have been commenced at law.

Courts of equity will sometimes interfere and grant perpetual injunctions, where the ejectments have been commenced in the usual way at the common law. (1)

EXECUTION.

26. EXECUTION.

GENERALLY.

I. Generally.

Execution for plaintiff in general.

After judgment in ejectment, the execution for the plaintiff is a writ of *habere facias possessionem*, or, as it is commonly called, a writ of possession, with or without a *feri facias* or *capias ad satisfaciendum* for the damages and costs.

Casual ejector.

On a judgment against the casual ejector, where the tenant or landlord does not appear, or, having appeared, does not confess lease, entry, and ouster at the trial, the execution for the plaintiff is a writ of *habere facias possessionem* only, the lessee of the plaintiff in such case having no other remedy for the recovery of his costs, than by action for the mesne profits.

After verdict and judgment against tenant or landlord.

But where the tenant or landlord appears, and there is a verdict and judgment against him, the lessor of the plaintiff may sue out an *habere facias possessionem* for the possession, and a *feri facias* or *capias satisfaciendum* for the damages and costs, or for the costs only, where the damages are remitted, either separately or in one writ at his election.

The defendant cannot proceed by execution for his costs, against the lessor of the plaintiff on a *non pros.*, nonsuit, or verdict; but his only remedy for the recovery of them, is by *attachment* on the consent rule.

Writ of *habere facias possessionem* defined.

The writ of *habere facias possessionem* is a *judicial* writ, issuing out of the court in which the action is brought, and directed to the sheriff of the county wherein the venue was laid; and, after reciting the judgment, commands him without delay to cause the plaintiff to have possession of his term, or, if there be more than one demise, his *several* terms, yet to come of and in the tenements recovered. (2)

Upon what judgments and when issued.

The writ of possession lies upon all judgments in ejectment for the plaintiff, whether against the casual ejector, tenant, or landlord, and may be issued at any time within a year and a day after signing judgment, without a *scire facias*. On a judgment by default against the casual ejector, the writ may be issued immediately after judgment is signed.

(1) *Barefoot v. Fry*, Bunb. 158. *Leighton v. Leighton* (Sir Edward), 1 P. Wms. 270. *Bath (Earl of) v. Sherwin*, Bro. Cas. Parl. 671. *Dearden v. Byron* (Lord), 8 Price, 417. (2) Tidd, 1244.

By Reg. Gen. Hilary Term, 2 Will. 4. r. 1. s. 76. (1), "a writ of *habere facias possessionem* may be sued out, without lodging a *præcipe* with the officer of the court," and "it shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed, till the judgment paper, *postea*, or inquisition, has been seen by the proper officer." (2)

EXECUTION.

Reg. Gen. H.
T. 2 Will. 4.
c. 2. s. 76.

It is no objection to the legality of a writ of *habere facias possessionem*, that the names of the officers to whom it was directed, were inserted by interlineation after the writ was sealed, and while it remained in the hands of the under-sheriff. (3)

The defendant in an ejectment having withdrawn his defence, and filed a consent for judgment with stay of execution, without the privity of the plaintiff, began, on the day before the expiration of the stay of execution, to pull down and destroy the premises, the court allowed the plaintiff to issue his execution immediately, notwithstanding the stay of execution. (4)

Where issue of writ will be allowed notwithstanding stay of execution.

Where the title of the lessor of the plaintiff was within two days of expiring, the court refused to issue an *habere*. (5)

Where issue of writ will be refused.

A party who had lain in prison a twelvemonth on a judgment in ejectment for damages 1s., costs 2l., increased costs 245l. 19s., was held entitled to his discharge. (6)

PRISONER.

II. Under Stat. 11 Geo. 4. & 1 Will. 4. c. 70.

It has been enacted by stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 38. that, "in all cases of trials of *ejectment* at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried to certify his opinion on the back of the record (7), that a writ of possession ought to issue immediately; and, upon such certificate, a writ of possession (8) may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued: provided always that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly, that the cause came on for trial at Nisi Prius at such a time and place, and before such a judge, (naming the time, place, and judge), and that thereupon the said judge certified his opinion, that a writ of possession ought to issue immediately."

UNDER STAT.
11 GEO. 4. & 1
WILL. 4. c. 70.

The provisions of this act, relating to the issuing of a writ of *habere facias possessionem*, are not affected by stat. 1 Will. 4. c. 7.

Respecting the power of the judge to grant the certificate, Mr. Justice Power of the

(1) 3 B. & Ad. 385. 8 Bing. 299. 2 C. out a previous affidavit ascertaining the rent having been filed, is irregular. *Nugent* & J. 189. (*Lessee of*) v. *Ejector*, 1 Jones (Irish), 103.

(2) Reg. Gen. Hill. 2 Will. 4. r. 1. s. 75. Ibid. (6) *Doe d. Daffey v. Sinclair*, 3 Bing.

(3) *Rex v. Harris*, 2 Leach's C. C. 929. 1 N. C. 778.

(4) *Dickenson (Lessee of) v. Dyas*, 1 record, vide App. Tidd. Sup. 331.

(5) *Jack d. Thompson v. Andrews*, 1 Jebb & Symes (Irish), 547. Ejectment for non payment of rent, judgment against the casual ejector, an *habere* which issued with- (8) Ibid. 216, 217. And for forms of writs of *fieri facias* and *capias ad satisfaciendum* for damages and costs, after verdict for the plaintiff in ejectment, ibid. 217, 218.

EXECUTION.

judge to grant
the certificate.

Judgment of
Mr. Justice
Taunton in
Doe d. *William-
son v. Dawson*.

Taunton in Doe d. *Williamson v. Dawson* (1) observed, "Under this act of parliament (2) there does not appear to be any discretion in the judge as to the time when the possession shall be delivered; we must either grant a certificate to enable the lessor of the plaintiff to get into *immediate* possession, or the case must take its regular course (3);" and if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession, the lessor of the plaintiff undertaking not to enforce it for a certain time. (4)

If the lessor of the plaintiff be nonsuited for want of the defendant's confessing lease, entry, and ouster, the judge will not grant a certificate under the above statute to give the lessor of the plaintiff immediate possession, unless an *affidavit* stating the circumstances of the case be laid before him. (5) And where it was intimated at the trial by the defendant's counsel, that he should move in the next term for a new trial, on the ground of certain evidence having been admitted which was not receivable in point of law, the judge who tried the cause said, that, under these circumstances, he should refuse to certify. (6)

An ejectment having been brought on two demises, and a verdict taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, and possession having been taken under it. (7)

It will be observed, that stat. 11 Geo. 4. & 1 Will. 4. c. 70. empowers the judge only to certify, that a writ of possession may be issued immediately, but does not allow of such certificate as to a writ of execution for the costs or damages (if any); and unless the judge certifies under stat. 1 Will. 4. c. 7. s. 2., as it seems he may do, that execution ought to issue for them, the party must wait the ordinary and regular time before issuing it. If the judge do not grant his certificate allowing the issuing of a writ of possession, then it cannot be issued until final judgment is signed in the ordinary course. (8)

DELIVERY OF
WRIT TO THE
SHERIFF, AND
DELIVERY OF
POSSESSION.

Delivery of
writ to sheriff,
and warrant to
officer.

Indemnity to
sheriff for exe-
cuting.

III. *Delivery of Writ to the Sheriff, and Delivery of Possession.*

The writ of *habere facias possessionem* being sued out, signed, and sealed, is delivered to the sheriff, who makes out a warrant thereon, directed to his officer; and it is usual for the lessor of the plaintiff to give the sheriff an indemnity for executing it. (9)

If the defendant die, after the writ of possession taken out, it may still be executed by the sheriff. (10) And where a writ of possession was tested in the lifetime of the lessor of the plaintiff, though it was not actually sued

(1) 4 C. & P. 589.

(2) Stat. 11 Geo. 4. & 1 Will. 4. c. 70.

(3) Vide etiam Doe d. *Packer v. Hilliard*,
5 C. & P. 132.

(4) Ibid., *sed quære*, if such certificate
might not be granted under stat. 1 Will. 4.
c. 7. s. 2. for the execution, at any time, the
provisions of such act being, as it seems,
cumulative. Archb. by Chitt. 799.

(5) *Per* Littledale J. in 4 C. & P. 589.

(6) Tidd's N. P. cit. Doe d. *Cook v.*
Barrett, 1 Leg. Obs. 351.

(7) Doe d. *England (Bank of) v. Cham-*
bers, 4 A. & E. 410.

(8) Archb. by Chitt. 799.

(9) Runnington on Ejectment, 487.

(10) Tidd, 1245.

out till after his death, the court of King's Bench held the execution to be regular. (1)

Under this writ, the sheriff or his officer, by the direction of the lessor of the plaintiff or his attorney, delivers possession of the premises recovered; and the sheriff must give a full and actual possession: thus, in *Massey (Lessee of) v. Ejector* (2) Mr. Baron Pennefather said, "We think that the execution has not been completely executed; and that we ought to consider, that until the party gets the quiet and peaceable possession of the premises, the writ is not executed."

If the recovery be of a house, the sheriff may justify breaking open a door, if he be denied entrance. (3) If the plaintiff recover several messuages or lands in the occupation of *different* persons, the sheriff must go to each house, or the land occupied by each tenant, and deliver the possession thereof by turning out the tenants; for the delivery of one messuage or parcel of land, in the name of all, is not in that case a good execution of the writ, because the possession of one tenant is not the possession of the other, each having a several possession. (4) But it seems, that if all the messuages or lands be in the occupation of *one* tenant, it is sufficient to give possession of *one* messuage or parcel of land, in the name of all (5); and this indeed seems to be the safest way for the sheriff, because he executes the writ at his peril; and therefore, if he give possession of any messuage or land not recovered, and not included in the *habere facias possessionem*, he is a trespasser. (6) But the surest and best way is said to be, for the sheriff to remove all the tenants entirely out of each house or parcel of land, and when the possession is quitted, to deliver it to the plaintiff; for if the sheriff turn out all the persons he can find in the house, and give the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, there appear to be some persons lurking in the house, this is no good execution, and the plaintiff may have a new writ of *habere facias*. (7) If the execution be for twenty acres, it seems the sheriff must give twenty acres in quantity, according to the common estimation of the county where the land lies. (8) And on a recovery of land, being part of a highway, the sheriff should deliver possession, subject to the right of passage over it for the king and his people. (9)

EXECUTION.

Mode of delivering possession in general.

Judgment of Mr. Baron Pennefather in *Massey (Lessee of) v. Ejector*.

Of land according to customary measure. Part of highway.

IV. Writ of Restitution.

It is at the lessor of the plaintiff's peril to take more, under the writ of possession, than he is strictly entitled to (10); and if he take more, the court on motion, will order it to be restored. (11) Thus, where the plaintiff in ejectment, as tenant in common, recovered possession of *five-eighths* of a cottage with the appurtenances, and a writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and

WRIT OF RESTITUTION.

Restoring possession of premises improperly delivered.

(1) Tidd, 1245.

(2) Jones (Irish), 459.

(3) *Semaine's case*, 5 Co. 91. (b.) Run-
nington on Ejectment, 485.

(4) 1 Rol. Abr. Execution (H.), 886.
Runnington on Ejectment, 485.

(5) Ibid. *Floyd v. Bethill*, 1 Rol. 421.

(6) Runnington on Ejectment, 486.

(7) *Carie v. Denis*, 1 Leon. 154. Run-
nington on Ejectment, 486.

(8) 1 Rol. Abr. Execution (H.), 886.
Floyd v. Bethill, 1 Rol. 420. Runnington
on Ejectment, 487.

(9) *Goodtitle d. Chester v. Alker*, 1 Burr.
138. Tidd. 1246.

(10) *Cottingham v. King*, 1 Burr. 627. 629.
Conner v. West, 5 ibid. 2673.

(11) Ibid. Runnington on Ejectment,
485. 487.

EXECUTION.

locked up the door, the court of Common Pleas made a rule upon the sheriff and lessor of the plaintiff, to restore the tenant to the possession of *three-eighth* parts of the premises; otherwise he would be obliged to bring another ejectment for the same. (1) But where a tenant, having held over after the expiration of his term, the landlord took (amongst other things) some severed crops under a writ of *habere facias possessionem*, issued on a judgment obtained against the former in an action of ejectment, the court of Common Pleas refused to grant a rule to refer it to the prothonotary to ascertain the value of such crops, or to order the landlord to pay over the balance to the tenant, after deducting the amount of rent due. (2)

Where judgment signed by the plaintiff as for want of a plea.

In *Doe d. Williams v. Williams* (3), where judgment was signed by the plaintiff as for want of a plea, and writs of possession were sued out and executed; but the defendant had left a plea at the judge's chambers; the defendant obtained a judge's order to set aside the judgment and writs of possession, and commanding the sheriff to restore possession:—It was holden, that the order ought not to have been on the sheriff, but upon the party in possession, and that writs of restitution issued upon the order were irregular. (4)

In *Doe d. Stephens v. Lord* (5) it appeared, that the lessor of the plaintiff in ejectment recovered against defendant, and taxed the costs. A writ of possession was taken out and delivered to the sheriff in November 1834, but not executed or returned. A second writ of possession was afterwards taken out in June 1837, which was shortly afterwards set aside for irregularity with costs, no *scire facias* having issued on the judgment:—It was held, that the lessor of the plaintiff, who was mortgagee of the premises, and had recovered in that right, and entered, could not on those grounds retain the premises independently of the writ of possession; and the court ordered him to restore possession. (6)

Where in ejectment for non payment of rent, and judgment against the casual ejector, the *habere* was executed before the affidavit ascertaining the rent was filed, the court awarded a writ of restitution. (7)

REMEDIES FOR
DISTURBANCE
OF POSSESSION.

Remedy for
disturbance on
giving possession.

By attachment.
On eviction by
defendant, after
possession
given.

V. Remedies for Disturbance of Possession.

If the sheriff be disturbed in the execution of the writ, the court on an affidavit will grant an attachment against the party, whether he be the defendant or a stranger; because the writ is the process of the court, and any disturbance given to the execution of it is punishable as a contempt. (8)

The process is not executed until the sheriff and officer are gone, and the plaintiff left in quiet possession. (9) But after possession given, either on the *habere facias*, or by agreement of the parties (10), the law seems to

(1) *Roe d. Saul v. Dawson*, 3 Wils. 49. Barnes, 191.

(2) *Doe d. Upton v. Witherwick*, 3 Bing. 11. Tidd, 1246.

(3) 2 A. & E. 381.

(4) Whether it is a valid objection to a writ of restitution, that no *præcipe* had been issued, or that the writs themselves were only sealed and not signed. *quære?* Ibid.

(5) 7 A. & E. 610.

(6) It was also held, that he could not set

off the costs on the judgment against the costs on the setting aside of the writ. Ibid.

(7) *Townshend (Lessee of) v. Casual Ejector*, 1 Alcock & Napier (Irish), 228.

(8) *Kingsdale v. Mann*, 6 Mod. 27. 1

Salk. 321., et vide *Ratcliff v. Tate*, 1 Keb.

779. *Devereux v. Underhill*, 2 ibid. 245.

Davies d. Povey v. Doe, 2 W. Black. 892.

(9) *Runnington on Ejectment*, 489.

(10) *Ratcliff v. Tate*, 1 Keb. 779. *Loveless (Executor) v. Ratcliff*, ibid. 785.

make a difference where the plaintiff is turned out of possession by the defendant, and where by a stranger. When it is done by the defendant, immediately or soon after the possession is delivered, the plaintiff it seems may have a new *habere facias*, before the former writ is returned (1), because the defendant himself shall never by his own act keep the possession, which the plaintiff hath recovered from him by due course of law. (2) And if the sheriff give possession of part only, he may have a new *habere facias* for the rest. (3) But if the writ be returned by the sheriff, though not filed, it seems no new *habere facias* can issue; because, when the return is made, it becomes a record which the court is entitled to. (4)

EXECUTION.

When *habere facias de novo* will be granted.

When a stranger turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to a new action, or an indictment for a forcible entry, where the force will be punished (5): the reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount to that of the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession, which he may have a right to.

On eviction by a stranger.

27. EVIDENCE.

EVIDENCE.

The plaintiff must prove a legal and possessory title in himself, unless claiming as landlord, or where a privity of estate exists between him and the defendant.

Plaintiff must prove a legal and possessory title.

In ejectment the plaintiff's proof generally consists in proving the lessor's title to enter and possess the identical lands in dispute; for, although four allegations are comprised in the declaration of ejectment, viz. the title of the lessor of the plaintiff, a lease by him to the plaintiff, an entry by the latter, and an ouster by the defendant, yet by the consent rule the proof is usually confined to the title of the lessor.

The lessor of the plaintiff can acquire no title from the weakness of his adversary, but must exclusively rely upon the strength of his own. (6)

Evidence of title consists in the exercise of acts of ownership from which the presumption of a legal title will arise, or in shewing a particular title, as devisee, heir, &c.

Evidence of title consists in positive acts of ownership, or in shewing a particular title.

The defence usually consists in shewing under the general issue, that the plaintiff has no such title, as gave him a right of entry at the time at which the demise is alleged to have been made to the nominal plaintiff.

Defence consists in shewing that plaintiff has no right of entry.

In ejectment by an administrator, he should prove the leasehold title of the intestate, the intestate's death, and should produce the letters of administration under the seal of the Ecclesiastical Court, or the entry in the book of orders of the court for granting administration (7), which may be

ADMINISTRATOR.

(1) *Pierson v. Tavernor*, 1 Rol. 353. *Molineaux v. Fulgam*, Palm. 289. *Ratcliff v. Tate*, 1 Keb. 779. *Loveless (Executor) v. Chapman*, ibid. 785. *Burgoin v. Thomas*, ibid. 786. *Kingsdale v. Mann*, 6 Mod. 27. 1 Salk. 321.

(2) *Runnington on Ejectment*, 489.

(3) *Devereux v. Underhill*, 2 Keb. 245.

(4) *Tidd*, 1247., cit. 2 Brownl. 216. 253.

et vide *Loveless (Executor) v. Ratcliff*, 1 Keb. 785.

(5) *Fortune v. Johnson*, Sty. 318. *Wood and Markham*, ibid. 408. *Ratcliff v. Tate*, 1 Keb. 779. *Loveless (Executor) v. Chapman*, ibid. 785. *Tidd*, 1248.

(6) *Doe d. Hodsden v. Staple*, 2 T. R. 684.

(7) *Bull. N. P.* 188. 246.

EVIDENCE.

proved by means of an examined copy. So he may shew his title by producing an exemplification of the letters of administration. (1)

ADMISSIONS IN A DEED.

In ejectment on the demise of S., evidence is admissible to shew, that a deceased party, being then in receipt of the rents, executed a deed, charging the land with an annuity, in which he stated S. to be legal owner of the fee, and himself to hold, for the term of his natural life, by permission of S. (2)

AFFIDAVIT NOT SWORN BEFORE A COMMISSIONER.

In an ejectment for non payment of rent, the lessor of the plaintiff proved at the trial an attested copy of the affidavit of service, purporting to be sworn before A. B., a commissioner of the court of Queen's Bench. On behalf of the defendant, a witness proved that he had applied to an officer of the court for an attested copy of the roll on which the names of the commissioners were enrolled (a rule of court requiring such enrolment), and was refused such copy; and that he then searched among the names of the commissioners upon the roll, and that the name of A. B. was not upon it. It was contended for the defendant, that this was evidence to shew, that A. B. was not a commissioner of this court, and that the affidavit could not be read. A verdict having been found for the plaintiff, subject to this objection, upon motion to enter a nonsuit, it was held, that the defence relied on by the defendant was not admissible; and that if it were, it was not established by proving that the name of A. B. was not enrolled as a commissioner. (3)

Attested copy.

In Ireland, a proof of service of summons in ejectment, by attested copy of the affidavit, is sufficient. (4)

ALIENATION.

Where in an ejectment the lessor of the plaintiff derived title under a lease made in 1756, subject to a condition to be void in case of alienation, without license in writing under hand and seal, and where the evidence shewed that an alienation had taken place in 1770, it was held, that an ejectment for non payment of rent, brought by the landlord in 1816, was evidence from whence the jury might presume that a license to alien had been given. (5)

The counsel for the plaintiff in his opening statement of the foregoing case referred to the ejectment of 1816 as the supposed case of the defendant, and stated, that that ejectment was defective; but the defendant, in his case, took no notice of the ejectment of 1816, but relied on an ejectment upon the title brought by him in 1818 as evidence of an eviction for breach of the condition against alienation:—It was held, that the plaintiff was entitled to give the ejectment for non payment of rent in evidence as a rebutting case. (6)

ASSIGNEES.**Bankrupt.**

Assignees of a bankrupt must prove the title of the bankrupt to the premises, and their own right to sue as assignees. (7)

Estoppel from disputing the landlord's title, how the acts of the parties may be explained.

In *Doe d. Plevin v. Brown* (8) it appeared, that A. demised a house and lands to B., and afterwards, being embarrassed, assigned the premises and all his personal estate to C. A. told B. that he had assigned the premises, and requested him to give C. an acknowledgment; whereupon B. gave C.

(1) *Kempton d. Boyfield v. Cross*, C. T. H. 108. *Elden (Administrator) v. Keddel*, 8 East, 187., post, 1471. tit. EXECUTOR.

(2) *Doe d. Daniel v. Coulthred*, 7 A. & E. 235.

(3) *Fry (Lessee of) v. King*, 1 Smith & Batty (Irish), 86., *Burton J. dubitante*.

(4) *Jack d. Boyle v. Kiernan*, 2 Jebb. & Symes (Irish), 231.

(5) *Nugent d. Keane v. Bantry (Earl of)*, 1 Hudson & Brooke (Irish), 147.

(6) *Ibid.*

(7) *Ante*, 669. tit. BANKRUPTCY.

(8) 7 A. & E. 447.

a shilling, and subsequently agreed with C. to give up possession to him of the house and lands respectively at the usual times, receiving an allowance for his improvements. Afterwards, and while the premises were still in B.'s occupation, A. became bankrupt, and C. brought ejectment. The assignees under A.'s commission defended as landlords, and contended that the assignment to C. was invalid, A. having become bankrupt when he made it:—It was held, that the acknowledgments above mentioned did not estop B., or the assignees as representing him, from contesting C.'s title on the above ground, such acknowledgments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment invalid.

EVIDENCE.

The assignees of an insolvent debtor, after proving the title of the insolvent, need only produce a copy of the record of conveyance and assignment to themselves, as filed in the insolvent court; but such copy must be written on parchment, and have the certificate of the provisional assignee of the court indorsed thereon, and be sealed with the seal of the court. (1)

Insolvent debtor.

The plaintiff who claims as the conusee of a statute merchant must produce the recognisance, or an examined copy of it (2); an examined copy of the writ of *capias si laicus* and return; and also an examined copy of the writ, and return of the extent and *liberari feci*.

CONUSEE OF STATUTE MERCHANT.

If the action be not against the conusor, but against one who had possession previous to the acknowledgment, the plaintiff must also prove the conusor's title; or if one claim under the conusor, that his interest is determined (3), and the identity of the parties.

The conusee of a statute staple (4), or of a recognisance in the nature of a statute staple (5), must prove the recognisance either by its production under the proper seals, or, as it seems, by an examined copy of its certification into the court of Chancery by the clerk of recognisances, and by examined copies of the writ of *capias* and return, and also of extent and *liberate*. A copy of the record containing the recital of the award of these writs and of their returns, seems to be sufficient evidence to prove them. (6)

CONUSEE OF STATUTE STAPLE.

Evidence of identity is also necessary; and if the proceedings be not against the conusor, the plaintiff must also give evidence of his title. (7)

If the lord of the manor bring ejectment for a forfeiture, he must prove the act of forfeiture, that he was lord at the time of the forfeiture committed, and that the tenant had been admitted on the rolls. (8)

COPYHOLD.

If the action be brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance, for his title is not complete before admittance; but, after admittance, his title relates back to the time of the surrender; and, provided he be admitted *before* the trial, it will be sufficient, though the demise be laid on a previous day. (9)

Secondary evidence of the execution of a deed will be admitted, where the attesting witness, in collusion with an adverse party, withholds his testimony. (10)

DEED.

Secondary evidence of execution.

(1) Stats. 7 Geo. 4. c. 57. s. 19. and 1 Will. 4. c. 38. s. 1.

(2) Bull. N. P. 104.

(3) Doe d. *Da Costa* v. *Wharton*, 8 T. R. 2.

(4) Stat. 27 Edw. 3. c. 9. s. 2.

(5) Stat. 23 Hen. 8. c. 6.

(6) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 655.

(7) 2 Stark. Ev. 296.

(8) Bull. N. P. 108.

(9) *Holdfast* v. *Clapham*, 1 T. R. 600., post, 1470. DEVISEE.

(10) *Clanmorris* (Lord, Lessee of) v. *Mullen*, 1 Crawford & Dix (Irish), 8.

EVIDENCE.

DEVISEE.

FREEHOLD INTEREST.

Stat. 3 & 4 Will.
4. c. 106. s. 3.

DEVISEE OF
COPYHOLD.DEVISEE OF
LEASEHOLD.

Assent of executor.

ELEGIT (Tenant by).

The devisee of a freehold interest must prove, 1. the seisin of the devisor; 2. the execution of the will; 3. the death of the devisor.

If the devise be of a remainder, or reversion in fee, or the like, he must prove the determination of all the precedent estates.

By stat. 3 & 4 Will. 4. c. 106. s. 3., "where land, &c. shall be devised by any testator who died since December 31. 1833, to his own heir, such heir shall be considered as taking by devise and not by descent."

Previous to this statute, a devise to any one of the *same estate* which he would otherwise have taken as heir at law of the devisor, was inoperative, and the devisee took by descent and not by devise.

. Devisee of copyhold must produce and prove, 1. the will of the devisor; 2. admittance of the testator; 3. his own admittance.

Wills of customary and copyhold lands must be executed with the same formalities as freehold (1); and a will so executed is good, though the testator may not have surrendered to the use of his will; and though being entitled as heir, devisee, or otherwise, he may not have been admitted; and though there may be no custom, or only a limited custom, to devise or surrender to the use of the will. Such facts can be proven by producing the original entries in the rolls of the manor by the proper officer, which entries the tenant has a right to examine (2), and proving the identity of the parties admitted (3), without shewing a copy of such surrender and admittances stamped, as required by stat. 55 Geo. 3. c. 184.

Stat. 55 Geo. 3. c. 192., which dispenses with the necessity of the surrender of copyholds to the use of the will of the copyholder, extends to those cases only where the surrender is merely formal. (4)

Stat. 3 & 4 Will. 4. c. 106., amending the law of inheritance, extends to copyhold and customary land.

The devisee of a leasehold must prove, 1. the lease to the devisor; 2. the will by the probate; 3. identity of the devisee; 4. assent of the executor.

An admission by the defendant of the testator's interest, will supersede the necessity of proving the lease. (5);

No particular form of assent by the executor is necessary; a general assent is sufficient. (6) So is a letter, by which the defendant promises to give possession at a particular time (7); in fact, a very small matter will amount to an assent, it being a rightful act. (8)

It seems that an assent is not to be implied from the sufficiency of assets (9); but an express assent will vest a term in the legatee from the death of the testator. (10)

The tenant by *elegit* should produce an examined copy of the judgment, of the writ of *elegit* taken out upon it, and the inquisition and return thereupon; or he should produce an examined copy of the judgment roll, recit-

(1) Stats. 7 Will. 4. & 1 Vict. c. 26. s. 1.

(2) *Folhard v. Hemet*, 2 W. Black. 1061. *Rex v. Shelley*, 3 T. R. 141.

(3) *Doe d. Hanson v. Smith*, 1 Camp. 197.

(4) *Doe d. Nethercote v. Bartle*, 5 B. & A. 492.

(5) *Doe d. Digby v. Steel*, 3 Camp. 115.

(6) *Dappa v. Mayo*, 1 Saund. 278.

(7) *Doe d. Saye and Sele v. Gwy*, 3 East, 120.

(8) *Noel v. Robinson*, 1 Vern. 94. *Doe d. Mubberley v. Mubberley*, 6 C. & P. 126.

(9) *Deeks v. Strutt*, 5 T. R. 690.

(10) *Saunders's case*, 5 Co. 12. (b.)

ing the judgment, the award of the *elegit*, and the return of the inquisition. (1)

EVIDENCE.

If the possession be not in the debtor, but in a third person, the plaintiff must also shew that such third person came in under the debtor, and that his right to possession has ceased; or if he hold adversely to the debtor, the plaintiff should shew the debtor's title. (2) It will, however, be sufficient to shew a *prima facie* title in the debtor, and that will cast on the defendant the burden of shewing that his title is anterior to the judgment. (3)

It must appear from the return that the sheriff has set out a moiety by metes and bounds, or the return will be bad (4); and the objection may be taken on the trial. (5)

An executor, when plaintiff, must prove, 1. the leasehold title of his intestate; 2. the intestate's death; 3. the probate. EXECUTOR.

Terms vest in the executor (6), from the death of the testator. The lease to the testator or intestate must also be proved.

The defendant's answer to a bill in equity, stating that "he believed that the testator was possessed of the leasehold premises in the bill mentioned," is *prima facie* evidence, that the testator had a chattel interest in the premises in the bill mentioned. (7)

To prove the title of a lessor of the plaintiff in ejectment claiming as executor, it is sufficient (without laying ground for reception of secondary evidence) to produce minutes of the proof of the will and sealing of probate, indorsed on the will by the surrogate and registrar of the Ecclesiastical Court; it being proved also that, by the practice of the particular court, no other record of such grants is kept. (8)

A lessor in ejectment, who claims title as a purchaser from the sheriff, who sells by virtue of a *fieri facias*, at the suit of such lessor, must prove the judgment as well as the writ. (9) But where the lessor of the plaintiff was not the plaintiff in the first action, it was held sufficient for him in ejectment against the defendant in the first action, to produce the *fieri facias* without proving the judgment. (10) FIERI FACIAS.

Where the assignment of a lease by deed taken in execution was made by the under-sheriff in the name and under the seal of office of the sheriff, his authority need not be proven. (11)

A guardian, to make out his title, must prove, 1. that the infant is the heir to socage lands, which is to be proved, as in the case of title by an heir, by evidence of the seisin of the ancestor of his death, and of the pedigree. GUARDIAN.

2. His own character as guardian, that is, that he is next of blood to the heir, to whom the inheritance cannot descend (12); and by evidence that the

(1) *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(2) *Doe d. Da Costa v. Wharton*, 8 T. R. 2.

(3) *Doe d. Evans v. Owen*, 2 C. & J. 71.

(4) *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(5) *Fenny d. Masters v. Durrant*, 1 B. & A. 40.

(6) *Post*, tit. EXECUTORS. *Rex v. Stone*, (Inhab. of) 6 T. R. 295. *Rex v. Horsley* (Inhab. of), 8 East, 410. Bull. N. P. 246.

(7) *Doe d. Digby v. Steel*, 3 Camp. 115.

(8) *Doe d. Edwards v. Gunning*, 7 A. & E. 240.

(9) *Doe d. Bland v. Smith*, 2 Stark. 199. *Hoffman (Assignee) v. Pitt*, 5 Esp. N. P. C. 22.

(10) *Doe d. Batten v. Murless*, 6 M. & S. 110.

(11) *Doe d. James v. Brawn*, 5 B. & A. 243.

(12) 2 Stark. Ev. 297.

EVIDENCE.

infant was under the age of fourteen at the time of the demise, for from that time the title of the guardian ceases. (1)

A guardian who has been appointed by deed or will, by virtue of stat. 12 Car. 2. c. 24. ss. 8 & 9., must prove his appointment, either by the deed of the father, or his last will and testament, executed as the statute directs, in the presence of two or more credible witnesses, the title of the infant, and his minority at the time of the demise.

Where the appointment is by will, it must now be executed in accordance with stat. 7 Will. 4. & 1 Vict. c. 26. s. 9.

HEIR AT LAW.

The heir at law must prove, 1. seisin of the ancestor; 2. that he is heir to that person. (2)

The seisin may be established by proving an actual possession of the ancestor; or that he received rent from the person in possession, which is presumptive evidence of a seisin in fee (3); or that the party in possession was the lessee of the ancestor. (4)

The descent may be proven by the plaintiff shewing his descent from the ancestor under whom he claims; or that he and the person last seised were descended from one common ancestor, or at least from two brothers or sisters (5); and that all intermediate heirs between himself and such ancestor were dead without issue. (6)

HUSBAND AND WIFE.

Upon a demise by husband and wife, in right of the wife, title must be proved in the wife. (7)

If the wife be a joint tenant of a term, the husband and wife should join in the ejectment with the other joint tenant. (8) A joint demise by husband seised in right of his wife, and his wife, is negatived by a receipt for rent, given in the name of the husband alone. (9)

JOINT TENANT.

By joint tenants.

The payment of an entire rent to the lessors of the plaintiff is evidence of their joint tenancy (10), such as to support a joint demise in the declaration: but although the defendant prove, that he has paid an entire rent to a receiver, for two jointly, for which the receipts stated the rent to be due to the two, yet they may recover on a declaration, stating separate demises by the two of the whole property; for by the several demises the joint tenancy is severed. (11) So if four joint tenants jointly demise, from year to year, such of them as have given notice to quit, may recover on separate demises. (12)

Where the lessor of the plaintiff is a tenant in common, coparcener, or joint tenant with the defendant, he ought to be prepared with the consent rule to shew, that the ouster has been admitted (13); and it seems that if the defendant mean to deny the ouster, he ought to enter into a special consent rule, which does not admit the ouster. (14)

(1) 4 Bac. Abr. Guardian (E.), 104.
Doe d. *Rigge v. Bell*, 5 T. R. 471.

(2) *Sed vide* stat. 3 & 4 Will. 4. c. 106.

(3) Bull. N. P. 103. Co. Litt. 15. (a.)
Jenkins d. Harris v. Prichard, 2 Wils. 45.

(4) Co. Litt. 243. (a.) *Bushby v. Dixon*,
3 B. & C. 298.

(5) *Roe d. Thorne v. Lord*, 2 W. Black.
1099.

(6) *Richards v. Richards*, 15 East, 294. n.

(7) 2 Stark. Ev. 298.

(8) 1 Bac. Abr. Baron and Feme (C.),
694.

(9) *Parry v. Hindle*, 2 Taunt. 180.

(10) *Doe d. Clarke v. Grant*, 12 East,
221.

(11) *Doe d. Marsack v. Read*, *ibid.* 57.

(12) *Doe d. Whayman v. Chaplin*, 3 Taunt.
120. *Doe d. Marsack v. Read*, 12 East, 57.
2 Stark. Ev. 308.

(13) *Doe d. White v. Cuff*, 1 Camp. 173.
Oates d. Wigfal v. Brydon, 3 Burr. 1895.

(14) *Ibid.* *Doe d. Gigner v. Roe*, 2 Taunt.
397., *sed vide* *Doe d. Hellings v. Bird*, 11
East, 49.

The bare perception of the whole of the profits does not amount to an ouster (1), although such perception of the profits continued for a great length of time will be evidence of an actual ouster (2); for the mere possession supports the common title, and a bare refusal to pay over his share of the profits to a tenant in common is not sufficient evidence of ouster without a denial of title; but if upon a demand of possession by a tenant in common, the co-tenant refuse and claim the whole, it is evidence of an actual ouster. (3)

EVIDENCE.

The bare perception of the whole of the profits does not amount to an ouster.

In ejectment by landlord, the determination of the lease may be proved, 1. by the terms of the lease itself, where the term is certain; 2. by proof of notice where it is necessary; 3. by some act of forfeiture. (4)

LANDLORD.

Determination of the lease.

Proof of the execution of the deeds (5) by the mortgagor, who is in possession of the premises, is usually conclusive against him, since he cannot set up a title inconsistent with his own deed. (6) But if a third person be defendant, it is necessary to prove that the mortgagor was in possession by the receiving of rents, or otherwise, at the time of the mortgage.

MORTGAGOR AND MORTGAGEE.

And when the defendant claims as tenant to the mortgagor under a lease prior to the mortgage, a regular determination of the tenancy by a notice to quit must be proved. (7)

But where the mortgagor has let the premises subsequently to the mortgage, no notice is requisite (8), although the mortgage was assigned to the lessor after the defendant had been let into possession, unless he has by some act acknowledged a tenancy, as by the receipt of rent. (9)

Notice by a mortgagee to the mortgagor's tenant in possession, will not alone create a tenancy between them without attornment (10), and an agreement that the mortgagor may continue to hold till a certain day fixed for payment, operates as a re-demise till that day. (11)

If the tenant have a legal title to the term, the lessor of the plaintiff cannot recover, although his only object be to get into possession of the rents and profits. (12)

Where the mortgagee recognises a party, as being in lawful possession of the premises at a given time, it is not competent for him to say afterwards, that at that time he was a trespasser (13); but mere payment of interest in respect of the original debt, for a period covering the day of the demise (14), is not a recognition of the right of mortgagor or his tenant to hold possession.

Recognition by mortgagee, of a party being in lawful possession.

In ejectment by the mortgagee against the assignee (under the Lords' Act) of a mortgagor, a letter written by the mortgagor to the plaintiff before the assignment, is evidence against the defendant, and it will be presumed to be written at the time of its date, until the contrary be shewn. (15)

(1) *Reading v. Rawsterne*, 2 Ld. Raym. 829. 2 Salk. 423.

(2) *Doe d. Fishar v. Prosser*, Cowp. 217.

(3) *Doe d. Hellings v. Bird*, 11 East, 49. *Doe d. Fishar v. Prosser*, Cowp. 217.

(4) *Post*, 1477. EJECTMENT BY LANDLORD AGAINST TENANT.

(5) *Doe d. Bristowe v. Pegge*, 1 T. R. 760. n.

(6) 2 Stark. Ev. 307.

(7) *Birch v. Wright*, 1 T. R. 379.

(8) *Keech v. Hall*, Doug. 21.

(9) *Thunder d. Weaver v. Belcher*, 3 East, 449. *Clayton v. Blakey*, 8 T. R. 3. *Rogers*

v. Humphreys, 4 A. & E. 313. *Doe d. Whitaker v. Hales*, 7 Bing. 322.

(10) *Roscoe's Ev.* 457. cit. *Evans v. Elliot*, A. & E. MSS. M. T. 1838.

(11) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(12) *Doe d. Da Costa v. Wharton*, 8 T. R. 2., *aliter*, Bull. N. P. 96.

(13) *Doe d. Whitaker v. Hales*, 7 Bing. 322.

(14) *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473.

(15) *Goodtitle d. Baker v. Milburn*, 2 M. & W. 853.

EVIDENCE.

POSSESSION.

Admissions in the consent rule respecting possession.

A party on being admitted to defend in ejectment must, on entering into the common rule, specify the premises in respect of which he intends to defend, and admit that they are in his own possession if he defend as tenant, or in the possession of his tenant, if he defend as landlord, and undertake to admit such possession on the trial of the cause. (1)

The plaintiff is bound to produce the rule to confess lease, entry, and ouster, in order that it may be seen for what premises and on what terms the action is brought. (2)

Where no doubt exists as to the identity of the premises.

But where there is no doubt as to the identity of the premises sought to be recovered, and those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent rule. (3)

Where in ejectment, the lessor of the plaintiff commenced his title by shewing a conveyance in fee from S. in 1807, evidence that S. was in possession of the property in the years 1806 and 1807, is evidence of his seisin in fee, unless there be something to shew, that he had a less estate. (4)

In ejectment the defendant having taken defence for the premises as laid in the declaration delivered, cannot go into evidence to shew, that the premises in his possession, are not part of the denomination described in the declaration. (5)

RECTOR.

Where the rector has been instituted and inducted into a living, proof of the letters of institution and of his induction, by which he acquires the corporeal possession, are sufficient evidence of title without proof of title in the patron; for institution and induction upon the presentation of a stranger is sufficient to bar the rightful claimant in ejectment, and to put the rightful patron to his *quare impedit* (6); and the plaintiff need not, until some proof has been given to the contrary, prove his subscription to, and reading of, the Thirty-nine Articles, and his assent to all things contained in the book of Common Prayer, for the law will presume the affirmative where the negative includes a crime. (7) Where, however, induction has not followed upon institution, it seems to be necessary to prove presentation by the patron, and that the recital of a presentation in the letters of institution would not be evidence of it. (8) If induction or possession have not followed, proof of a verbal presentation is sufficient; but it has been said that the patron would not be competent to prove this right, although he were but the grantee of the avoidance. (9) It has been stated, that reputation would be admissible to prove the fact, but this position may with reason be doubted. (10)

Adverse possession.

Adverse possession is not in general evidence against the right of a rector or vicar, unless he be the party who has acquiesced in the possession. (11)

- (1) *Ante*, 1446. tit. THE CONSENT RULE. *Milbank*, 2 W. Black. 851. 3 Wils. 355.
 (2) *Ibid.* Doe d. *Lamble v. Lamb*, *Williams v. E. I. Comp.* 3 East, 199. *Sheppard's case*, cit. 2 W. Black. 853.
 (3) Doe d. *Greaves v. Raby*, 2 B. & Ad. 948. (8) Bull. N. P. 105. (a.) *Heath v. Fryn*, 1 Vent. 15. 1 Sid. 426.
 (4) Doe d. *Hall v. Penfold*, 8 C. & P. 536. (9) Bull. N. P. 105. (a.)
 (5) *Murphy d. Roberts v. Furlong*, 2 Hudson & Brooke (Irish), 548. (10) *Ibid.* 2 Stark Ev. 307.
 (6) Bull. N. P. 105. (a.) Doe d. *Kerby v. Carter*, R. & M. 237. (11) Doe d. *Cooper v. Runcorn*, 5 B. & C. 696. *Croft v. Howel*, Plowd. 538. *Stowell v. Zouche*, *ibid.* 355. *Barker v. Richardson*, 4 B. & A. 579.
 (7) *Monke v. Butler*, 1 Rol. 83. *Powel v.*

An incumbent is entitled to glebe lands, although the current year of a tenancy created by his predecessor is unexpired. (1) A rector may recover on a lease avoided by his own non residence (2); so on his own demise to a spiritual person (3); and the description of the lessee in the lease is evidence that he is a spiritual person.

EVIDENCE.

If the affidavit upon which the rule to shew cause is grounded, state that the instrument of demise was executed by the tenant, it is sufficient; and such instrument must appear to the court to be properly stamped; but if it be not, they will allow time for having the proper stamp affixed. (4)

STAMP.

Proof must be given of the subject-matter sought to be recovered, and of its local situation, according to the allegations. Houses may be recovered under the description of land, for they are mere accessories to the land. Although it be not necessary to allege the land to be situated in a township or parish, yet if it be so described, a variance in proof will be fatal. (5)

VARIANCE.
From local description.

If it appear that the title of the lessor of the plaintiff did not accrue until after the day of the demise laid in the declaration, the variance will be fatal; but a demise of copyhold lands laid between the times of the surrender and admittance will be good, for the title relates from the admittance to the surrender, as against all, except the lord. (6)

VARIANCE
FROM THE DEMISE.

Where the declaration described the premises as being in the *county* of Dublin: — It was held, that although the declaration followed the description in the lease which was executed both by lessor and lessee; the defendant was not estopped from proving, that the premises were in the *city* of Dublin. (7)

Where two persons are contending for the possession, who are to pay rent in different rights, it seems that the landlord is not a competent witness to prove the priority of demise in an action of ejectment. As where A. the landlord demises to B., and afterwards to C., and the latter demises to D., against whom B. brings ejectment; A. is not competent to prove the demise to B., for the effect would be to change the possession. (8) But in such case, if no rent be reserved (9), or if the question arose on an action of covenant brought by C. against D., then A. would be competent to prove the priority of the demise to B.; for the result would not alter the possession, and the verdict would not be evidence afterwards, either for or against A. the landlord. (10)

WITNESS (COMPETENCY OF).
Landlord.

An heir apparent can be a witness concerning the title of the land, because his heirship is a mere contingency; but a remainder man cannot, for he has a present estate in the land, and this rule extends to the remainder man in tail. (11)

Heir apparent.

(1) Doe d. Kerby v. Carter, R. & M. 237.
Doe d. Cates v. Somerville, 6 B. & C. 126.
2 Stark Ev. 308.

(2) Frogmorton d. Fleming v. Scott, 2 East, 467. Stat. 13 Eliz. c. 20.

(3) Ibid. Stat. 21 Hen. 8. c. 13. s. 3.

(4) Juck d. Spollen v. Thrustout, 1 Hudson & Brooke (Irish), 354.

(5) 2 Stark. Ev. 309.

(6) Holdfast d. Woodlams v. Clapham, 1 T. R. 600. Doe d. Bennington v. Hall, 16 East, 208. 2 Stark. Ev. 309.

(7) Doe d. Stock v. Willett, Armstrong & Macartney (Irish), 8.

(8) Per Buller J. in Bell v. Harwood, 3 T. R. 308. Fox v. Swann, Sty. 482. Smith v. Chambers, 4 Esp. N. P. C. 164.

(9) Per Buller J. in Bell v. Harwood, 3 T. R. 308.

(10) Rex v. Woodland (Inhab. of), 1 ibid. 261. Fox v. Swann, Sty. 482.

(11) Doe d. Teynham (Lord) v. Tyler, 6 Bing. 391.

EVIDENCE.	The mother of a defendant in ejectment, who claimed as heir to his father, is a competent witness for him, though the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower. (1)
Co-defendant.	In ejectment for non payment of rent, a co-defendant who has suffered judgment to go by default, is a competent witness for a defendant who has taken defence. (2)
Son of plaintiff's lessor.	Where the son of the plaintiff's lessor admitted, that he employed the attorney for his father, who had promised by parol to let him have the land when recovered, he was rejected as incompetent. (3)
Tenants.	A tenant is not competent to defend his landlord's possession. (4). Where <i>prima facie</i> evidence has been given against the defendant, a witness is incompetent to prove, that he himself is the real tenant, and that the defendant is but his bailiff. (5) Where a witness stated, that the claimant had formerly assigned to him the premises for a temporary purpose, but that he had given up the deed, and did not believe that he had any beneficial interest in them, he was held to be incompetent. (6)
Lessor of the plaintiff cannot be called, though no title be proved in him.	A lessor of the plaintiff cannot it seems be called as a witness by the defendant, though no title be proved in him. (7) Where a lessor had become a bankrupt, and released his assignees, it was held, that he was competent. (8)
Vendor.	It seems that one who sells an estate, without any covenant or warranty, on which he may be liable in case the title be defective, is a competent witness for the plaintiff; otherwise, if he be a mere mortgagor. (9)
Parishioner.	In ejectment by a person to recover a cottage taken from him by the parish officers, as being a parish house; an inhabitant who has rateable property in the parish, but is not rated, is a competent witness for the defendant under the stat. 54 Geo. 3. c. 170. s. 9. (10) Rated inhabitants of the parish are also competent witnesses for parochial officers under stat. 54 Geo. 3. c. 170. s. 9. (11)
Attorney.	Where an attorney who is the attesting witness to the counterpart of a lease is afterwards concerned for the tenant in an action of ejectment brought by the lessor, the court will, notwithstanding, compel him to make an affidavit of the execution of the counterpart in support of an application for the landlord's rule under stat. 1 Geo. 4. c. 87. s. 1. (12)
Executor.	An executor in trust may be a witness with respect to the estate, as to prove the sanity of the testator. (13) So where a grantee is a bare trustee,

(1) Doe d. *Nightingale v. Maisey*, 1 B. & Ad. 439.

(2) Doe d. *Kingston (Earl of) v. Ready*, 1 Irish Circuit Cases, 156.

(3) Roscoe's Ev. 469. cit. *Doe v. Abbott*, Winton Sum. Ass. 1838.

(4) *Bourne v. Turner*, Str. 633. Doe d. *Foster v. Williams*, Cowp. 621. Doe d. *Winchley v. Pye*, 1 Esp. N. P. C. 364.

(5) Doe d. *Jones v. Wild*, 5 Taunt. 183. Doe d. *Lewis v. Bingham*, 4 B. & A. 672. Doe d. *Scales v. Bragg*, R. & M. 87.

(6) Doe d. *Scales v. Bragg*, R. & M. 87.

(7) *Fenn v. Granger*, 3 Camp. 177.

(8) *Longchamps d. Evitts v. Fawcett*, Peake's N. P. C. 71.

(9) 2 Stark. Ev. 311. cit. *Anon.* 11 Mod. 354.

(10) Doe d. *Harrison v. Murrell*, 8 C. & P. 134.

(11) Doe d. *Batchelor v. Bowles*, 8 A. & E. 502.

(12) Doe d. *Avery v. Roe*, 6 Dowl. P. C. 518. *Quære*, Whether the affidavit of the attesting witness is in every case indispensable?

(13) *Fountain v. Coke*, 1 Mod. 107. *Goodtitle d. Fowler v. Welford*, Doug. 139. *Abrahams, q. t. v. Bunn*, 4 Burr. 2254.

he is competent to prove the execution of the deed to himself. (1) A co-defendant is not a competent witness. (2)

EVIDENCE.

The circumstance of the executor taking a pecuniary interest under the will is unimportant (3), if the verdict will only establish the will in relation to the real property.

The acts of occupiers during their occupancy are, even after it has ceased, evidence against the parties under whom they came into possession. (4)

ACTS AND DECLARATIONS OF OCCUPIERS.

The declarations of deceased tenants are admissible for the purpose of proving that any particular lands formed part of the estate they occupied, and also to negative adverse possession. (5)

Declarations of deceased tenants.

28. EJECTMENT BY LANDLORD AGAINST TENANT.

I. *Proceedings at Common Law for Non-payment of Rent.*

EJECTMENT BY LANDLORD AGAINST TENANT.

If a tenant fail to pay his rent to his landlord, whereby a forfeiture has been incurred, the latter can proceed against the former in ejectment either at common law or under stat. 4 Geo. 2. c. 28.

PROCEEDINGS AT COMMON LAW FOR NON-PAYMENT OF RENT.

To support ejectment at common law in case of forfeiture for non payment of rent, there must be a sufficient distress upon the premises, and a demand must be made of the rent, unless a stipulation exist dispensing with it (6); although there may be no person present on the part of the tenant to answer. (7)

Demand must be made for the rent ;

The landlord must go in person, or execute a formal power to another, who must go in person. (8) If the lease do not specify when the rent is to be paid, the demand must be made upon the land, and at the most notorious part of it; and therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house. (9)

by whom.

If the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture. (10) If the lease, however, specify a place for the payment of the rent, the demand must be made at that and no other. (11) Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as, where the proviso in the lease is, that, if the rent be behind and unpaid for the space of twenty days, the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time, usually half an hour before sun-

Period at which the rent must be demanded.

(1) *Goss v. Tracy*, 1 P. Wms. 287. 290.
(2) *Dormer v. Fortescue*, Runnington on Ejectment, 291. Doe d. *Harrop v. Green*, 4 Esp. N. P. C. 198.

(3) Doe d. *Wood v. Teage*, 5 B. & C. 335.

(4) Doe d. *Manton v. Austin*, 9 Bing. 41.

(5) *Davies v. Pierce*, 2 T. R. 53. *Outram v. Morewood*, 5 ibid. 121. Doe d. *Human v. Pettett*, 5 B. & A. 223.

(6) Bro. Abr. Demaunde, pl. 19. Doe d. *Harris v. Masters*, 2 B. & C. 490. *Goodright d. Hare v. Cator*, Doug. 486.

(7) *Kedwellie v. Brande*, Plowd. 70. (a, b.)

(8) Doe d. *West v. Davis*, 7 East, 363.

(9) Archb. by Chitt. 806.

(10) Co. Litt. 201. (b.) 202. (a.) Doe d. *Forster v. Wandlass*, 7 T. R. 117. *Duppa v. Mayo*, 1 Saund. 287.

(11) Co. Litt. 202. (a.)

**EJECTMENT BY
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NANT.**

Where rent
payable quar-
terly.

If rent be not
paid when de-
manded, the
tenant forfeits
his term.

set (1); a demand at one o'clock in the day will not do. (2) And lastly, the demand must be made of the precise sum due, and not a penny more or less. (3)

Where the rent was payable quarterly, and more than one quarter was due, it was held, that only a quarter's rent should have been demanded. (4)

If the rent be not paid when demanded, the tenant forfeits his term, and the landlord may re-enter for the forfeiture; that is, he may bring an ejectment to recover the possession of the premises; for an actual entry is not necessary in this case. (5) The proceedings in this ejectment are the same as in ordinary cases, according as the tenant is in possession, or the possession is vacant.

The tenant, by filing a bill in equity, may obtain an injunction and stay the proceedings upon payment of the rent in arrear. (6)

**PROCEEDINGS
UNDER STAT. 4
GEO. 2. C. 28.
S. 2.**

If half a year's
rent be in ar-
rear, landlord
can re-enter
serving a decla-
ration of eject-
ment.

II. *Proceedings under Stat. 4 Geo. 2. c. 28.*

By stat. 4 Geo. 2. c. 28. s. 2., "in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage, or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such declaration in ejectment, shall stand in the place and stead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, or ouster, it shall be made appear to the court where the said suit is depending by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

**Construction of
stat. 4 Geo. 2.
c. 28.**

By this statute the service of the declaration in ejectment is substituted for the demand of rent, which, at common law, must have been made upon the day when the forfeiture accrued in case of non payment; neither does this statute require that the day of demise must be the very day, when declaration is served. (7)

(1) Co. Litt. 203. *Hill v. Graunge*, Plowd. 172. (b.) *Duppa v. Mayo*, 1 Saund. 287.

(2) *Doe d. Wheeldon v. Paul*, 3 C. & P. 613.

(3) *Fabian v. Winston*, Cro. Eliz. 209. 1 Leon. 305.

(4) *Doe d. Wheeldon v. Paul*, 3 C. & P. 613.

(5) *Anon.* 1 Vent. 248. *Little v. Heaton*, 2 Ld. Raym. 750. 1 Salk. 259. 1 Saund. 319. *Duppa v. Mayo*, ibid. 287.

(6) Archb. by Chitt. 806, 807.

(7) *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752.

The words of the statute, "no sufficient distress was to be found on the premises," mean no sufficient distress which can be got at: thus, when the outer door was locked, so that the landlord could not get at the premises, Lord Tenterden held, that there was not any sufficient distress, for there was not any available distress. (1)

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AGAINST TE-
NANT.

"No sufficient
distress."

Upon a lease reserving rent payable quarterly, with a proviso, that if the rent be in arrear twenty-one days next after day of payment, being lawfully demanded, the lessor may re-enter, it was holden, that five quarters being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand. (2)

The declaration is the same as in ordinary cases. The demise must be laid on a day when the forfeiture was complete, and on or after a day when it is certain, there was not sufficient property to distrain upon. (3) If the possession be vacant, the notice is signed by the plaintiff's attorney, and directed to the tenant last in possession.

DECLARATION,
AND SERVICE
OF.

Where proceedings are taken under stat. 4 Geo. 2. c. 28., affixing the declaration in ejectment upon the door of the demised premises will not be allowed as good service, if there be any probability that the tenant can be personally served. (4)

Service of a declaration by nailing it on the barn door of the premises, in which barn the tenant had occasionally slept (there being no dwelling-house, and the tenant not being to be found at his last place of abode), was allowed to be good service. (5)

The court will not in an ejectment for non payment of rent, make a rule for substituting service upon a person, not in the possession of the premises, and who is not known to have an interest in them. (6)

If the tenant do not appear, the plaintiff can have judgment against the casual ejector as in ordinary cases.

JUDGMENT
AGAINST CASUAL
EJECTOR.

On an application for judgment against the casual ejector, where proceedings under stat. 4. Geo. 2. c. 28. have been taken, it is not sufficient to shew, that there is no sufficient distress "to countervail the arrears of rent," if more than half a year's rent be sworn to be due. (7)

When the premises are deserted by the tenant, and the landlord proceeds on the statute 4 Geo. 2. c. 28. s. 2., the affidavit should state that a copy of the declaration and notice was affixed on the door of the messuage, or some notorious place on the premises, there being no person in possession upon whom the declaration could be legally served; that half a year's rent was due from the then tenant, and no sufficient distress to be found upon the premises to countervail the same; that the late tenant held the premises by virtue of a lease from the lessor of the plaintiff; and that a clause of re-entry is contained therein for non payment thereof. (8) And if one part of the premises be vacant, and the other in the occupation of a tenant it is sufficient for the affidavit to ground a motion for judgment against the

Statements that
should be em-
bodied in the
affidavit.

(1) Doe d. Chippendale v. Dyson, M. & M. 77., et vide Roe d. West v. Daves, 7 East, 363.

(2) Doe d. Scholefield v. Alexander, 2 M. & S. 525.

(3) Doe d. Smelt v. Fuchau, 15 East, 286. Doe d. Lawrence v. Shawcross, 3 B. & C. 752.

(4) Doe d. Pugh v. Roe, 1 Scott, 464.

(5) Fenn d. Buckle v. Roe, 1 N. R. 293.

(6) Ridge d. Darnley (Earl) v. Thrustout, 1 Hudson & Brooke (Irish), 408.

(7) Doe d. Powell v. Roe, 9 Dowl. P. C. 548.

(8) 1 Cas. Pr. C. P. 68. Runnington on Ejectment, 183.

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casual ejector to state, that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed on that part of the door which was vacant. (1)

The affidavit as to the half year's rent being in arrear, and no sufficient distress on the premises to liquidate the amount, must be positive, and not merely to the belief of the deponent (2)

It is not requisite that the landlord himself should swear to the amount of the rent due; it may be sworn to by his receiver or agent. (3)

Between land-
lord and tenant.

In all cases of ejectment by landlord against tenant, if the defendant do not appear at the trial, and confess lease, entry, and ouster, then, upon proof that such defendant or his attorney was regularly served with notice of trial, the plaintiff will not be nonsuit; but the production of the consent rule shall in all such cases be sufficient evidence of the lease, entry, and ouster. (4)

APPEARANCE,
PLEA, &c.

The appearance, plea, and other proceedings to trial, &c. are the same as in ordinary cases. (5)

Stat. 4 Geo. 2.
c. 28. s. 4.

STAY OF PRO-
CEEDINGS.

Tender of rent.

By stat. 4 Geo. 2. c. 28. s. 4., "if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be released in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease made, without any new lease to be thereof made to him, her, or them."

A tender of rent before the declaration is delivered will stay the proceedings under the foregoing statute. (6)

In ejectment for non payment of rent, proceedings will be stayed on payment of the rent due and costs, exclusive of any tithe instalments paid by the lessor of the plaintiff under the Tithe Million Act, on account of the premises, the subject of the ejectment. (7)

Equitable re-
lief.

By consent, the court or a judge will, even after execution executed, stay the proceedings, &c. on payment of the rent and costs. (8)

The rent to be paid must it seems be calculated only to the last rent day, and not to the day of computing. (9)

Stat. 4 Geo. 2.
c. 28. s. 2.

When lessor in
ejectment may
recover judg-
ment, &c.

The defendant can apply to equity for relief either before or after trial; but by stat. 4 Geo. 2. c. 28. s. 2., "and in case the lessee, his assignee, or other person claiming or deriving under the said lease, shall suffer judg-

(1) Woodfall by Harrison, 801. Adams on Ejectment, 213.

(2) *Doe v. Roe*, 2 Dowl. P. C. 413.

(3) *Doe d. Charles v. Roe*, *ibid.* 752. 3 M. & Sc. 751.

(4) Stat. 1 Geo. 4. c. 87. s. 2.

(5) Where a notice at the foot of a declaration in ejectment required an appearance in Michaelmas Term, but service could not be effected in time to move in that term, the court, in Hilary Term, granted a rule for judgment against the casual ejector, unless cause was shewn before the last day but one

of that term. *Doe d. Warwick (Earl of) v. Roe*, 9 Dowl. P. C. 714.

(6) *Goodright d. Stevenson v. Noright*, 2 W. Black. 746.

(7) *Bruen (Lessee of) v. Casual Ejector*, 1 Crawford & Dix (Irish), 16.

(8) Archb. by Chitt. 809. In *Doe d. Lambert v. Roe*, 3 Dowl. P. C. 557., Mr. Justice Williams refused to set aside the proceedings in ejectment after execution executed, or where there were other grounds of forfeiture, besides the non payment of rent.

(9) *Doe d. Harcourt v. Roe*, 4 Taunt. 883.

ment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill for relief in equity, within six calendar months after such execution executed, then and in such case the said lessee, assignee, and all other persons claiming and deriving under the said lease shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error, for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease."

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NANT.

In ordinary cases of ejectment for non payment of rent, the court will not grant a certificate for immediate execution. (1)

In ejectment for a forfeiture by the tenant or his assignee, the plaintiff must first prove the lease, and secondly the breach of it. (2)

EVIDENCE.

The general rule is, that a clause of re-entry is to be construed strictly. (3)

Under stat. 4 Geo. 2. c. 20., the plaintiff must prove at the trial, *inter alia*, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises counter-vailing the arrears then due, and that the lessor had power to re-enter.

In ejectment against the assignee on a clause of re-entry for non payment of rent, it has been held to be sufficient to prove the execution of a counter-part, without proving the original lease, or notice to produce it. (4)

Where the landlord is entitled to re-enter for a forfeiture, it is unnecessary to prove an actual entry. (5) In general, where the covenant is to do an act, the plaintiff ought to give some evidence, it is said, of the omission to do the act. (6)

Determination
by forfeiture.

In ejectment, upon a condition for re-entry for non payment of rent, the landlord must prove an actual demand (7) of the rent, although no one be there to pay it (8); of the precise rent (9); on the precise day (10); upon the demised land, at the most notorious place upon it, at a convenient time before sunset (11); by the landlord, or by a person duly authorised by him to demand it by a power of attorney (12), which he produced at the time, or which he had ready to produce, having notified it to the tenant. (13)

Onus of proof lies on the tenant disputing the validity of an ejectment for non payment of rent. (14)

EVIDENCE FOR
DEFENDANT.

In ejectment on the title for a house, a tenant of part, who takes defence, will not be ordered by the court to confine his defence to the part in his possession. (15)

DEFENCE.
Mode of taking
defence.

It is a general rule, that a tenant shall not be permitted to dispute his landlord's title (16), nor a mortgagor to impeach his own title at the time of

Tenant cannot
dispute the title
of the landlord.

(1) *Davis (Lessee of) v. Jackson*, 1 Crawford & Dix (Irish), 50.

(2) 2 Stark. Ev. 303.

(3) *Per Lord Tenterden* in *Doe d. Palk v. Marchetti*, 1 B. & Ad. 720.

(4) *Roe d. West v. Davis*, 7 East, 363. *Nash v. Turner*, 1 Esp. N. P. C. 217.

(5) 2 Saund. 287.

(6) *Doe d. Chandless v. Robson*, 2 C. & P. 245.

(7) *Doe v. Brydges*, 2 D. & R. 29.

(8) *Kedwellie v. Brande*, Plowd. 69. (a, b.) 1 Rol. Abr. Condition (X.), 458. *Smith v. Spooner*, 3 Taunt. 246.

(9) *Fabian v. Winston*, Cro. Eliz. 209.

(10) 2 Saund. 287.

(11) *Ibid.* *Doe d. Forster v. Wandlass*, 7 T. R. 117. *Roe d. West v. Davis*, 7 East, 363. *Fabian v. Winston*, Cro. Eliz. 209. Co. Litt. 202.

(12) Co. Litt. 201. 1 Rol. Abr. Condition (X.), 458.

(13) *Roe d. West v. Davis*, 7 East, 363.

(14) *Long d. Connor v. Disney*, 2 Hudson & Brooke (Irish), 113. *Fawcett (Lessee of) v. Hall*, 1 Alcock & Napier (Irish), 248.

(15) *Browne (Lessee of) v. Mason*, 1 Jebb & Symes (Irish), 31.

(16) *Doe v. Whitroe*, 1 D. & R. 1.

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the mortgage. (1) Nevertheless, it is competent to a tenant to shew that the landlord's title has expired (2) subsequently to the demise. And, as the tenant cannot deny the landlord's title, neither can any one controvert it who claims by him. A third person cannot defend as landlord, where the tenant came into the possession under an agreement with the lessor of the plaintiff (which has expired), and paid rent to him, but afterwards disclaimed. (3)

The defendant may prove in answer, a tender at any time on the last day for the payment of the rent (4); or a waiver of the forfeiture by the receipt of rent subsequently due (5); or by giving advice to a purchaser to purchase the term (6), provided the landlord had notice of the forfeiture; and reasonable evidence ought to be given that he had received such notice (7); such receipt of subsequent rent will not set up a void lease for years (8); but as a lease for life cannot be avoided without entry, the acceptance of subsequent rent without entry will restore the lease. (9)

**FORFEITURE
(WAIVER OF).**

Where in ejectment, the lessor of the plaintiff derived title under a lease made in 1756, subject to a condition to be void in case of alienation, without license in writing under hand and seal; and where the evidence shewed, that an alienation had taken place in 1770, it was held, that an ejectment for non payment of rent, brought by the landlord in 1816, was evidence from which the jury might presume, that a license to alien had been given, or that the forfeiture had been waived. (10)

In ejectment for non payment of rent, defence was allowed to be taken for a portion of the premises in the declaration mentioned, on the terms, that the only question to be raised be, whether the defendant was tenant thereof to the lessors of the plaintiff, or any of them, without affidavit denying that he was. (11)

In ejectment for a house, a person served with the summons will not be restricted, in his defence, to those parts of the house in his actual occupation. (12)

**Moiety of pre-
mises.**

But a defence taken for a moiety of the premises will be set aside. (13)

**CONSOLIDATION
OF DEFENCES.**

The lessor of the plaintiff should undertake, by the consolidation rule, to allow one defendant to be a witness for another at the trial, at the discretion of the judge. (14)

(1) Bull. N. P. 110. (a.) *Lade (Bart.) v. Holford*, 3 Burr. 1416.

(2) *England d. Syburn v. Slade*, 4 T. R. 682. *Doe d. Jackson v. Ramsbotham*, 3 M. & S. 516. *Doe d. Grundy v. Clarke*, 14 East, 488. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

(3) *Doe d. Knight v. Smythe (Lady)*, 4 M. & S. 347.

(4) Co. Litt. 201, 202. (a.)

(5) *Goodright d. Walter v. Davids*, Cowp. 803. *Pennant's case*, 3 Co. 64. *Roe d. Gregson v. Harrison*, 2 T. R. 425. Co. Litt. 201. *Goodright d. Charter v. Cordwent*, 6 T. R. 219. *Fryett d. Harris v. Jeffreys*, 1 Esp. N. P. C. 393.

(6) *Doe d. Sore v. Eykins*, 1 C. & P. 154.

(7) *Goodright d. Walter v. Davids*, Cowp. 803. *Roe d. Gregson v. Harrison*, 2 T. R.

425. *Pennant's case*, 3 Co. 64. (b.) 2 Saund. 287. (c.)

(8) Co. Litt. 215. (a.) 2 Saund. 287. *Pennant's case*, 3 Co. 64. *Jones d. Cowper v. Verney*, Willes, 176. *Doe d. Bryan v. Banks*, 4 B. & A. 401. *Reid v. Parsons*, 2 Chitt. 247.

(9) 2 Saund. 287. Co. Litt. 211. (b.) Ibid. 215. (a.) *Pennant's case*, 3 Co. 64.

(10) *Nugent d. Keane v. Bantry (Earl of)*, 1 Hudson & Brooke (Irish), 147.

(11) *Kerr d. Keown v. Thrustout*, 1 Smythe (Irish), 478.

(12) *Brown (Lessee of) v. Mason*, 1 Crawford & Dix (Irish), 167.

(13) *Coote (Lessee of) v. Grady*, 1 Jones (Irish), 131.

(14) *Smith (Lessee of) v. Grey*, 1 Jebb & Symes (Irish), 684.

III. *Proceedings under Stat. 1 Geo. 4. c. 87.*

Stat. 1 Geo. 4. c. 87. s. 1., after reciting that the laws then in existence for preventing the losses to which landlords were exposed by the unlawful holding over of lands and tenements by tenants, or persons claiming under them, after the expiration or legal determination of their terms or interests, had been found by experience insufficient, and that it was therefore expedient to provide in certain cases a more expeditious mode for recovering the possession of lands and tenements so held over, enacts, "that where the term or interest of any tenant, now or hereafter holding, under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced on the first day of the term then next following, or, if the action shall be brought in Wales, or in the counties palatine of Chester, Lancaster, or Durham respectively, then on the first day of the next session or assizes, or at the court day or other usual period for appearance to process then next following, as the case may be, there to be made defendant, and to find such bail, if ordered by the court, and for such purposes as are hereinafter next specified."

EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.PROCEEDINGS
UNDER STAT. 1
Geo. 4. c. 87.
s. 1.

DECLARATION.

Landlords
bringing eject-
ments may give
notice to ten-
ants to appear
in term, and
then on produc-
tion of the lease
or agreement
to move an affi-
davit for a rule
nisi on the
tenant to enter
into certain un-
dertakings and
give certain
bail.

In *Doe d. Phillips v. Roe* (1) Chief Justice Abbott said, "One of the main objects of stat. 1 Geo. 4. c. 87. was, to save the landlord the necessity of going to trial, where the tenant holds over vexatiously, and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises."

Object of stat.
1 Geo. 4. c. 87.

By stat. 1 Geo. 4. c. 87. s. 7., "nothing in this act contained shall be construed to prejudice or affect any right of action or remedy which landlords already possess, in any of the cases hereinbefore provided for."

Stat. 1 Geo. 4.
c. 87. s. 7.

The statute extends to a tenancy by virtue of an agreement in writing for a term certain. (2)

Cases to which
the statute ex-
tends.

And where a landlord had entered into a written agreement with the tenant, to grant him a lease for a certain term, which lease, however, was never granted; and at the expiration of the term the tenant held over, after having been served with a proper notice to quit; and he was then served with a written demand of possession, with an intimation that, if he did not deliver it, an ejectment would be brought: the court decided, 1. that the tenant held under an agreement in writing, and was not to be treated as a tenant from year to year; and 2. that the demand of possession was sufficient to entitle the plaintiff to the benefit of the undertaking, and security required by the statute. (3)

(1) 5 B. & A. 768.

(2) Ibid. 766.

(3) *Doe d. Anglesey (Marquess of) v. Roe*,
2 D. & R. 565.

**EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.**

Cases to which
the statute does
not extend.

A tenancy for years, determinable on lives, is not a holding for any term or number of years certain within the meaning of the above statute. (1)

And the statute does not extend to the case of a lessee holding over after notice to quit given by himself, where his tenancy has not expired by efflux of time. (2)

So where a tenant holds from year to year without a lease or agreement in writing, it is not a case within the statute. (3)

A tenant held premises under a lease for six months made in the usual manner, after the execution of the writ of *habere facias possessionem*, in an ejectment for non payment of rent, and the lease bore date on the 19th of July, 1823, and the tenancy terminated on the 19th of January, 1824, it appeared, that on the 7th of June a demand in writing to deliver up possession was made and served on the tenant, but that no such demand had been served anterior to the 19th of January. The ejectment was brought on the 10th of June. The case having been mentioned on the first day of term before Mr. Baron Pennefather, he expressed a doubt whether the facts of the case brought it within the act of the 1st of Geo. 4., and desired that it might stand over for the full court; when Chief Baron O'Grady observed, "Is not this party to pay something for the occupation from January to June? You must treat him either as a tenant at sufferance, or as a trespasser; and if he be either one or the other the statute does not apply. Though he be an overholding tenant, yet, unless the possession has been demanded of him, he is in no default, and you have no right to call upon him to give security. It is impossible to execute the law in that way. It is the default of the landlord not to have come to the tenant at the proper period, and demanded the possession. To say that it was the duty of the tenant to give up the possession, is not a fair representation of the case: a lessee may have two hundred under-tenants, and they may have actually cropped the lands; and to require them to give up the possession in this sudden manner, might be attended with the worst consequences. The act is to be enforced against a man that has been in default; the tenant has been in no default, the landlord in great default. He lies by during the whole spring, and then when summer arrives he endeavours to get into possession. In the case under the 4th Geo. 2. (Eng.) (4), there need not have been a notice under that statute before the determination of the tenancy." (5)

Judgment of
Chief Baron
O'Grady in
*Loveland d.
Roberts v.
Thrustout.*

**NOTICE SUB-
SCRIBED TO THE
DECLARATION.**

Doubtful whe-
ther a rule un-
der stat. 1 Geo.
4. c. 87. can be
granted upon
an unstamped
lease or agree-
ment.

A notice under stat. 1 Geo. 4. c. 87. s. 1. requiring the tenant, "according to the statute, to appear in court in Trinity Term next following," &c. is bad; it ought to require his appearance on the first day of the term. (6)

And it is doubtful whether a rule can be had under stat. 1 Geo. 4. c. 87., where the lease or agreement is unstamped at the time the motion is made, because the instrument cannot by law be used in evidence, so that there are no materials for granting the rule. (7)

Where a declaration in ejectment is served with two notices annexed,

(1) *Doe d. Pemberton v. Roe*, 7 B. & C. 2.

(2) *Doe d. Cardigan v. Roe*, 1 D. & R. 540.

(3) *Doe d. Bradford (Earl) v. Roe*, 5 B. & A. 770.

(4) *Cobb v. Stokes*, 8 East, 358.

(5) *Loveland d. Roberts v. Thrustout*, Exch. T. T. 1824, cit. 1 Hudson & Brooke (Irish), 354. n.

(6) *Doe d. Holder v. Rushworth*, 4 M. & W. 74. 6 Dowl. P. C. 712.

(7) *Ibid.*

one requiring the appearance of the defendant, and the other that he should enter into recognisances on his appearance, the latter may be treated as surplusage. (1)

The notice at the foot of the declaration, served in pursuance of stat. 1 Geo. 4. c. 87., must be signed by the landlord himself, and not by Richard Roe, in order to give the landlord that benefit of that statute. (2)

But such notice need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even if it be signed by a wrong name, the court will permit judgment against the casual ejector to be drawn up. (3)

A rule for judgment having been obtained against the casual ejector, the tenant in possession, or his landlord, either appears and enters into the consent rule to be made defendant instead of the casual ejector, and to confess lease, entry, and ouster, confesses the action or makes default.

By stat. 1 Geo. 4. c. 87. s. 1., "upon the appearance of the party at the day prescribed [in the notice to appear and find bail, &c.], or in case of non appearance or making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit as the case may be, and that possession has been lawfully demanded in manner therein mentioned, to move the court for a rule for such tenant or person to shew cause, within a time to be fixed by the court on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial; or if the action shall be brought in Wales, or in the counties palatine respectively, then of the session, assizes, or court day, as the case may be, at which the trial shall be had; and also why he should not enter into a recognisance, by himself and two sufficient sureties, in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the court upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings, and find such bail, with such conditions and in such manner as shall be specified in the said

EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.

Appearance,
confession, or
default of te-
nant or his
landlord.

BAIL.
Proceedings by
landlord against
tenant on stat.
1 Geo. 4. c. 87.
s. 1.

Affidavit of
service of de-
claration and
notice.

Production and
proof of execu-
tion of lease, or
agreement, &c.

Motion and
rule nisi to
enter into re-
cognisance and
give under-
taking.

Affidavit of
service of rule
nisi.

(1) Doe d. *Roberts v. Roe*, 5 Dowl. P. C. 508.

(2) *Anon.* 1 D. & R. 435. n., sed vide *Jack d. Spollen v. Thrustout*, 1 Hudson & Brooke (Irish), 354.

(3) *Goodtitle d. Norfolk (Duke) v. No-
title*, 5 B. & A. 849. 3 D. & R. 292. The
notice may be as follows:—

Mr. Joseph Styles [*the tenant*],

Take notice, that you are hereby re-
quired to appear in Her Majesty's court of
at Westminster, on the

first day of next term, then
and there to be made defendant in this action
of ejectment, and then and there to enter
into a recognisance by yourself and two suf-
ficient sureties, in such sum as to the said
court shall seem reasonable, conditioned to
pay the costs and damages which shall be
recovered in this action, if the court shall so
order.

Yours, &c.

John Nokes [*the landlord*].

**EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.**

Rule absolute
thereon.

Recognisances
before whom
and how taken.

Limitation of
actions thereon.

Security for
costs.

rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff."

By sect. 4. "all recognisances and securities entered into pursuant to the provisions of this act, may and shall be taken respectively in such manner and by and before such persons as are provided and authorised in respect of recognisances of bail, upon actions and suits depending in the court in which any such action of ejectment shall have been commenced; and that the officer of the same court with whom recognisances of bail are filed, shall file such recognisances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognisance or security, after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

In order to obtain the usual landlord's rule provided by stat. 1 Geo. 4. c. 87. s. 1., the execution of the lease may be proved by the affidavit of a person who is not the attesting witness. (1)

A rule to shew cause will be granted, why the tenant upon being made defendant instead of the casual ejector, beside entering into the common consent rule and giving the usual undertaking should not undertake, in case a verdict should pass for the plaintiff, to give him judgment to be entered up of the preceding term against the real defendant, and why he should not enter into a recognisance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff pursuant to the statute.

This rule, however, need not specify all the particulars required by the statute, as the court may mould the rule conformably to its requisites on shewing cause (2); and if no sufficient cause be shewn, they will, on making the rule absolute, order the tenant to give the additional undertaking required by the statute, and also that he enter into a recognisance by himself and two sufficient sureties, in a certain sum to be fixed by the court, conditioned to pay the costs and damages, &c.

A tenant under a lease for twenty-one years from the 25th of March, containing a proviso that either the landlord or tenant may in any year determine it by six months' notice ending on the 25th of March, cannot, within the twenty-one years, be called upon to give security for costs under stat. 1 Geo. 4. c. 87. s. 1. (3)

Under stat. 1 Geo. 4. c. 87. it is not necessary for the landlord to serve a notice in writing upon the tenant at or before the expiration of the term, to entitle him to the security from the tenant required by that act. (4)

(1) *Doe d. Gowland v. Roe*, 6 Dowl. P. C. 35.

(2) *Doe d. Phillips v. Roe*, 5 B. & A. 766. *Doe d. Gowland v. Roe*, 6 Dowl. P. C. 35.

(3) *Jack d. Devonshire (Duke of) v. Lynch*, 1 Jebb & Symes (Irish), 403.

(4) *Jack d. Spollen v. Thrustout*, 1 Hudson & Brooke (Irish), 354. *Loveland d. Roberts v. Thrustout*, contra Exch. ibid. n. 1. In *Irie (Lessee of) v. Power* (Exch. T. T. 1829, 1 Hayes (Irish), 49. n.) was an application under stat. 1 Geo. 4. c. 87. s. 1. against an overholding tenant, that he might be ordered to

A tenant who holds during a minority, cannot be required to give security under stat. 1 Geo. 4. c. 87. (1)

EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.

The time within which the undertaking is to be given and recognisance entered into, is to be fixed by the court at the time when the rule is granted. (2)

Putting in and perfecting bail are not under this statute, as in ordinary cases, an appearance of the tenant, but the tenant must also enter an appearance, and enter into the consent rule as in ordinary cases.

THE TRIAL.
APPEARANCE
AND PLEA.

If the defendant do not appear at the trial, and confess lease, entry, and ouster, the plaintiff will not be nonsuit as in ordinary cases, stat. 1 Geo. 4. c. 87. s. 2. having enacted that, "wherever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance to confess lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry, and ouster; and the judge before whom the cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for mesne profits which shall accrue from the verdict or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

Stat. 1 Geo. 4.
c. 87. s. 2.

But "in all cases wherein the landlord shall elect to proceed in ejectment under the provisions hereinbefore contained, and the tenant shall have found bail as ordered by the court, then, if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him with double costs." (3)

Sect. 6.
In what cases
double costs.

If the ejectment be brought upon the determination of a lease, the plaintiff must prove, first, the demise; secondly, its determination.

EVIDENCE.
Determination
of a lease.

give security by recognisance, by himself and two sureties, in such sum as should be named by the court, for the payment of the costs and damages to be recovered by the plaintiff. The court ordered that such security should be given within a fortnight, for 90*l.*, which was the amount of rent due on the gale day next previous to the time of bringing the ejectment.

In England bail is usually required for a sum sufficient to cover a year's value and 40*l.* for costs. Archb. by Chitt. 814.

In an Irish civil bill ejectment, the sureties in the recognisance, on appeal, must be bound in double the costs below. *Riordan (Resp.) Dwyer (Appel.)*, 1 Irish Circuit Cases, 21.

(1) *Hobson (Lessee of) v. Ejector*, 1 Hayes (Irish), 49.

(2) *Doe d. Anglesey (Marquess of) v. Brown*, 2 D. & R. 688.

(3) *Ibid.* s. 6.

**EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.**

If the demise has been by deed or other written instrument, it should be produced and proved in the usual way; and if it be in the defendant's possession, notice must be given to produce it. (1)

After notice to produce the original, which is not produced, the plaintiff may give a counterpart in evidence, or if there be none, a copy. (2)

If there has been no written demise, the plaintiff may prove a demise by parol: proof of payment of rent by the defendant is, *prima facie*, evidence of a tenancy from year to year. (3) It is usual for this purpose to give notice to the tenant to produce the receipts, but the fact of payment may be proved by other evidence. (4)

Payment of small sums on three different occasions, as rent in respect of land inclosed from a waste thirty-three years, was held to be conclusive evidence of permissive occupation. (5)

Actual enjoy-
ment of pre-
mises under
lease or agree-
ment.

Proof must be adduced, in the case of a tenancy at will, that the premises have been actually enjoyed under the lease or agreement under which the right of entry or possession is claimed, and that the interest of the tenant has expired, or been determined by regular notice to quit.

Demand of
possession in
writing.

It must likewise appear that a demand in writing of the possession has been made, and signed by the landlord or his agent, and personally served upon, or left at the dwelling-house or usual place of abode of the tenant, or person holding under him.

The confession of the defendant by entering into the common rule, is not evidence to shew such determination. (6)

TENANT AT
WILL.

One put into possession upon an agreement for the purchase of land, cannot be ousted of the possession before the lawful possession has been determined by demand or otherwise. (7) And so it is where a tenancy at will is created by means of a lease for four years without writing. (8)

STAY OF EXE-
CUTION AFTER
VERDICT BY
LANDLORD
AGAINST TE-
NANT ON STAT.
1 GEO. 4. C. 87.
2. 3.

In ejectment by landlord against tenant on stat. 1 Geo. 4. c. 87. s. 3, "in all cases in which such undertaking shall have been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the *fifth* day of the term then next following, or till the next session, assizes, or court day (as the case may be), which order the judge shall, in all other cases, make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within *four* days from the day of the trial he shall actually find, security by the recognisance of himself and two sufficient sureties in such reasonable sum as the judge shall direct, conditioned not to commit any waste or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may

Amount of
security.

(1) 2 Stark. Ev. 299.

(2) *Burleigh v. Stibbs*, 5 T. R. 465. *Roe d. West v. Davis*, 7 East, 363.

(3) *Doe d. Castleton v. Samuel*, 5 Esp. N. P. C. 173.

(4) 2 Stark. Ev. 299.

(5) *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413.

(6) *Right d. Lewis v. Beard*, 13 East, 210.

(7) *Ibid.* *Doe d. Newby v. Jackson*, 1 B. & C. 448.

(8) *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680.

happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be."

EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.

Where several crops were on the land at the time it was taken in execution under a writ of possession, on an ejectment against a tenant for holding over, the court refused a rule to oblige the lessors of the plaintiff to pay over the value of the crops to the defendant, after deducting the amount of the rent due, because, if granted, it would "offer an inducement to tenants to hold over property." (1)

IV. *Ejectment under Stat. 11 Geo. 4. & 1 Will. 4. c. 70.*

Stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 36. enacts, "that in all actions of ejectment hereafter to be brought in any of his Majesty's courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in ejectment entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried: provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his Majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the judge in his discretion to make such order in the said cause, as to him shall seem expedient."

EJECTMENT
UNDER STAT. 11
GEO. 4. & 1
WILL. 4. c. 70.
ss. 36 & 37.

Landlords to
recover posses-
sion of lands,
&c. after notice
of ejectment.

Proceedings
in ejectment
by landlord
against tenant,
when tenancy
expires, or
right of entry
accrues, in or
after Hilary or
Trinity Terms.

Service of de-
claration and
notice.

Proceedings
thereon, and
giving rules to
plead.

Judgment
against casual
ejector.

Notice of trial.

Application
by defendant
for time to
plead, &c.

And by sect. 37. "in making up the record of the proceedings on any such declaration in ejectment, it shall be lawful to entitle such declaration specially of the day next after the day of the demise therein, whether such day shall be in term or vacation, and no judgment thereupon shall be avoided or reversed by reason only of such special title."

Sect. 37.

Declaration to
be entitled spe-
cially.

Ejectment can only be maintained by landlords under the foregoing statute, and the tenancy must expire, or the right of entry accrue *in or after* Hilary or Trinity Terms. (2)

BY WHOM AC-
TION MAINTAIN-
ABLE.

(1) Doe d. *Upton v. Witherwick*, 3 Bing. 11. P. C. 304. Doe d. *Somerville v. Roe*, 4 M.
(2) Doe v. *Roe*, 2 C. & J. 123. 1 Dowl. & Sc. 747.

**EJECTMENT BY
LANDLORD
AGAINST TE-
NANT.**

**DECLARATION
AND NOTICE.**

The foregoing statute applies to country ejectments, but does not apply to those of Middlesex or London. (1)

The declaration must be entitled of the day next after the day of the demise laid in such declaration; but in other respects the declaration is the same as in ordinary cases.

The notice appended to the declaration is also the same as under ordinary circumstances, with the exception, that the defendant is required within *ten* days to appear and plead to it.

The service of the declaration has been previously discussed. (2)

**JUDGMENT
AGAINST CASUAL
EJECTOR.**

If the tenant do not appear and plead within ten days after the service of the declaration (one day inclusive and the other exclusive), the plaintiff will be entitled to judgment against the casual ejector. (3)

The affidavit should state when the tenancy expired, or right of entry accrued, and when the declaration was served.

**APPEARANCE
AND PLEA.**

The practice relating to the appearance and plea is the same as in ordinary cases.

**NOTICE OF
TRIAL.**

The plaintiff must give to the defendant six clear days' notice of trial (exclusive of the day it is given, and the commission day) before the commission day of the assizes.

Proof of such notice need not be given at the trial; and if the notice be irregular, the appearance of the defendant will operate as a waiver. (4)

**STAY OF PRO-
CEEDINGS.**

The court or a judge can order a stay of proceedings, and postpone the trial until the next assizes, upon an affidavit of merits.

**STATUTES FOR
RECOVERY OF
POSSESSION OF
PROPERTY BE-
FORE MAGIS-
TRATES.**

V. Statutes for Recovery of Possession of Property before Magistrates.

The stats. 11 Geo. 2. c. 19. s. 16., 57 Geo. 3. c. 52., and 1 & 2 Vict. c. 74., enable a landlord, where a tenant at rack rent, or who shall be in arrear one half year's rent, and who shall hold the lands under any demise or agreement, whether written or verbal, and has vacated the premises, to recover possession of his lands, tenements, &c. upon application to two or more justices of the peace; but as such proceedings have no direct relation to the law of Nisi Prius, a specific detail of the provisions of such statutes has been omitted.

**ACTION FOR
MESNE PRO-
FITS.**

29. ACTION FOR MESNE PROFITS.

I. Generally.

GENERALLY.

An action for the mesne profits is consequential to the recovery in ejectment. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; and in either shape it is equally his action. The tenant is concluded by the judgment, and cannot deny the title; therefore, he cannot controvert the plaintiff's possession, be-

(1) Doe d. *Norris v. Roe*, 1 Dowl. P. C. 547.

(2) *Antè*, 1426—1437. 1478—1482.

(3) *Vide antè*, 1441, 1442. JUDGMENT AGAINST CASUAL EJECTOR.

(4) Doe d. *Antrobus v. Jepson*, 3 B. & Ad. 402. Doe d. *Rankin v. Brindley*, 4 *ibid.* 84.

cause his possession is part of his title: for the plaintiff, to entitle himself to recover in ejectment, must shew a possessory right not barred by the Statute of Limitations. This judgment, like all others, only concludes the parties *quoad* its subject-matter; therefore, beyond the time laid in the demise, it proves nothing; because, previous to that period, the plaintiff has alleged no title.

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As the judgment neither proves the length of time the tenant has occupied, nor the value, it must be proved, how long the defendant enjoyed the premises, and what their value was.

The action for mesne profits can however be waved; and a landlord can maintain debt under stat. 4 Geo. 2. c. 28. against the tenant for double the yearly value of the premises during the time he holds over; because the double value is given by way of penalty, and not as rent (1); and in ejectment under stat. 1 Geo 4. c. 87. s. 2. (2), the landlord can recover the mesne profits of the premises, from the expiration of the tenant's interest down to the time of the verdict, or some other prior day, to be specially mentioned therein; but trespass must be resorted to for the subsequent profits.

Landlord may wave his action for mesne profits and maintain debt.

Mesne profits where recoverable in an action of ejectment, under stat. 1 Geo. 4. c. 87. s. 2.

II. *By whom Action can and cannot be maintained.*

The action for mesne profits may be brought *by* the lessor of the plaintiff in ejectment, either in his own name, or in the name of the nominal lessee (John Doe). It is however sometimes more advantageous to bring the action in the name of the lessor of the plaintiff, who is the party really concerned, as he may then recover damages for the rents and profits received by the defendant, anterior to the time of the demise laid in the declaration in ejectment, which cannot be done at the suit of the nominal plaintiff. (3)

**BY WHOM AC-
TION CAN AND
CANNOT BE
MAINTAINED.**

The action may be brought in the name of the nominal lessee, where the judgment in ejectment is by default, or where it is upon a verdict; for there is no distinction between the judgment by default and upon verdict in this respect; in the one, the right of the plaintiff is tried and determined against the defendant, and in the other it is confessed. (4)

Nominal lessee.

To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an *habere*, if the plaintiff have been let into possession by the defendant. (5)

Not requisite to execute an *habere*.

A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion. (6) A joint action for mesne profits may be supported by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained only a separate demise by each. (7) A mortgagee can recover in ejectment, without a previous notice to quit, against a tenant who claims

Tenant in common.

Action may be supported by several lessees of the plaintiff jointly, although the de-

(1) *Antè*, 1478—1482.

(2) *Antè*, 1483—1489.

(3) Bull. N. P. 87. *Chatfield v. Parker*, 8 B. & C. 551. n.

(4) *Aslin v. Parkin*, 2 Burr. 665. 2 Ld. Ken. 376. *Gulliver v. Drinkwater*, 2 T. R. 261. *Doe d. v. Davis*, 1 Esp. N. P. C. 358.

(5) *Calvert v. Horsfall*, 4 Esp. N. P. C. 167.

(6) *Goodtitle v. Tombs*, 3 Wils. 118. *Cutting v. Derby*, 2 W. Black. 1077.

(7) *Chamier v. Clingo*, 5 M. & S. 64. S. C. nom. *Chamier v. Llingon*, 2 Chitt. 410.

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MESNE PRO-
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Declaration in
ejectment con-
tained only a
separate demise
by each.

Person against
whom the
judgment in
ejectment has
been given,
ought in gene-
ral to be made
the defendant.

In general any
person found in
possession after
a recovery in
ejectment, is
liable to the
action.

Under-tenant.

Party having
a cross claim
against the
plaintiff.

Stat. 3 & 4
Will. 4. c. 42.
s. 2.
Executors.

under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. (1)

Where the plaintiff is a nominal party, the court will not permit him to release the action: in fact, his release has been set aside as a contempt of court, and therefore cannot be pleaded. (2)

An action for mesne profits may be brought, pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment, but the court will stay execution, until the writ of error be determined. (3)

The person against whom the judgment in ejectment has been given, ought in general to be made the defendant in this action; and a recovery in ejectment against the wife, cannot be admitted as evidence in an action against the husband and wife for mesne profits. (4) A tenant, whose under-tenant holds over, after the expiration of his term, is liable for *mesne profits* if he has expressly recognised the acts of his under-tenant, and has received rent from him, for the period possession was improperly detained. (5)

Any person found in possession after a recovery in ejectment, is in general liable to the action; and it is no defence, that he was on the premises merely as an agent, and under the license of the defendant in ejectment; for no man can license another to do an illegal act. The defendant, however, in such case, will only be liable for the mesne profits, for the time during which he actually retained possession. (6)

It is doubtful, whether the action can be maintained against a tenant, whose under-tenant retains the possession after the term; for the action should be brought against the person in actual possession and trespassing. (7)

Where an action of trespass for mesne profits is brought against a party, who has a cross claim against the plaintiff at law, for money expended on the land, the court will grant an injunction to restrain the proceedings at law, there being no right of set-off in such action. (8)

By stat. 3 & 4 Will. 4. c. 42. s. 2. this action can be maintained by or against personal representatives for the profits accruing during the lifetime of the testator or intestate, and received by him.

**THE DECLARA-
TION AND
PLEADINGS.
VENUE.**

Declaration
should state the
time when the
defendant
ejected the
plaintiff.

III. The Declaration and Pleadings.

An action for mesne profits being local in its nature, must be brought in the county where the lands are situated.

The *declaration* should state the time when the defendant ejected the plaintiff, and the length of time he was kept out of possession; and a declaration, which does not contain these averments is bad on special demurrer; but the defect is aided after judgment by the statute 4 Anne,

(1) *Keech d. Wurne v. Hall*, Doug. 21.

(2) *Woodfall by Harrison*, 674.

(3) *Harris v. Allen*, Cas. Prac. C. P. 46. S.C. post, 1497. *Donford v. Ellys*, 12 Mod. 138.

(4) *Denn v. White*, 7 T. R. 112.

(5) *Roe v. Wiggs*, 2 N. R. 330. *Burne* 427.

v. Richardson, 4 Taunt. 720., *sed vide per* Mansfield C. J. *ibid*.

(6) *Girdlestone v. Porter*, *Woodfall by* Harrison, 673. *n.* Adams on Ejectment, 384.

(7) *Burne v. Richardson*, 4 Taunt. 720.

(8) *Cawdor (Earl) v. Lewis*, 1 Y. & C.

c. 16. (1) The land or other premises from which the profits arose, should also be described in the declaration. It is usual to adopt the description of the premises, which was given in the declaration in ejectment.

ACTION FOR
MESNE PRO-
FITS.

It is then averred, that the defendant received mesne profits, shewing their value during the time the plaintiff was kept out of possession. If any particular waste or injury to the premises was committed by the defendant, the same should be stated specially; and, as a part of the damages, the costs of the action of ejectment may be claimed.

Averment of
damages.

Stat. 3 & 4 Will. 4. c. 42. s. 21. seems to enable the defendant, by leave of the court or a judge, to pay a sum to cover damages into court; but before the enactment of that statute, such a payment could not have been made.

Stat. 3 & 4
Will. 4. c. 42.
s. 21.

The general issue is "not guilty;" and the rule is, that the party against whom the recovery in ejectment was had, cannot, in the action for mesne profits, dispute the right of the lessor of the plaintiff to recover mesne profits after the day of demise laid in the declaration. (2)

PLEADINGS.
PLEA OF NOT
GUILTY.

If there be two counts, and the defendant plead to the first "not guilty," and on the last suffer judgment by default, the defendant will be entitled to a verdict on the first count, if the plaintiff cannot prove that the defendant had committed another and different act of trespass from that confessed by the defendant. (3)

The defendant may protect himself by the Statute of Limitations from the mesne profits accruing more than six years before the action is brought. (4) But bankruptcy is no bar to this action, because the damages are uncertain, and could not be proved under a fiat in bankruptcy. (5) Nor does the discharge of the defendant under an insolvent act protect him from this action. (6)

Statute of
Limitations
may be pleaded.
Bankruptcy or
discharge under
insolvent act no
bar.

In trespass for mesne profits arising between 10th July, 1826, and the commencement of the suit, it was pleaded, 1. that plaintiff was not possessed of the premises, *modo et forma*; 2. that the premises were the soil and freehold of the defendant during all the time, &c.: to which it was replied by way of estoppel to each plea, that, after 10th July, 1826, the plaintiff commenced an action of ejectment for recovery of the same premises, upon a demise laid 10th July, 1826, for fourteen years, and a demise laid 26th December, 1831, for seven years, and an ouster on the 27th December, 1881, and had judgment to recover his said terms; concluding with a prayer of judgment, if the defendant ought, during the said terms, to be admitted, &c.:—It was held on general demurrer, that the replication was good; and that a rejoinder, stating, that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined — was bad. (7)

Defective re-
joinder.

The plea of *liberum tenementum* admits a sufficient possession of the

Libera tenementum.

(1) *Higgins v. Highfield*, 13 East, 407.

(2) *Chatfield v. Parker*, 8 B. & C. 551.

(3) *Compere v. Hicks*, 7 T. R. 727.

(4) Bull. N. P. 87. (b.)

(5) *Goodtitle v. North*, Doug. 584. But if the demand be such, that the amount can

be liquidated and ascertained without the intervention of a jury, it is a debt that may be proved. Ibid. n. 1.

(6) *Lloyd v. Peell*, 3 B. & A. 407.

(7) *Doe v. Wright*, 10 A. & E. 763.

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plaintiff to support an action against a wrong-doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant. (1)

EVIDENCE.

IV. Evidence.

Where plaintiff seeks to recover only the profits accrued subsequently to the demise in his declaration.

When the plaintiff seeks to recover only such profits as have accrued from the time of the demise in his declaration, no other evidence of his title is required, than examined copies of the judgment in ejectment, of the writ of possession, and of the sheriff's return thereon (2); and if the plaintiff have been let into possession of the premises by the defendant, an examined copy of the judgment in ejectment only will be sufficient. (3) It has indeed been doubted, whether evidence of the writ of possession and sheriff's return is ever necessary, except upon judgment by default against the casual ejector; but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant. (4)

Length of possession.

The plaintiff must prove the length of time the defendant (or his tenant if he be the landlord) has been in possession, the value of the mesne profits, and likewise the costs of the ejectment, if they be included in the declaration as damages.

Judgment against casual ejector for want of an appearance.

When the judgment in ejectment is against the casual ejector for want of an appearance, and the action for mesne profits is brought against the landlord, that the defendant was landlord when the ejectment was brought (which may be done by shewing him to have received the rents and profits accruing subsequently to the day of the demise), and that he received due notice of the service of the declaration in ejectment upon the tenant in possession; but if the landlord has subsequently promised to pay the rent and costs of the ejectment, this proof will be dispensed with. (5)

Injury done to the premises.

The plaintiff will also be entitled to give evidence of any injury done to the premises in consequence of the misconduct of the defendant, provided such fact be specially alleged in the declaration.

The judgment in the preceding ejectment is evidence against a defendant, who came into possession under the defendant in the ejectment. (6)

Inadmissible evidence of waiver.

Upon a plea of the general issue, evidence is not admissible, that the plaintiff had accepted the rent of the premises for the time in dispute, and had agreed to waive the costs of the ejectment. (7)

Ejectment against wife.

A recovery in ejectment against the wife cannot be given in evidence in an action against the husband and wife for mesne profits. (8)

Recovery in ejectment against a former tenant in possession.

"A recovery in ejectment against a former tenant in possession, is not producible in evidence against a person, who is afterwards found in possession, without proving that he came in under the defendant in ejectment, so as to make him a privy to the judgment in ejectment;" "the general rule of law is, that judgments bind only parties and privies, but, as to strangers, are

(1) *Doe v. Wright*, 10 A. & E. 763.

(2) *Astlin v. Parkin*, Bull. N. P. 87. (a.)

(3) *Calvert v. Horsfall*, 4 Esp. N. P. C. 167.

(4) *Thorp v. Fry*, Bull. N. P. 87. (a.) *Astlin v. Parkin*, Burr. 665.

(5) *Hunter v. Britts*, 3 Camp. 455.

Adams on Ejectment, 390.

(6) *Doe v. Whitcomb*, 8 Bing. 46. 1 M. & Sc. 107.

(7) *Doe d. Hill v. Lee*, 4 Taunt. 459.

(8) *Denn v. White*, 7 T. R. 112.

considered as *res inter alios acta*, and are not producible in evidence against them." (1)

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FITS.

A judgment in ejectment is in no case conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary form), that the premises in the declaration mentioned were not the premises of the plaintiff, it was held, that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment. (2)

Evidence of
title.

To a declaration in trespass by John Doe as plaintiff, the defendant pleaded, that the premises were not the premises of the plaintiff: and it was determined, that, under this plea, the defendant was at liberty to prove title in himself, the judgment in ejectment not being conclusive against the defendant, unless shewn upon the record. (3)

V. *Damages and Costs.*

The judgment in ejectment is conclusive of the plaintiff's right to the premises from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intend to go for mesne profits antecedent to that time, he must give distinct evidence of the defendant's possession. (4)

DAMAGES AND
COSTS.

In estimating the damages, the jury are not confined to the mere *rent* or annual value of the premises, but may give such extra damages as they may think the circumstances of the case demand (5); and the costs of the action of ejectment are recoverable as part of the damages, not only where judgment by default was obtained in the action of ejectment, but also where the defendant appeared and pleaded in that action; nor is it material in these cases, that such costs have not been taxed. (6)

Principles un-
der which the
damages are
estimated.

The jury, however, are to give damages only for the time the defendant is proved to have been in actual possession (7), and since the plaintiff's title accrued; but the plaintiff is not restricted to the period stated in his demise in the declaration in ejectment, but may also recover the profits which accrued previously, if entitled to the premises at the time. (8) Where an actual entry, however, has been made to avoid a fine, the jury can only give damages for the profits accruing since the time of entry. (9)

Where there is judgment by default in an ejectment, the plaintiff may, in the action for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. (10)

(1) *Per* Tindal C. J. in *Doe v. Harvey*, 8 Bing. 241, 242.

(2) *Ibid.* *Doe v. Huddart* (*Sir Joseph*), 2 C. M. & R. 316. 4 Dowl. P. C. 437. *Doe d. Strode v. Seaton*, 2 C. M. & R. 732.

(3) *Ibid.* Bull. N. P. 232. 4 Bac. Abr. Evidence (F.), 290.

(4) *Dodwell v. Gibbs*, 2 C. & P. 615.

(5) *Goodtitle v. Tombs*, 3 Wils. 121.

(6) *Symonds v. Page*, 1 C. & J. 29.

(7) *Stanynought v. Cosins*, Barnes, 456.

(8) Bull. N. P. 87.

(9) Archb. by Chitt. 821.

(10) *Doe v. Huddart* (*Sir Joseph*), 2 C. M. & R. 316. 4 Dowl. P. C. 437.

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Where A. took possession of premises on the 2d of June, and a sum of money became due for ground rent on the 24th for the quarter ending on that day, which A. paid : — It was held, in an action for mesne profits against A., that he was entitled to deduct the money so paid from the damages : “because the defendant only paid what the plaintiff must have paid, and if so, the plaintiff is not hurt.” (1)

After ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the inn, and destroying the custom, unless such damage be specially stated in the declaration. (2)

In trespass for mesne profits, the damages found having included the arrears of rent up to the day of the demise in ejectment for non payment of rent, the court held this to be erroneous, and ordered the amount of damages to be reduced accordingly. (3)

Recovery of
costs incurred
in a court of
error.

The plaintiff may also recover as *damages*, the *costs* incurred by him in a court of error in reversing a judgment in ejectment erroneously obtained by the defendant, although directly such costs may not be recoverable. (4)

The costs of the ejectment are recoverable in all cases, unless they are extra costs (5), notwithstanding, they have not been taxed (6) ; — but in an action for mesne profits, the plaintiff is entitled to receive only the taxed costs of the ejectment, and not the extra costs. (7)

Where the
plaintiff is en-
titled to no
more costs than
damages.

Where an ejectment is defended, and the plaintiff obtains a verdict, he cannot, on the execution of a writ of inquiry to assess damages in an action for mesne profits, give in evidence the extra costs beyond his taxed costs in order to increase the damages ; but, after judgment by default in ejectment, the costs of such judgment may be recovered, as well as the mesne profits. (8)

Stat. 16 & 17
Car. 2. c. 8.

If in ejectment there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognisance to pay costs in case of nonsuit, &c. pursuant to stat. 16 & 17 Car. 2. c. 8., and he be nonsuited, &c. the defendant in error need not bring a *scire facias* or debt on the recognisance, but may sue out an *elegit* or writ of inquiry to recover the mesne profits since the first judgment in ejectment. (9)

Stat. 3 & 4
Vict. c. 24.

By stat. 3 & 4 Vict. c. 24. (10), if in any action of trespass, the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant in respect of such verdict, any costs whatever.

Amendment of
certificate.

But the judge can certify for costs, where it appears from the declaration, that the action was brought to try a right ; and if the certificate be informal it may be amended, at any time before a rule absolute be granted to set it aside. (11)

(1) *Per* Bayley B. in *Doe v. Hare*, 2 C. & M. 145. 4 Tyrw. 29.

(2) *Dunn v. Large*, 3 Doug. 335.

(3) *Uniacke v. Howard*, Batty (Irish), 436.

(4) *Nowell v. Roake*, 7 B. & C. 404. 1 M. & R. 170.

(5) *Doe v. Davis*, 1 Esp. N. P. C. 358. *Brooke v. Brydges*, 7 Moore, 471. *Doe v. Hare*, 2 Dowl. P. C. 245. 247.

(6) *Symonds v. Page*, 1 C. & J. 29. *Doe v. Huddart* (Sir Joseph), 2 C. M. & R. 316.

(7) *Doe v. Hare*, 2 Dowl. P. C. 245. 2 C. & M. 145. 4 Tyrw. 29.

(8) *Brooke v. Brydges*, 7 Moore, 471.

(9) *Short v. Heath*, 2 Crompt. Prac. 225.

(10) *Ante*, 228., *vide etiam*, stat. 3 & 4 Vict. c. 24. respecting verdicts anterior to stat. 3 & 4 Vict. c. 24.

(11) *Shuttleworth v. Cocker*, C. B. M. T. 1840, 10 Law Journal, N. S.

If the action be brought in the name of the nominal plaintiff, the court upon application will stay the proceedings until security be given for costs. (1)

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VI. Bail — Payment of Money into Court — Judgment and Stay of Execution.

The defendant cannot be holden to bail, as of course, but an application must be made for a judge's order for that purpose, which, however, is seldom denied. (2)

**BAIL — PAY-
MENT OF MO-
NEY INTO
COURT — JUDG-
MENT AND STAY
OF EXECUTION.**

The defendant can obtain a rule or order under stat. 3 & 4 Will. 4. c. 42. s. 21. to pay money into court. (3)

Holding de-
fendant to bail.

If the action be brought pending a writ of error on the judgment in ejectment, the plaintiff may proceed to judgment, but the court will stay execution until the writ of error be determined. (4)

Payment of
money into
court.

Judgment and
stay of execu-
tion.

(1) Bull. N. P. 89. *Pike v. Corbin*, Sayer, 78.
(2) Archb. by Chitt. 820.

(3) *Ante*, 1493.
(4) *Harris v. Allen*, Cas. Prac. C. P. 46.

EVIDENCE.

1. GENERALLY, pp. 1505—1510.

Certainty defined — Demonstrative or deductive certainty — Difference between demonstration and certainty — OBJECT OF EVIDENCE — BURDEN OF PROOF LIES ON THE PARTY ASSERTING THE AFFIRMATIVE — EVIDENCE RESTRICTED TO THE ISSUE — SUBSTANCE OF THE ISSUE MUST BE PROVED — GENERAL PRINCIPLES APPLICABLE TO THE LAW OF EVIDENCE, AS LAID DOWN BY MR. JUSTICE BULLER.

2. PRIMARY EVIDENCE, pp. 1510—1517.

The highest evidence of which the nature of the thing is capable, must be produced — Omitting to supply all the proofs capable of being produced — Judicial proceedings — Where several distinct sources of information exist — SUBSTITUTION OF ORAL EVIDENCE FOR A WRITTEN INSTRUMENT — Judgment of Lord Tenterden in Vincent v. Cole — Official memorandum — Admission by a party does not supersede direct proof of matter of record — Where the issue is the occupation of land, or the terms of a tenancy, parol evidence admissible — Fact of marriage — If defendant rely upon a written instrument it must be produced — Written instrument collateral to the question in issue — SUBSTITUTION OF WRITTEN TESTIMONY — Private memorandum — WRITTEN DOCUMENTS WHICH CANNOT BE PRODUCED IN EVIDENCE FROM DEFECT OF STAMP — PRINCIPLE UPON WHICH PRIMARY EVIDENCE IS NOT ALWAYS REQUIRED TO PROVE RECORDS — Public books — Registers, &c. — Appointments of public officers — Voluminous facts; one unvaried mode of dealing; notices of the dishonour of bills; notices to quit; and bills of costs — MATTERS JUDICIALLY NOTICED — ORIGINAL EVIDENCE NOT AVAILABLE — Inscriptions on walls, &c. — Missing documents — Inscriptions on flags and banners — Resolutions read at a public meeting.

3. SECONDARY EVIDENCE, pp. 1517—1551.

I. GENERALLY, pp. 1517—1520.

Admissible where primary evidence cannot be acquired — Degrees of secondary evidence — ATTESTED INSTRUMENT — Where secondary evidence of an instrument not required to be proved by an examined copy — Judgment of Lord Ellenborough in Pritt v. Fairclough — ANCIENT WRITINGS — Judgment of Lord Redesdale in Bullen v. Michel — Enrolment of a bargain and sale — Counterparts of leases — Drafts of deeds — Enrolment of lease under stat. 1 & 2 Geo. 4. c. 52. s. 8. — Registry of a deed — Memorial of a conveyance — Probate of will.

II. DEEDS LOST OR DESTROYED, pp. 1520—1524.

Evidence may be given of the contents of a lost deed — Best evidence of the loss ought to be given — Proper custody for expired lease — Order of removal — Lost bonds — Information and warrant — Not requisite to establish a sufficient search to negative every possibility of an instrument being in esse — Judgment of Lord Ellenborough in Rex v. Morton (Inhab. of) — If it be the duty of any person to deposit an instrument in any particular place, and it be not found there, the presumption is, that it is destroyed — USELESS PAPERS — Recital of a deed in another deed, evidence of the recited deed — Memorandum book — INSUFFICIENT EVIDENCE OF LOSS — PROOF OF STAMP.

III. NOTICE TO PRODUCE ORIGINAL INSTRUMENTS, pp. 1524—1532.

WHEN REQUISITE — WHEN NOT REQUISITE — FORM OF NOTICE — SERVICE ON WHOM — TIME OF SERVICE — EFFECT OF PRODUCTION AND NON PRODUCTION.

IV. VERBAL TESTIMONY TO VARY OR DISCHARGE WRITTEN INSTRUMENTS, pp. 1532—1537.

Generally — Parol evidence always admissible to shew, that a written instrument never had legal existence — Deeds for the performance of that, which the common or statute law has forbidden — Non enrolment of an annuity — Judgment of Mr. Justice Patteson in Doe d. Chandler v. Ford — WHERE MISTAKES EXIST — Inaccurate depositions can be explained by parol evidence — Judgment of Mr. Justice Crampton in Curtin's case — WHERE WRITING APPEARS INCOMPLETE — SUPPLEMENTARY MATTER — Judgment of Lord Ellenborough in Jeffery v. Walton — WRITTEN INSTRUMENTS CANNOT BE ADDED TO, BY WHAT HAS VERBALLY OCCURRED

BETWEEN THE PARTIES—*Landlord and tenant*—*Auctioneer*—*Judgment of Lord Ellenborough in Powell v. Edmunds*—FRAUDULENT INSTRUMENTS—PROOF OF ANOTHER CONSIDERATION—*Deed of bargain and sale*—*Landlord and tenant*—*Seaman's wages*—*Sale of goods*—*Bills or notes*—TIME OF DELIVERY OF DEED.

V. LATENT AMBIGUITY, pp. 1538—1545.

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13. POSTPONEMENT OF TRIAL, pp. 1813—1816.

14. NONSUIT, pp. 1816, 1817.

15. THE VERDICT, pp. 1817—1819.

16. NEW TRIAL, pp. 1819—1822.

17. SPEEDY JUDGMENT AND EXECUTION, pp. 1822—1824.

1. GENERALLY.

Questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity and the good sense in which they are founded.

In trials of right it is requisite to range all matters in the scale of proof or verisimilitude, where direct proof cannot be had, according to the measure of probability, which the subject to be decided requires or admits by the rules of law; and then, as to the evidence of the fact, to allow each particular its absolute and relative force, so, that the weight shall fall where the cause ought to preponderate, and thereby to make the most exact discernment of right.

To understand legal certainty, and even to come to the true knowledge of the nature of probability itself, it is necessary to ascertain what certainty is, and whence it arises.

GENERALLY.

CERTAINTY.
DEFINED.INTUITIVE
KNOWLEDGE.DEMONSTRATIVE OR DE-
DUCTIVE CER-
TAINTY.DIFFERENCE
BETWEEN DE-
MONSTRATION
AND PROBABILITY.

Certainty is a clear and distinct perception; and all clear and distinct perceptions depend upon a man's own proper senses. Thus, this in the first place is certain, and that what we cannot doubt of, if we would, that one perception or idea is not another; that what belongs to one man does not belong to another; and when perceptions are thus distinguished upon the first view, it is called self-evidence, or intuitive knowledge. (1)

There are some other things whose agreement or difference is not known on the view; and then we compare them by the means of some third matter, by which the measure of their agreement, disagreement, or relation is ascertained. Thus, if the question be, whether certain land be the land of J. S. or J. N., and a record be produced, whereby the land appears to be transferred from J. S. to J. N.; now, when we show any such third perception, that does necessarily infer the relation in question, this is called knowledge by demonstration. (2) The way of knowledge by necessary inference, is certainly the highest and clearest that man is capable of in his way of reasoning, and therefore always to be sought when it may be had.

Demonstration is always conversant about permanent things, which being constantly obvious to our senses, do afford to them a very clear and distinct comparison; but transient things, that cannot always occur to our senses, are more obscure; because they have no constant being, but must be retrieved by memory and recollection.

Most of the business of civil life subsists on actions of men that are transient things, and therefore oftentimes are not capable of strict demonstration, which is founded on the view of our senses; and therefore the rights of men must be determined by probability.

As all demonstration is founded on the view of a man's own proper senses by a gradation of clear and distinct perceptions, so all probability is founded upon views "partially, or in some degree," obscure and indistinct, or upon report from the sight of others. Thus, when we cannot see or hear any thing ourselves, and yet are obliged to make a judgment of it, we must see and hear by report from others, which is one step farther from demonstration, which is founded upon the view of our own senses; and yet there is that faith and credit to be given to the honesty and integrity of credible and disinterested witnesses attesting any fact, under the solemnities and obligations of religion, and the dangers and perils of perjury, that the mind equally acquiesces therein as on a knowledge by demonstration; for it cannot have any more reason to be doubted, than if we ourselves had heard and seen it (3): and this is the "basis of the reliance to be placed

(1) Locke's Essay, b. iv. c. 2.

(2) This can only be figuratively applied to questions of jurisprudence, which admit of no higher proofs than those of the third order, or very high and convincing probability, at the most; yet there are points which, being not legally controvertible, are forensically demonstrable. (*Vide* Doderidge, E. L. 196, 197.) Thus, no averment being receivable against a record, evidence by record is the highest evidence, and therefore analogically demonstrative.

(3) The principles of our confidence in testimony are such, as may well support the high

persuasion it is capable of conveying: for truth itself is so congenial to the mind, that even a bad man will not violate the natural attachment to it, from an abstract preference to falsehood; second, in legal cases it is not only speculative, but practical truth must be infringed; and third, it is not only the injury to a fellow man, but generally the hazard of detection which is indefinitely great, and the consequent immediate disgrace and temporal evils superadded to the influence of religion, and all the awful anticipations of futurity.

in decisions upon solemn trial, and of the satisfactory result of legal evidence." (1)

GENERALLY.

The object of evidence is to ascertain and settle the point in issue between the litigant parties; and, in doing so, there are three rules:—

OBJECT OF EVIDENCE.

1. That the burden of proof lies on the party asserting the affirmative.

THE BURDEN OF PROOF LIES ON THE PARTY ASSERTING THE AFFIRMATIVE.

In all courts of justice the affirmative ought to be proved, because it is sufficient barely to deny what is affirmed, until the contrary be proved; for words are but the expression of facts, and therefore, where nothing is said to be done, nothing can be proved; and this is a rule, both in common and civil law. The civil law says, *ei incumbit probatio, qui dicit, non qui negat*—the proof lies on him who makes the allegation, for it is against the nature of things to prove a negative.

But in a case where the affirmative is *prima facie* proved, the other side may contest with opposite proofs; and this is not properly the proof of a negative, but the proof of a proposition totally inconsistent with what is affirmed.

And therefore, when the general issue is in the negative, the plaintiff must always begin with his proof, because the defendant cannot prove the negative, and the charge beginning by the plaintiff, he must take it out of his evidence: as if the defendant be charged with a trespass, he need only make a general denial of the fact; and, if evidence be given, which uncontradicted, will prove the fact, he can only prove a proposition inconsistent with the charge, as, that he was at another place at the time when the fact was supposed to be done, or that the ground was his own, where he had a right to be, or the like. (2)

But where the law "implies an affirmative, contained in the issue, then the opposite party 'may' be put into the proof of it by a negative: as in the issue *ne unques accouple en loyal matrimonie*, the law will suppose the affirmative, that the 'marriage was lawful; at the same time, the plaintiff having averred a general illegality, the defendant, from the necessity of the case, is put to shew on what marriage, under what circumstances and qualifications he relies. It is therefore, in truth, the defendant must begin, 'by offering evidence to support the legality of the marriage.'"

Where the law implies an affirmative contained in the issue.

So likewise in a suit against a justice of peace, for exercising that office, *not* being qualified according to the statute, it lies on the defendant to prove his *qualification*. (3)

In an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of exchequer, the court put the plaintiff to prove, that he did not deliver them; for a person shall be presumed duly to execute his office till the contrary appears. And this might be proved by positive facts, such as refusal, their remaining in his possession, and the like. (4) So, also, where in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had not read the Thirty-nine Articles:—It was held, that the proof of the issue lay on the defendant. (5)

The fact is, that, in legal questions, the general negative term is convert-

(1) Gilb. Ev. 3. Locke's Essay, b. iv. c. 15. s. 2. Watts' Logic, c. ii. s. 8. p. 2. Hartley's Theory of the Human Mind, ed. by Priestley, c. iii. s. 2. prop. 38—40. (2) Vide *Godefroy v. Jay*, 7 Bing. 413. *Ross v. Hunter*, 4 T. R. 33. *Rutherford*, 3 B. & B. 302. Roscoe's Ev. 71. (3) Stat. 18 Geo. 2. c. 20. (4) Bull. N. P. 298. (a.) (5) *Monke v. Butler*, 1 Rol. 83. *Ord v. Fenwick*, 3 East, 109.

GENERALLY.

ible, often by various distinct substitutions of litigated fact, into a positive one. (1) In such instances, therefore, where it suffices for the plaintiff generally to deny the existence of any legal qualification, under which the defendant might justify, it is incumbent on the defendant to prove, the particular circumstances, which contradict the negative. And this is not proving a negative, which in a direct sense is impossible, but it is proving an affirmative repugnant to the general negation.

As in the case just intimated, the plaintiff charges that the defendant hath acted as a justice of the peace, not having qualified pursuant to the statute. The defendant proves his property, and his compliance with the requisitions of the statute. The nature of the question puts the proof on the defendant. If he fail in that proof, then the general negative of qualification, comprised in the plaintiff's charge, is converted into an affirmative, that the defendant, having an estate amounting in the whole to less value than the qualification by law required, did exercise the office of a justice of the peace; or that the defendant having neglected to take and subscribe the oath of qualification, hath acted as a justice; or that his qualification, if any, consisteth in lands which he hath omitted to specify in the oath prescribed, or in the notice directed in default thereof, to be given in writing before the trial. Now these positive requisites, being acts to be performed by the defendant, it is for him to prove, that he hath performed them. (2)

So where, on a conviction for selling ale without a license, the only evidence given was, that the party sold ale, and no proof was offered of his selling it without a license; the party being convicted, it was held, that the conviction was right, for that the informer was not bound to sustain by evidence the negative averment; and it was said by Chief Justice Abbott that the party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case be taken the other way, the informer is put to considerable inconvenience. (3)

EVIDENCE RESTRICTED TO THE ISSUE.

2. That evidence is restricted to the issue.

Evidence is restricted to the issue between the parties, and immaterial, collateral, superfluous, or irrelevant matters are excluded: thus, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover.

SUBSTANCE OF ISSUE MUST BE PROVED.

3. That the substance of the issue must be proved; i. e. the material facts in the declaration, which are put in issue, must be supported by evidence.

The nature and extent of the proof depend upon the mode in which the alleged facts are introduced; allegations, which are "mere matters of inducement, do not require such strict proof as those allegations which are precisely put in issue between the parties." (4) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the

(1) Crousaz's Art of Thinking, c. 4. s. 2.

(2) Vide etiam *Williams v. E. I. Comp.* 3 East, 193. *Marsh v. Horne*, 5 B. & C. 327. *Rex v. Hawkins*, 10 East, 216.

(3) *Rex v. Harrison*, Paley on Convictions, 45. 2d ed. n. cit. Roscoe's Ev. 72, 73.

(4) Per Chambre J. in *Smith v. Taylor*, 1 N. R. 210.

subject-matter to which it is applied, and to the person against whom it is used.

GENERALLY.

Mr. Justice Buller states, that there are nine general principles applicable to the laws of evidence, viz. —

GENERAL PRINCIPLES APPLICABLE TO THE LAW OF EVIDENCE AS LAID DOWN BY MR. JUSTICE BULLER.

1. That you must give the best evidence that the nature of the thing is capable of; that is, no such evidence shall be brought which, *ex natura rei*, supposes still a greater evidence behind in the parties' possession or power; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it was produced; for if the other greater evidence did not make against the party, why did he not produce it to the court:—as if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence: but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence, the presumption of greater evidence behind in the party's possession being overturned by positive proof. (1)

Best evidence that the nature of the thing is capable of, must be given.

2. No person interested in the question can be a witness. (2)

No. interested person can be a witness.

3. Hearsay is no evidence; for no evidence is to be admitted, but what is upon oath, how high soever the rank or pure the morals of the witness may be; and if the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice. Besides, if the witness be living, what he has been heard to say, is not the best evidence. (3)

Hearsay is no evidence.

But though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. (4)

4. In all cases, where a general character or behaviour is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally. (5)

Evidence of particular facts may be given, where general character or behaviour is in issue.

5. “*Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.*”

Lord Bacon, in his reading upon this maxim, distinguishes ambiguity into *patens* and *latens*, and saith that *latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed, that breeds the ambiguity: but *ambiguitas patens*, i.e. that which appears to be ambiguous upon the deed or instrument, is never holpen by averment; for that were in effect to make that pass without deed, which the law appoints shall not pass but by deed; therefore, where the devisee's name is totally omitted, parol evidence cannot be admitted to explain an ambiguity which is *patent*, much less will it be admitted to alter the apparent meaning of the will (6); therefore, where

“*Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.*”

(1) Bull. N. P. 294. (a.)

(2) *Post*, 1726. tit. INTERESTED WITNESS.

(3) *Lutterell v. Reynell*, 1 Mod. 283.

(4) Bull. N. P. 294. (b.), *post*, 1782. tit.

IMPEACHING AND SUPPORTING THE CREDIT OF WITNESSES.

(5) *Post*, 1545. tit. PATENT AMBIGUITY.

(6) *Baylis v. Att. Gen.* 2 Atk. 240. Bull. N. P. 297. (b.)

GENERALLY.

a man gave 2000*l.* to his brother John, and in case of his death, to his wife Chief Justice Lee would not suffer proof to be given, that the testator meant his brother should have it only during life. (1)

But where A. devised 400*l.* to his wife, and made her executrix without disposing of the surplus, Lord Chancellor Hardwicke admitted parol evidence to shew, the testator meant his wife should have it; for there was no ambiguity in the will, nor was it to alter the apparent intent of the testator; for by the law she was entitled to the surplus as executrix; therefore the evidence was admitted only to rebut the equity. (2)

In every issue the affirmative is to be proved.

6. In every issue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed, until it be proved; but where the affirmative is proved, the other side may contest it with opposite proofs. (3)

To this rule there is an exception of such cases where the law presumes the affirmative contained in the issue: as where a man is charged with not doing an act which by the law he is liable to do; for the law presumes every man does his duty to society till the contrary is proved. (4)

No evidence need be given of what is agreed by the pleadings.

7. No evidence need be given of what is agreed by the pleadings, for the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly before them.

And the jury cannot find any thing against that, which the parties have affirmed and admitted of record, though the truth be contrary; but, in other cases, though the parties be estopped to say the truth, the jury are not, as in *Goddard's case* (5), where the bond was dated nine months after the execution, and after the death of the obligor. (6)

Whenever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. If the substance of the issue be proved, it is sufficient.

8. Whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue (7); *ex. gr.* A. cannot justify the killing another, therefore he may give the special matter in evidence on the general issue, as that it was *se defendendo*, &c. (8)

9. If the substance of the issue be proved, it is sufficient (9): thus, in an action of waste for cutting twenty ash trees, proof that ten were cut is sufficient, for, in effect, the issue is, waste or no waste. (10)

PRIMARY EVIDENCE.

The highest evidence of which the nature of the thing is capable, must be produced.

2. PRIMARY EVIDENCE.

Chief Baron Gilbert observes (11), "The first and most signal rule in relation to evidence, is this, that a man must have the utmost evidence the nature of the fact is capable of; for the design of the law is to come to a rigid demonstration in matters of right, and there can be no demonstration of a fact, without the best evidence that the nature of the thing is capable of: less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration; for if it be plainly seen in the nature of the transaction, that there is some more evidence that doth not appear, the very not producing it, is a

(1) *Lowfield v. Stoneham*, Str. 1261.

(2) *Lake v. Lake*, Ambl. 126. *post*, 1532—1537.

(3) Bull. N. P. 298. (a.)

(4) Gilb. Ev. 148.

(5) 2 Co. 4. (b.)

(6) *Antè*, 1508.

(7) 2 Rol. Abr. Trial (E.), 682. *antè*, 1508.

(8) Co. Litt. 283. *antè*, 1508.

(9) *Ibid.* 282.

(10) *Foster v. Jackson*, Hob. 53.

(11) Ev. 3, 4.

presumption, that it would have detected something more than appears already, and therefore the mind does not acquiesce in any thing lower than the utmost evidence the fact is capable of."

PRIMARY
EVIDENCE.

Thus, where the question was, whether the abbey *de sentibus* was an inferior abbey, or not, *Dugdale's Monasticon Anglicanum* being produced for evidence was refused, because the original records might be had in the Augmentation Office. (1) The proper evidence of judicial proceedings, is the production of the proceedings, or of examined copies. (2) Thus, parol evidence is not admissible of the day on which a cause was tried, as it is capable of proof by matter of record, viz. the *postea* (3); and where, the plaintiff had been discharged under the Insolvent Act, and it was proposed to give in evidence his admission to that effect, Lord Ellenborough held it insufficient. (4)

Judicial pro-
ceedings.

But no legal objection exists against a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced. (5) Thus, if there be a notice to produce a letter transmitted by a plaintiff to a defendant, its contents can be proven by any person conversant with the contents, although it was in the plaintiff's power to produce the clerk who wrote the letter (6): neither is it requisite to prove handwriting to call the supposed writer himself (7); and if a deed or will be attested by several subscribing witnesses, the execution may be proved by either of them. (8)

Omitting to
supply all the
proofs capable
of being pro-
duced..

If there be several distinct sources of information relative to the same fact, it is not, in general, requisite to establish, that they have all been exhausted, before recourse is had to secondary evidence. (9)

Where several
distinct sources
of information
exist.

Oral evidence cannot be substituted for a written document, which by authority of law, or by private compact, is constituted the authentic and appropriate instrument of evidence; yet in other cases, the mere existence of written evidence never excludes independent parol evidence to prove the same fact.

Oral evidence cannot be substituted for any written instrument: thus in *Vincent v. Cole* (10) Lord Tenterden observed, "I have always acted most strictly on the rule, that what is in writing, shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments: they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." (11)

SUBSTITUTION
OF ORAL EVI-
DENCE FOR A
WRITTEN IN-
STRUMENT.
Judgment of
Lord Tenter-
den in *Vincent*
v. Cole.

Upon which principle, the original written minutes of inclosure commissioner must be produced to prove allotments; and, until the absence of such minutes be accounted for, no other evidence of their contents is receivable (12): and a witness cannot be questioned on cross-examination,

(1) *Post*, 1659.

(2) *Thellusson v. Shedden*, 2 N. R. 228.

(3) *Thomas v. Ansley (Sheriff)*, 6 Esp. N. P. C. 80. Ibid. 83.

(4) *Scott v. Clare*, 3 Camp. 236., vide etiam *Rex v. Hube*, Peake's N. P. C. 180.

(5) *Koster v. Reed*, 6 B. & C. 21. *Rex v. Burdett*, 4 B. & A. 162. *Williams v. E. I. Comp.* 3 East, 193. 201.

(6) *Liebman v. Pooley*, 1 Stark. 167., vide etiam *Rex v. Benson*, 2 Camp. 508. 2 Burr. 1189.

(7) *Hughes's case*, 2 East's P. C. 1002. R. & R. 378.

(8) Bull. N. P. 263. (b.) *Wright v. Doe d. Tatham*, 1 A. & E. 3.

(9) *Middleton v. Melton*, 10 B. & C. 328.

(10) M. & M. 258.

(11) *Queen's case*, 2 B. & B. 287. *Strother v. Barr*, 5 Bing. 151.

(12) *Bendyshe v. Pearse*, 1 B. & B. 464., vide *post*, 1517. tit. SECONDARY EVIDENCE.

PRIMARY
EVIDENCE.

Oral evidence cannot be substituted for any written conveyance or contract.

respecting the contents of a written instrument, although in his own handwriting, unless the instrument be produced. (1)

Oral evidence cannot be substituted for any written conveyance or contract (2): the written instrument in such cases may in some measure be regarded as the ultimate fact to be proved, especially where the question relates to the proof of deeds and negotiable securities; and the principal object of committing contracts of every kind to writing, is the intention of the parties to preserve a memorial of them more lasting and more authentic than oral testimony.

If, in an action for work and labour it be proved that, a written agreement was entered into respecting such work, the agreement ought to be produced in order to recover extras, for the written contract might afford evidence between the parties as to the rate at which the work should be paid for. And the judge will not examine an unstamped agreement, in order to see whether it referred to the items claimed to be received independently of it; because such a practice would be attended with too much inconvenience. (3)

Official memorandum.

Where an official memorandum, not strictly of record, is required by law to be made, of the particulars of any statement, all evidence, in substitution of such memorandum, is, in general to be excluded. (4)

Admission by a party does not supersede direct proof of matter of record.

An admission by a party does not supersede direct proof of matter of record (5); and if the law require an entry to be made in a court of justice of particular transactions, the official entry excludes all independent evidence of the transaction.

Policy of insurance.

Where on the trial of a person for having wilfully, with intent to injure an insurance company, set fire to a house, the insurance was not allowed to be proved by the books of the company, without giving the prisoner a regular notice to produce the policy. (6)

Registered deed.

So if it be essential to prove the contents of a registered deed, which is in the defendant's possession, the memorial of the deed is inadmissible, unless there had been previously a notice given to the defendant to produce the original (7); and the rule has reference to the substitution of evidence, whether it be of the same or inferior degree. (8)

Where the issue is the "occupation of land;"

But if the issue be respecting the occupation of land, such occupation can be shewn by payment of rent, declarations of tenant, or other parol evidence, notwithstanding the existence of a written agreement (9): but if the issue be, respecting the person under whom the land is holden, and if there be a written agreement by the lessor, it must be produced. (10)

or the terms of tenancy.

In an action for use and occupation, or ejectment, where there is a written contract of a tenancy, such contract must be shewn. (11) So like-

(1) *Queen's case*, 2 B. & B. 286. *Crowley v. Page*, 7 C. & P. 790.

(2) Bull. N. P. 246. (a.)

(3) *Vincent v. Cole*, M. & M. 258., sed vide *Rex v. Pendleton (Inhab. of)*, 15 East, 449.

(4) Phillipps' Ev. 445.

(5) *Scott v. Clare*, 3 Camp. 236.

(6) *Rex v. Doran*, 1 Esp. N. P. C. 127. *Rex v. Gibson*, R. & R. 138.

(7) *Molton, q. t. v. Harris*, 2 Esp. N. P. C. 548., et vide *Underhill v. Witts*, 3 ibid. 56.

(8) *Quere*, Whether there are degrees of

secondary evidence? *Brown v. Woodman*, 6 C. & P. 206. *Rex v. Castleton (Inhab. of)*, 6 T. R. 236. Bull. N. P. 254. (a.)

Lidman v. Pooley, 1 Stark. 167.

(9) *Rex v. Holy Trinity Hall (Inhab. of)*, 7 B. & C. 611. *Strother v. Barr*, 5 Bing. 136., adverted to in *Doe v. Harvey*, 8 ibid. 241.

(10) *Doe v. Harvey*, 8 Bing. 241.

(11) *Fenn d. Thomas v. Griffith*, 6 ibid. 533. *Rex v. Castle Morton (Inhab. of)*, 3 B. & A. 588. *Brewer v. Palmer*, 3 Esp. N. P. C. 213. *Dover v. Maestrac*, 5 ibid. 92.

wise tenancy at a certain rent, and for a certain period, so as to gain a settlement under stat. 6 Geo. 4. c. 57., cannot be proved by parol if there be a written agreement (1); and where there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. (2)

PRIMARY
EVIDENCE.

Persons who were present at a marriage may prove the fact of the marriage, or it may be proved by general representation (3), because the register is not of a judicial nature.

Fact of marriage may be proved by oral evidence.

Nor is the evidence of the attesting witness required to prove the handwriting of the parties in the register (4); but an entry of a marriage in a day-book will not be received in evidence, if the entry have been afterwards made in the register. (5)

If in any action it appear, that there is a written contract respecting the matter in issue, it must be produced; but if the plaintiff make out a *prima facie* case, without its appearing that any written contract is in issue, the other party, if he rely upon a written contract, must produce it. (6) But where the plaintiff proved a parol contract, and the defendant produced an unstamped written agreement, it was holden, that the plaintiff could not be nonsuited (7), the defendant having neglected to give the plaintiff notice to produce. (8)

If defendant rely upon a written instrument it must be produced.

If a written communication or agreement between parties be collateral to the question in issue, it need not be produced: thus, if the writing be a mere proposal, which has not been acted upon (9); or where, during an employment under a written contract, a separate parol order is given (10); or where the action is not in the form of *assumpsit* upon the agreement, but in tort for the conversion of it (11); in fact, in order to render the production of a writing necessary, it must appear to relate to the matter in question. (12)

Written instrument collateral to the question in issue.

If a writing be not directly relating to the fact in issue, and not made by the parties an instrument of evidence required by law, oral or other evidence of its contents will not be excluded. Thus, the payment of money can be established by oral evidence, though a receipt be taken (13); and if there be a verbal and also a written notice to deliver up property, the written notice need not be given in evidence. (14)

Writings not directly relating to the fact in issue.

Rex v. Rawden (Inhab. of), 8 B. & C. 708. *Shearwood v. Pearson*, cit. 12 East, 238. *Per Park J. in Strother v. Barr*, 5 Bing. 150.

(1) *Rex v. Merthyr Tydvil (Inhab. of)*, 1 B. & Ad. 29.

(2) *Alderson v. Clay*, 1 Stark. 405.

(3) *Birt v. Barlow*, Doug. 172. *St. Devenez v. Much Dew Church*, 1 W. Black. 367. *Reed v. Passer*, Peake's N. P. C. 305. *Evans v. Morgan*, 2 C. & J. 453. Bull. N. P. 247. *Allison's case*, R. & R. 109.

(4) *Birt v. Barlow*, Doug. 174.

(5) *May v. May*, Str. 1073., et vide *Doe d. Warren v. Bray*, 8 B. & C. 813.

(6) *Rex v. Padstow (Inhab. of)*, 4 B. & Ad. 210. *Finn d. Thomas v. Griffith*, 6 Bing. 533. *Feelder v. Ray*, ibid. 332.

(7) *Reed v. Deere*, 7 B. & C. 266. *Stevens v. Pinney*, 8 Taunt. 327.

(8) *Per Bayley J. in Rex v. Rawden (Inhab. of)*, 8 B. & C. 708.

(9) *Hawkins v. Warre*, 3 B. & C. 698. *Stevens v. Pinney*, 8 Taunt. 328. *Dalison v. Stark*, 4 Esp. N. P. C. 163. *Doe d. Bing-*

ham v. Cartwright, 3 B. & A. 326. *Wilson v. Bowie*, 1 C. & P. 8. *Ramsbottom v. Tunbridge*, 2 M. & S. 434. *Edgar v. Blick*, 2 Stark. 464. *Ingram v. Lea*, 2 Camp. 521.

(10) *Reid v. Batte*, M. & M. 413.

(11) *Jolley v. Taylor*, 1 Camp. 143. *Davis v. Reynolds*, 1 Stark. 115. *Doe d. Wood v. Morris*, 12 East, 237. *Shearwood v. Pearson*, cit. ibid. 238. *Bucher v. Jarrett*, 3 B. & P. 143. *Dover v. Maestaer*, 5 Esp. N. P. C. 92. *Per Park J. in Strother v. Barr*, 5 Bing. 150., vide etiam *Whitehead v. Scott*, 1 M. & Rob. 2. *Bayne v. Stone*, 4 Esp. N. P. C. 13. *Ingram v. Lea*, 2 Camp. 521.

(12) If oral evidence of an agreement be given at a trial, the party desirous of excluding it, may ask the witness in cross-examination whether it was not in writing; and a party may in cross-examination inquire as to the subject of a writing, in order to shew that parol evidence is inadmissible.

Curtis v. Greated, 1 A. & E. 167.

(13) *Rambert v. Cohen*, 4 Esp. N. P. C. 213.

(14) *Smith v. Young*, 1 Camp. 439.

PRIMARY
EVIDENCE.SUBSTITUTION
OF WRITTEN
TESTIMONY.

Private memorandum.

Written document which cannot be produced in evidence from defect of stamp, &c.

PRINCIPLE
UPON WHICH
PRIMARY EVIDENCE IS NOT
ALWAYS REQUIRED TO
PROVE RECORDS, PUBLIC
BOOKS, REGISTERS, &c.

Appointments of public officers, magistrates, under-sheriffs, surrogates, commissioners, revenue officers.

Parol evidence of voluminous facts, or of one unvaried mode of dealing.

The principles applicable to the reception of oral evidence, equally apply to the substitution of written testimony.

If several persons be witnesses of the same fact, and one of them, to assist his memory, make a memorandum of it, this circumstance would not exclude the testimony of the other witnesses, who, from their number, their powers of discernment, and their concurrence in the same account, may be more entitled to credit than the witness who made the memorandum. (1)

Oral evidence will be received of a written document, which cannot be produced in consequence of its being in the nature of hearsay evidence, or from having either no direction, or no stamp. Thus, an informal examination taken before a magistrate, will not exclude oral evidence of what a prisoner has stated. For although the witness is allowed to refresh his memory by reading the examination, he is supposed, in the eye of the law, to speak from his memory, independently of the written paper. Where a witness read over to the defendant an account in writing, which was signed by the defendant, but which could not be used in evidence for want of a receipt stamp, the witness was allowed to refresh his memory by the inspection of the account, and to prove that he called over the items to the defendant, and that the defendant admitted them to be correct. (2) So likewise what a party says, admitting a debt, is evidence, notwithstanding the promise to pay be reduced into writing. (3)

As the rule requiring the best evidence to be produced, of which the nature of the subject is capable, was intended to guard against fraud, its operation ceases where the presumption of fraud does not arise; consequently, it does not apply, where the law itself raises a presumption under particular circumstances; therefore, in general, examined copies are admissible of any record, or of proceedings of a court of justice, or of entries in court rolls, or in public books or registers; neither is it generally requisite, upon the foregoing principle, to prove the written appointments of any public officer, such as justices of the peace, peace-officers, constables (4), under-sheriffs (5), vestry clerks (6), surrogates (7), public commissioners (8), or officers of any branch of the revenue (9), proof of their having respectively acted in such offices being considered *prima facie* evidence of their appointment and authority.

Where the evidence is the result of voluminous facts, or of the inspection of many book or papers, the examination of which could not conveniently take place in court, the exclusion of secondary evidence has been relaxed: thus, parol evidence can be received of one unvaried mode of dealing between parties by means of bills of exchange; but if the mode of dealing vary, the bills must be produced. (10) If the solvency of a party at a particular time be the issue, a witness can speak to the general result of his

(1) 1 Stark. Ev. 440.

(2) *Jacob v. Lindsay*, 1 East, 461. *Dalison v. Stark*, 4 Esp. N. P. C. 163.(3) *Singleton v. Barrett*, 2 C. & J. 369.(4) *Rex v. Shelley*, Leach's C. C. 381. n. *Gordon's case*, cit. per Buller J. in *Berryman v. Wise*, 4 T. R. 366.(5) *Doe d. James v. Brawn*, 5 B. & A. 243.(6) *McGahey v. Alston*, 2 M. & W. 211. Per Tindal C. J. in *Cannell v. Curtis*, 2 Bing. N. C. 234.(7) *Rex v. Verelst*, 3 Camp. 432.(8) *Rex v. Howard*, 1 M. & Rob. 187.

(9) Stat. 26 Geo. 3. c. 77. s. 13. Stat. 26 Geo. 3. c. 82. s. 6., et vide 11 Geo. 1. c. 30. s. 32.

(10) *Spencer v. Billing*, 3 Camp. 310.

inquiries, as derived by the accounts rendered by a bankrupt of his affairs. (1)

PRIMARY
EVIDENCE.

Evidence of a general balance of accounts may be given (2), and a bankrupt's ledger is evidence to prove that a person had no funds in the bank, without calling the clerks who made the entries. (3)

Solvency of a party at a particular time.
Balance of accounts.
Examination of records.

A witness may be interrogated as to his examination of old records, and may state they correspond in substance with a particular record which has been read, without going through the whole in detail, subject however to a full cross-examination. (4)

Notices of the dishonour of bills, notices to quit, and attorney's bills of charge delivered under the statute, can be proved by secondary evidence, without giving a notice to produce, or shewing the loss of the original evidence. (5)

Notice of dishonour of bills, to quit, bills of costs.

The judges will take judicial notice of the existence of facts which must have happened according to the constant and invariable course of nature (6); of the public laws and general statutes of the realm (7); the privileges of the king's palaces (8); the prerogative of the crown (9); the rights and privileges of the queen (10); ecclesiastical, civil (11), and maritime (12) laws; chartered franchises (13); rights of peerage (14); the general customs of the realm, as the custom of merchants (15), gavel-kind (16), and borough English (17); the ordinary computation of time (18); the fasts and festivals (19), whether moveable (20) or fixed, which are appointed by the calendar; the number of days in any particular month, or in leap year; the coincidence of the day of the week with that of the year (21); the beginning and end of term (22); the time of the king's accession (23); the commencement of a session of parliament (24); the place of holding parliament on any particular day (25); the prorogation, sessions, and sittings of parliament (26); and the course of proceedings (27) in parliament, either before one of the houses or a committee.

MATTERS JUDICIALLY NOTICED.
Statutes and laws.

Customs.
Computation of time.

King's accession, &c.

The judges will recognise the proceedings of the common law courts at

(1) *Meyer (Assignees of) v. Sefton*, 2 Stark. 274.

(2) *Roberts v. Doxon*, Peake's N. P. C. 116.

(3) *Furness v. Cope*, 5 Bing. 114.

(4) *Rowe v. Brenton*, 3 M. & R. 212.

(5) *Kine v. Beaumont*, 3 B. & B. 288. *Colling v. Treweek*, 6 B. & C. 395. *Ackland v. Pearce*, 2 Camp. 601.

(6) *Rex v. Luffe*, 8 East, 202. Upon the trial of an issue out of chancery, that part of the statute of frauds which directs certain agreements to be in writing will be judicially noticed by the court. *Burnand v. Nerot*, 1 C. & P. 578. The production of a deed with the enrolment indorsed satisfies an averment that the defendant had caused a memorial to be enrolled. *Compton v. Chandless*, 4 Esp. N. P. C. 18.

(7) Bull. N. P. 222.

(8) *Elderton's case*, 2 Ld. Raym. 980.

(9) Ibid.

(10) Ibid.

(11) 1 Rol. Abr. Court (D.), 530.

(12) *Chandler v. Grieves*, 2 Hen. Black. 606. n.

(13) *Rex v. Lyme Regis*, Doug. 150.

(14) *Hunter v. Deloraine (Lord)*, Lofft, 49.; although it seems the courts will not take judicial notice of a plaintiff being an Irish peer. *Nugent (Lord) v. Harcourt*, 2 Dowl. P. C. 578.

(15) *Ereskine (Sir John) v. Murray*, 2 Ld. Raym. 1542.

(16) *Clements v. Scudamore*, ibid. 1025.

(17) *Launder v. Brooks*, Cro. Car. 562.; but not of particular local customs. *Wiltshire v. Lloyd*, Doug. 380.

(18) *Hoyle v. Cornwallis (Lord)*, Str. 387.

(19) *Harvy v. Broad*, 2 Salk. 626.

(20) *Brough v. Perkins*, 6 Mod. 81.

(21) *Page v. Faucet*, Cro. Eliz. 227.

(22) *Estwick v. Cooke*, 2 Ld. Raym. 1557. *Hanson v. Shackelton*, 4 Dowl. P. C. 48. 1 H. & W. 542.

(23) *Holman v. Burrow*, 2 Ld. Raym. 794.

(24) *Birt, q. t. v. Rothwell*, 1 ibid. 343.

(25) Ibid. 210.

(26) *Rex v. Wilde*, 1 Lev. 296.

(27) *Lake v. King*, 1 Saund. 131.

PRIMARY EVIDENCE.	Westminster (1), the court of Chancery (2), the courts of the counties palatine (3), the prerogative court of the archbishop of Canterbury (4), and the other courts of general jurisdiction (5); the known divisions of the kingdom into counties (6) and dioceses (7), and the extent of a port. (8)
Proceedings of all courts of general jurisdiction.	
Divisions of the kingdom.	Public matters recited in acts of parliament (9), royal proclamations (10), or other public documents published by competent authority.
Public matters recited in acts of parliament, royal proclamations.	A war between foreign countries must be proved; but the courts take judicial notice of a war in which this country is engaged. (11)
	Thus, the court will take judicial notice that a war exists between this country and a foreign state, which war is recognised in different acts of parliament; and therefore an allegation to that effect need not be proved. (12)
ORIGINAL EVIDENCE NOT AVAILABLE.	When the production of evidence indicates the existence of other evidence of a more original character, still if it can be shewn, that the better evidence is not attainable, the principle of the rule as to the production of the best evidence will not apply.
Inscriptions.	Thus, inscriptions on walls and fixed tables do not admit of being proved, otherwise than by secondary evidence (13); and it is in general permitted to give secondary evidence of documents, where they are destroyed and lost, or where they are in the possession of an adversary who refuses to produce them, or are not available in consequence of some reason of public policy, or of consideration for the interest of witnesses.
Missing documents.	
Inscriptions on flags and banners.	Inscriptions on flags and banners, which have been exhibited to public view, can be proved by eye-witnesses speaking to what they had seen on the occasion, because "they are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings." (14)
Resolutions read at a public meeting proved by parol.	So likewise resolutions <i>read</i> at a public meeting can be proved by parol evidence, because it is shewing, not what the paper contained, but what one person proposed, and what the meeting adopted; in fact, to prove the transactions and general conduct of the assembly (15); and in the case of printed documents, all the impressions are originals, and are evidence against a person who adopts the printing by taking away copies. (16)
Resolutions at a meeting.	If a paper have been delivered by the defendant to a person present at a meeting, as a copy of certain resolutions about to be proposed and read, and which was proved to correspond with the resolutions afterwards proposed, it is receivable as evidence of those resolutions, without proof of any previous notice to the defendant to produce the paper from which the resolutions were supposed to be read, because such paper, as

(1) *Pugh v. Robinson*, 1 T. R. 118. *Estwick v. Cooke*, 2 Ld. Raym. 1557. *Lane's case*, 2 Co. 16.

(2) *Weaver v. Clifford*, Cro. Jac. 5.

(3) *Peacock v. Bell*, 1 Saund. 74.

(4) *Harrison's Ev.* 3 cit. 1 Ford. 446.

(5) *Gryffyth v. Jenkins*, Cro. Car. 179.

(6) 2 Inst. 557.

(7) *Adams v. Savage*, 2 Ld. Raym. 854.

(8) *Anon.* 1 Chitt. 31. (a.)

(9) *Rex v. De Berenger*, 3 M. & S. 67.

(10) *Rex v. Sutton*, 4 ibid. 532.

(11) *Dolder v. Huntingfield (Lord)*, 11 Ves. 292.

(12) *Rex v. De Berenger*, 3 M. & S. 67.

(13) *Doe d. Coyle v. Cole*, 6 C. & P. 360. *Rex v. Fursey*, ibid. 81.

(14) *Rex v. Hunt*, 3 B. & A. 574.

(15) 31 Howell's St. Tr. 672. *Rex v. Moors*, 6 East, 420. n.

(16) *Rex v. Watson*, 2 Stark 129.

against the party himself to whom it applied, is the best evidence that could be produced. (1)

PRIMARY
EVIDENCE.

3. SECONDARY EVIDENCE.

I. Generally.

SECONDARY
EVIDENCE.
GENERALLY.

Secondary evidence is admissible where primary evidence cannot be acquired. Thus, if writings be in a foreign country, and not legally removable from their place of deposit, secondary evidence of their contents is admissible. (2) So, if the non production of an instrument be privileged on grounds of public policy, as in the case of attorney and client. (3)

Admissible
where primary
evidence cannot
be acquired.
Privileged.

It has been questioned, whether degrees of secondary evidence exist (4): thus, it has been considered, that an abstract of a deed would not be the best secondary evidence, and that if a copy of it be proved to be in existence, it might have been necessary to give notice to produce the copy. (5)

Degrees of se-
condary evi-
dence.

Where a defendant had given notice to a plaintiff to produce a letter of which he had kept a copy, and the letter was not produced, parol evidence of its contents was held to be admissible, and that he was not bound to put in the copy (6); Mr. Justice Parke observing, "There are no degrees in secondary evidence. If there had been a duplicate original, it might have been different."

Entries by deceased clerks, purporting to be copies of letters, where it has been the duty of the clerks to see, that the letters copied by them are sent by the post, are secondary evidence of the contents of the letters, and also amount to proof of the fact of sending the letters. (7)

Entries by a
deceased clerk.

Where a deed proved to be in possession of the opposite party is not produced upon a notice to quit, the person giving the notice may give parol evidence of the contents, without calling the subscribing witness. (8)

ATTESTED IN-
STRUMENT.

But if an instrument be destroyed, and the witness be known, he must be called. (9)

When requisite
that witness
should be
called.

Where, however, a plaintiff declared on a lost bond, and a witness stated, that names of subscribing witnesses were in the bond, but that he did not know the names, the plaintiff recovered without calling either of such witnesses. (10)

If a document be traced into the possession of one of the parties to a suit, it is not, after notice to produce it, essentially requisite to prove its contents by an examined copy. Thus, in *Pritt v. Fairclough* (11), where the defendants had acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial, it was held,

Where second-
ary evidence of
an instrument
not required to
be proved by
an examined
copy.

(1) *Rex v. Hunt*, 3 B. & A. 568. 572. *Watson's case*, 32 Howell's St. Tr. 68. 83. 256, 257.

(2) *Alivon v. Furnival*, 1 C. M. & R. 277.

(3) *Mills v. Oddy*, 6 C. & P. 732. *Marston v. Downes*, 1 A. & E. 31.

(4) *Brown v. Woodman*, 6 C. & P. 206. *Doe d. Rowlandson v. Wainwright*, 5 A. & E. 520.

(5) Vide etiam *Rex v. Castleton (Inhab.*

of), 6 T. R. 236. Bull. N. P. 254. (a.) *Per Best C. J. in Munn v. Godbold*, 3 Bing. 294. *Doe d. Coyle (Clerk) v. Cole*, 6 C. & P. 369.

(6) *Brown v. Woodman*, 6 C. & P. 206.

(7) *Pritt v. Fairclough*, 3 Camp. 305. *Hagedorn v. Reid*, *ibid.* 377. *Toosey v. Williams*, M. & M. 129.

(8) *Cooke v. Tanswell*, 8 Taunt. 450.

(9) *Gillies v. Smither*, 2 Stark. 528.

(10) *Keeling v. Ball*, Peake's Ev. App. 82.

(11) 3 Camp. 305.

**SECONDARY
EVIDENCE.**

Judgment of
Lord Ellen-
borough in
*Pritt v. Fair-
clough*.

that an entry by a deceased clerk of the plaintiff's in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was admissible evidence of the contents of the letter, on proof: that according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct (1); Lord Ellenborough observing, "The rules of evidence must expand according to the exigencies of society: this entry, I think, is reasonable evidence to prove the contents of the letter of the 18th Dec. 1807, which the defendants acknowledge they received, and which they do not produce upon a notice for that purpose. We know it is the habit of merchants to keep such a book; and a witness has sworn, that the book in question was kept with great punctuality. Therefore, if the entry in the clerk's handwriting were not admitted, there would be no way in which, the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore allow the entry to be read as *prima facie* evidence, and the defendants may rebut it by producing the original."

**ANCIENT
WRITINGS.**

Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage (whether perfect or not), are good evidence (*quantum valeant*) of their subject-matter, although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons, who were not privy to it, and could have had no cognisance of the matters to which it relates.

Judgment of
Lord Redes-
dale in *Bullen
v. Michel*.

It was also held, that the foregoing book was in the proper custody to make it evidence, it being in the possession of an owner, who was so far connected with the abbey as to be possessed of some part of the former estates of the monastery; although no part of such estate was situated in the parish in which the question between the parties to the suit arose: and that the objection of *res inter alios acta* was not applicable to such entries and book when offered to furnish a counter presumption, in order to rebut a presumption raised by the other side (2); Lord Redesdale observing (3), "That the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, inquisitions on the writ of *ad quod damnum*, and a variety of similar evidence, from which the jury may draw their inference. The only question then is, whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries would not be evidence. But search has been made, and the originals cannot be found; and if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall continually do injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted, to raise pre-

(1) *Per* Lord Ellenborough in *Pritt v. Fairclough*, 3 Camp. 305., vide etiam *Roberts v. Bradshaw*, 1 Stark. 28. 4 Dow, 298. *Wolley v. Brownhill*, 13 Price, 507, 508.

(3) 4 Dow, 324. 2 Price, 478.

(2) *Bullen v. Michel (Clerk)*, 2 Price, 399.

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EVIDENCE.

sumption or inference, where no direct evidence can be had. This, then, is the next best evidence; and perhaps evidence still more inferior might have been admitted, if this could not have been produced. This, however, appears to be the best, after the originals. For these two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey that the instruments should be preserved; and from the same reason it might be presumed, that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept."

An examined copy of the enrolment of a bargain and sale of freehold in lands, pursuant to the stat. of Henry 8., is as good evidence as an examined copy of the original itself; and where the original is wanting (as where it has been lost or destroyed, or where different parcels of land are comprised in the same indenture, and afterwards devised to different persons) (1), a copy of the enrolment signed by the proper officer who has the custody of the enrolment, and proved by oath to be a true copy, will have the same force and effect as the original itself would have had if produced.

ENROLMENT OF
A BARGAIN
AND SALE.

An enrolment in the office of the duchy of Cornwall of a lease purporting to be granted by the king, *vacante ducatu*, is primary evidence of such lease. (2)

So is an enrolment of a lease, purporting to be granted by the duke of Cornwall. (3)

But a copy of the enrolment of a bargain and sale of a chattel interest, or of any other deed enrolled for safe custody, is not admissible in evidence, except as against the party acknowledging the deed, or persons claiming under him; and against such party, and against all claiming under him, an examined copy of the enrolment of any deed is admissible, and equivalent to an examined copy of the original deed. (4)

Counterparts of old leases from the repository of a lord of a manor are evidence of the demise of premises without proof of enjoyment. (5)

Counterparts
of old leases.

Though there are more parts of a deed than one, which is in the defendant's possession, but who does not produce it after notice, the plaintiff is not obliged to produce in evidence one of the originals, but may give a copy in evidence. (6)

If, as secondary evidence of the contents of the deed, the draft be given in evidence, and in the draft, words be abbreviated, which in the setting out of the deed in the indictment are put in words at length, it will be for the jury to say, whether they think the words abbreviated in the draft were inserted at length in the deed itself. (7)

Drafts of deeds.

The enrolment of a lease under stat. 1 & 2 Geo. 4. c. 52. s. 8., which enacts that a deed so enrolled "shall be as good and available in law, and of the

Enrolment of
lease under
stat. 1 & 2 Geo.
4. c. 52. s. 8.

(1) Stat. 10 Anne, c. 18. s. 3.

(2) *Rowe v. Brenton*, 3 M. & R. 214. 8 B. & C. 765.

(3) *Ibid.*

(4) *Phillipps' Ev.* 689, 696., *et vide etiam* *Gilb. Ev.* 86, 87. *Garrick v. Williams*, 3 Taunt. 544. *Baikie v. Chandless*, 3 Camp. 21. *Taylor v. Jones*, 1 Ld. Raym. 746.

Bull. N. P. 255. (a.), 256. (a.) *Co. Litt.* 225. (b.) *Olive v. Gwyn*, Hardr. 119.

(5) *Clarkson v. Woodhouse*, 3 Doug. 189. 5 T. R. 412. n.

(6) *Doxon v. Haigh*, 1 Esp. N. P. C. 409.

(7) *Rex v. Hunter*, 4 C. & P. 128.

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EVIDENCE.**

like force and effect in all respects, as if the same had been enrolled in any of his majesty's courts of record at Westminster, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution. (1)

Registry of a deed.

An examined copy of the registry of a deed, in the registry of the county of Middlesex, is admissible as secondary evidence of its contents. (2) But the memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice have been served upon the opposite party to produce the conveyance. (3)

Memorial of a conveyance.

Probate of will.

In an action against A. and B. as executors, A. had suffered judgment by default. The probate of the will was produced, and notice had been given to both the defendants to produce a receipt which had been given to A. as one of the executors:—It was held, that if it was not produced, secondary evidence might be given of its contents, and that A.'s having suffered judgment by default, made no difference. (4)

**DEEDS LOST OR
DESTROYED.****II. Deeds lost or destroyed.**

Evidence may be given of the contents of a lost deed.

Evidence may be given in the best manner possible of the contents of a deed lost or destroyed, if it be first proved, that the deed existed, and was lost. (5)

But "the degree of diligence to be used in searching for a deed, must depend on the importance of the deed, and the particular circumstances of each case." (6)

Where, on the second trial of a cause, a witness stated, that he had, on the argument for the new trial, handed a document to one of the learned judges, and had not since seen it, or been able to find it, secondary evidence was received of its contents, without any search for it having been made at the chambers of the learned judge, the presumption being, that his lordship had returned it to the party who produced it. (7)

In replevin the defendants avowed for a distress for poor's rates:—It was held, that one of the defendants having acted as overseer of the poor was *prima facie* evidence that he was so; and that to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to the defendant for his appointment, and that he said that he had lost it, without proving any search made. (8)

The best evidence of the loss of the original document

Upon the principle, that, to let in secondary evidence, the best evidence of the loss of the original document that the case admits of ought to be given, it was held, if a party has delivered a letter to his daughter, and pre-

(1) *Jenkins v. Biddulph*, R. & M. 339.

(2) *Doe d. Ubele v. Kilner*, 2 C. & P. 289.

(3) *Molton, q. t. v. Harris*, 2 Esp. N. P. C. 549.

(4) *Beckwith v. Benner*, 6 C. & P. 681.

(5) *Tyssen v. Clarke*, Loft, 496. S. C. not S. P. 3 Wils. 419. 1 W. Black. 941.

(6) *Per Best C. J. in Gully v. Exeter (Bishop of)*, 4 Bing. 298., et vide *Rex v. Stourbridge (Inhab. of)*, 8 B. & C. 98.

M^r Gahey v. Alston, 2 M. & W. 386.

(7) *Deacon v. Fuller*, 6 C. & P. 74.

(8) *Bristol (Governor, &c. of Poor) v. Wait*, ibid. 591.

viously to the trial a witness has made diligent search for it, assisted by the daughter, and could not find it, it is not evidence of loss to let in proof of its contents without calling the daughter; but if the party had kept it in his own custody, and had set a person to search who could not find it in any of the places where letters were kept, that would be sufficient. (1) If the question be respecting an expired lease, the muniment chest of the lessor and his assigns is the proper custody for such an instrument. (2).

SECONDARY EVIDENCE.

which the case admits of ought to be given.

Proper custody for expired lease.

Parol evidence of an order of removal.

Lost bonds.

Parol evidence of an order of removal, proved to be lost, is sufficient. (3)

In order to prove payment of the bond debts of an intestate, which bonds were stated to have been burnt on satisfaction of such debts, the existence of the bonds must be proved by calling the attesting witness. (4) But where a bond is lost, and the plaintiff does not know who the subscribing witnesses are, he may call another person. (5)

Where the plaintiff declared on a bond with a *profert*, to which *non est factum* was pleaded, secondary evidence of the bond by means of a copy, and shewing that the defendant had taken away the original, and before action brought said he had burnt it, was considered not to be sufficient to sustain the declaration. (6)

In an action for a malicious arrest, where parol evidence was given of the loss of the information and warrant upon which the plaintiff was arrested, it was held, that the plaintiff was at liberty to go into secondary evidence of their contents; and such evidence having been rejected at *Nisi Prius*, the court ordered a new trial, but without costs. (7)

Parol evidence of the loss of the information and warrant in a malicious arrest.

It is not requisite to establish a sufficient search to negative every possibility of an instrument being *in esse*; nor is it necessary that the search should have been within two or three years, or made for the purpose of the cause (8); if every reasonable probability that nothing is suppressed be negated, it will suffice. (9)

Not requisite to establish a sufficient search to negative every possibility of an instrument being *in esse*.

In order to establish a settlement by apprenticeship, it was proved, that the indenture was only of one part, and that upon application to the pauper who was then ill, and died soon afterwards, to know what had become of it, he declared, that when the indenture expired, it was given to him, and he burnt it long since; and it was also proved that inquiry was made of the executrix of the master, who said that she knew nothing about it:—It was held, that this proof was sufficient to let in parol evidence of the contents of the indenture (10); Lord Ellenborough observing, “The making search and using due diligence are terms applicable to some known or probable place, or person, in respect of which diligence may be used. If what the pauper said, when he was inquired of, was not admissible, then the indenture is not traced into his hands, and being *functus officio*, there was no particular reason why it should be with him. If, on the other hand, what he said was admissible, then, although it may not amount to proof of the fact that the indenture was destroyed by him, yet it may be so far evidence as to afford a reason why further search was not made with him. Suppose this had been an in-

Settlement by apprenticeship.

Judgment of Lord Ellenborough in *Rex v. Morton* (*Inhab. of*).

(1) *Parkins v. Cobbet*, 1 C. & P. 282.

(6) *Smith v. Woodward*, 4 East, 585. 1

(2) *Plaxton v. Dars*, 5 M. & R. 1. 10 B. & C. 17.

Smith, 212.

(7) *Freeman v. Arkell*, 3 D. & R. 669. 2

(3) *Rex v. Metherringham* (*Inhab. of*), 6 T. R. 556.

B. & C. 494. 1 C. & P. 135. 326.

(4) *Gillies v. Smither*, 2 Stark. 528.

(8) *Fitz v. Rabbits*, 2 M. & Rob. 60.

(5) *Keeling v. Ball*, Peake's Add. Cas. 88.

(9) *M^r Gahey v. Alston*, 2 M. & W. 206.

(10) *Rex v. Morton* (*Inhab. of*), 4 M. & S. 48.

SECONDARY EVIDENCE.

If it be the duty of any person to deposit an instrument in any particular place, and it be not found there, the presumption is, that it is destroyed.

Indenture of apprenticeship.

Appointment of overseers.

USELESS PAPERS.

The presumption is, that a useless instrument will be destroyed.

quiry of a merchant for some commercial purpose, and he had given a similar answer, would it not have been sufficient? It is like a non production upon request, and the party accounts for it. Not that I mean to pronounce that this was evidence of the fact of the indenture having been burnt by the pauper; though there might be some ground for saying that, as the pauper was perfectly free from all interest, he had no bias to make the declaration he did. But without giving it such an effect, it is evidence that such information was obtained as precluded the necessity of any farther search in that quarter, and discharges the parties of any laches in not making it."

Where it is the duty of a party in possession of an instrument to deposit it in a particular place, if it be not found there, the presumption is, that it is destroyed.

The mother of a pauper stated, that about twenty-four years previously, she had received money from the parish officers of S. to put her son out apprentice, which she did accordingly; that she had given the indenture to certain persons who were dead, and she did not know whether they had left any will. Evidence was then given that search had been made in the parish church of S. for the indenture, and that it could not be found:—It was held, that as it was the duty of the overseers, if the indenture had come into their possession, to deposit it in the parish chest, therefore the presumption was, that it had been lost or destroyed; and that secondary evidence of the execution and contents of the indenture was admissible. (1)

The master of an apprentice having had the indenture in his possession, failed in business, and an attorney took the management of his affairs, and custody of his papers, which he inspected, but did not find the indenture:—It was held, that this, after the master's death, was a sufficient case to let in secondary evidence of the indenture, though his widow was living, and no inquiry had been made of her respecting it. (2)

An unsuccessful search for the appointment of overseers for 1802, made in the parish chest, and among the papers of B., deceased, who had acted as executor to A., the overseer of that year, is sufficient *prima facie* evidence of the loss of the appointment to let in parol evidence of its contents, without producing the probate of the will of A. or of B. (3)

But in *Rex v. Rawden* (4), in which the appellants against an order of removal relied upon the settlement of a deceased party by apprenticeship; and, to let in parol evidence of the indenture, they called the widow of the deceased, who stated that her husband, in his last illness, told her that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket; the court held, that without further proof of inquiry after the indenture, evidence of this conversation was not admissible; and they refused to send the case back to the sessions to be restated.

The presumption is, that a useless instrument will be destroyed (5), and proof, by a witness, that the paper in question was thrown aside as useless, and that he *believes* it to be lost or destroyed, will be sufficient to let in secondary evidence; because it cannot be expected, that the witness should be able to speak with more confident certainty to a fact, to which his atten-

(1) *Rex v. Stourbridge (Inhab. of)*, 8 B. & C. 96. 2 M. & R. 43.

(2) *Rex v. Piddlehinton (Inhab. of)*, 3 B. & Ad. 460.

(3) *Rex v. Witherly*, 4 M. & R. 724.

(4) 2 A. & E. 156. 4 N. & M. 97.

(5) *Per Bayley J. in Rex v. Farleigh*, 6 D. & R. 153.

tion would not be particularly drawn at the time, on account of any importance being supposed to belong to it. (1)

A loss having been settled on a policy of insurance against fire six years ago, the plaintiff in an action for a libel charging him with fraud respecting such loss, not being able to produce the original policy, called the agent of the company, who stated that the policy was returned to him after the fire; and that on the loss being settled, it became a useless paper; it was also proved, that it was not in the plaintiff's possession, although a diligent search had been made for it:—It was holden, that this evidence was sufficient to entitle the plaintiff to give secondary evidence of its contents. (2)

The recital of a deed in another deed is evidence of the recited deed, if the original be lost, against the party who executed the reciting deed, or against any person claiming under him (3), and where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, without being proved to be true, because in such case it may be impossible to give better evidence. (4)

A witness proving the contents of a lost writing, may assist his recollection by entries in his memorandum book; but these entries are not in themselves admissible as evidence, so that if the witness has not the memorandum book at hand, ready to be produced, no objection can be taken on account of its absence. (5)

Although a plaintiff may give secondary evidence of the contents of a written paper, if the person in whose possession it was, prove that he had made diligent search for, and could not find it (6); yet he is not at liberty to give secondary evidence of the contents of a document, if his witnesses trace it to a person who is not connected with the cause, without calling that person. (7)

To establish a settlement by apprenticeship, it was proved, that the indenture was of two parts, that one had been destroyed, that the other had come to the hands of A. B., who, when asked for it, said she could not find it, but A. B. was not subpoenaed, and upon that ground the evidence was deemed insufficient. (8)

A pauper proved, that, on the expiration of his apprenticeship, his master told him the deed was in the possession of the parish officers. The latter proved, that they had searched for it among the parish papers, but could not find it; such search was held not to be sufficient to admit parol evidence of the contents, as the master, who was alive, ought to have been produced, to prove the delivery to the parish officers. (9)

A person to whom letters required to be produced on a trial were written, said, that he had searched in a particular box in which he thought he had put them, without being able to find them, but added, that he thought they

SECONDARY EVIDENCE.

Policy of insurance.

Recital of a deed in another deed, evidence of the recited deed.

Memorandum book.

INSUFFICIENT EVIDENCE OF LOSS.

When secondary evidence of the contents of a document cannot be given, if it be traced to the possession of a person not connected with the cause.

(1) *Rex v. Johnson*, 7 East, 66. *Kensington v. Inglis*, 8 East, 278. 288. *Freeman v. Arkell*, 2 B. & C. 494. 497. *Phillipp's Ev.* 675, 676.

(2) *Brewster v. Sewell*, 3 B. & A. 296.

(3) *Com. Dig. Evidence (B. 5.)*. *Skipwith v. Shirley*, 11 Ves. 64. *Burnett v. Lynch*, 5 B. & C. 601.

(4) *Bull. N. P.* 254. *Teed v. Martin*, 4 Camp. 90.

(5) *Kensington v. Inglis*, 8 East, 279. 289.

(6) *Harper v. Cook*, 1 C. & P. 139.

(7) *Freeman v. Arkell*, 2 B. & C. 494. 1 C. & P. 326. 135.

(8) *Rex v. Castleton (Inhab. of)*, 6 T. R. 236.

(9) *Rex v. Denio (Inhab. of)*, 7 B. & C. 620. 1 M. & R. 294.

**SECONDARY
EVIDENCE.****PROOF OF
STAMP.**

were somewhere in his possession, but he had not searched in any other place than the box:—It was held, that enough had not been done to let in secondary evidence of the contents of the letters. (1)

Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents, even if it had been destroyed by the wrongful act of the party who takes the objection. (2)

An unstamped agreement in writing, for the purpose of letting a tenement at a certain rent, having been lost, parol evidence of its contents is not admissible to shew the value of the tenement. (3)

Where two parts of an instrument are prepared, but only one stamped.

Where the plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and at the trial of an action on the agreement, the defendant upon notice produced his part unstamped, and the plaintiff the draft of the agreement:—It was held, that the defendant's part unstamped might be received in evidence (4); but he is not compellable to take the unstamped part, subject to the objections that may be made to it, although he has given notice to produce. (5)

If two parts of an instrument be prepared, but only one stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse on notice to produce the stamped part. (6)

When an instrument will be presumed to be stamped.

Against a party who refuses (after notice) to produce an agreement, it will be presumed that it is stamped (7); but the party refusing is at liberty to prove the contrary. (8)

**NOTICE TO PRO-
DUCE ORIGINAL
INSTRUMENTS.
WHEN REQUI-
SITE.****III. Notice to produce original Instruments.**

If a written document be in the hands of the opposite party, secondary evidence, generally speaking, cannot be received of its contents, without proof of a notice to produce the original.

An examined copy of a letter, containing notice of the dishonour of a bill of exchange which is not produced, nor the subject-matter of action, is not admissible, without notice to produce the letter sent. (9)

If A. be surety for B., and bind himself to pay to C. the balance of an account between B. and C. within the space of six months after notice; parol evidence of such notice cannot be given in an action by C. against A., without proof of the usual notice to produce. (10)

Where there is evidence to prove the destruction of an instrument.

This rule extends to cases where there is evidence to prove the destruction of an instrument; when it is once traced to the hands of the opposite party, no further evidence can be given of it, without a notice to produce. (11)

(1) *Bligh v. Wellesley*, 2 C. & P. 400.

(2) *Rippiner v. Wright (Clerk)*, 2 B. & A. 478.

(3) *Rex v. Castle Morton (Inhab. of)*, 3 ibid. 588.

(4) *Munn v. Godbold*, 3 Bing. 292. 11 Moore, 49. 2 C. & P. 97.

(5) Ibid.

(6) *Garnons v. Swift*, 1 Taunt. 507. *Waller v. Horsfall*, 1 Camp. 501.

(7) *Crisp v. Anderson*, 1 Stark. 95. *Pooley v. Goodwin*, 4 A. & E. 94.

(8) Ibid.

(9) *Lanauze v. Palmer*, M. & M. 131.

(10) *Grove v. Ware*, 2 Stark. 174.

(11) *Doe d. Phillips v. Morris*, 3 A. & E. 50. *Quære*, Whether the proof of the destruction would not *per se* establish, that the adverse party could not comply with the notice to produce, and that consequently, notice would be practically useless?

SECONDARY
EVIDENCE.

In ejectment, the defendant relied upon a will, on the cross-examination of one of his witnesses he stated, that about a fortnight after the execution of the will, a second will was prepared, which had come to the possession of the defendant; the plaintiff's counsel was not allowed to ask whether the latter paper was duly signed by three witnesses, and whether the testator had declared it to be his last will, no notice to produce it having been given. (1)

If from the nature of the action the defendant has notice, that the plaintiff means to charge him with the possession of the instrument, a notice to produce such instrument is not required (2), and the plaintiff may prove the nature and description of the document by secondary evidence, though the defendant offers to produce it. (3)

WHEN NOT RE-
QUISITE.

Notice to produce a written demand of a thing, for which an action of trover is brought, is unnecessary (4): thus, in trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice has been given to produce the certificate itself. (5)

Action of
trover.
Ship's registry.

In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient (6); nor is it necessary that the parties examining, should read the two bills alternately. (7)

Attorney's bill.

Where notice of the dishonour of a bill of exchange has been given in writing, it is not necessary to give a notice to produce that writing, to let in parol evidence of its contents. (8)

Bill of ex-
change.

Where an assignment has been executed of property due by a third person, and the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at the same time, which he signs, and serves one of them on such person: if an action be afterwards brought by the assignee, he can give in evidence that notice which he retained, without notice to produce that, which was served on the other person (9);—in fact, it may be considered as a principle, that where a notice has been given to a party to produce an instrument, of which, at the same time, another copy was made, it may be given in evidence without notice to produce that, which is in the other party's possession. (10)

Deed of assign-
ment.

Sometimes a description or copy of writing may be in the nature of original and primary evidence, and if it be so, notice to produce is not requisite: thus, in *Rex v. Hunt* (11), parol evidence of inscriptions and devices on banners and flags displayed at a meeting, and also a copy of resolutions delivered by one of the defendants to a witness, as resolutions intended to be proposed, and which copy corresponded with the resolutions, that the witness afterwards heard read from a paper, were received as evidence, no previous notice to produce the banners having been given.

WHERE COPY
OF ORIGINAL,
CONSIDERED AS
ORIGINAL AND
PRIMARY EVI-
DENCE.

So likewise on a trial for administering unlawful oaths, where a witness

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|----------------------------------------------------|-------------------------------------------------------|
| (1) <i>Doe v. Morris</i> , 3 A. & E. 46. | (7) <i>Ibid.</i> |
| (2) <i>How v. Hall</i> , 14 East, 274. | (8) <i>Swain v. Lewis</i> , 2 C. M. & R. 261. |
| (3) <i>Whitehead v. Scott</i> , 1 M. & Rob. 2. | 4 Dowl. P. C. 261. <i>Ackland v. Pearce</i> , 2 |
| (4) <i>Hammond v. Plank</i> , Peake's Add. Cas. | Camp. 601. |
| 90. <i>Colling v. Treweek</i> , 6 B. & C. 394. | (9) <i>Surtees v. Hubbard</i> , 4 Esp. N.P.C. 203. |
| D. & R. 456. <i>Scott v. Jones</i> , 4 Taunt. 865. | (10) <i>Gottlieb v. Danvers</i> , 1 <i>ibid.</i> 455. |
| (5) <i>Bucher v. Jarratt</i> , 3 B. & P. 143. | (11) 3 B. & A. 574. |
| (6) <i>Fyson v. Kemp</i> , 6 C. & P. 71. | |

**SECONDARY
EVIDENCE.**

swore to the language of the oath as used by the prisoner, who read it from a paper, it was held, that no notice to produce such paper was required. (1)

**FRAUDULENT
POSSESSION.**

If a fraudulent possession of a written instrument have been acquired, no notice to produce is requisite: thus, where a witness was called on the part of the defendant to produce a letter written to him by the plaintiff, and it appeared, that after the commencement of the action he had given it to the plaintiff, under such circumstances, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpoena*. (2)

**DUPLICATE
ORIGINAL.
COUNTERPART.
NOTICE.
Attorney's bill.**

Notice to produce is not required, where the paper offered in evidence is a duplicate original (3), or a counterpart (4); or where the instrument to be proved is a notice, as a notice to quit, a notice of the dishonour of a bill of exchange, or a notice of action (5); and where an attorney's bill duly signed has been delivered to the defendant, a copy, though not signed, is admissible in evidence, without proof of notice to produce the original, on the ground, that the bill delivered is considered as a notice. (6)

**Public
placards.**

Where a great number of placards announcing a public meeting had been printed, the prisoner, who was indicted for treason, took twenty-five of them away from the printer's:—It was held, that one of the remaining placards might be read, without any preparatory evidence as to the original manuscript, and without any notice to produce the twenty-five copies, the whole impression being duplicates in the nature of originals. (7)

***Assumpsit* for
non delivery of
written instru-
ments.**

In *assumpsit* against a carrier for the non delivery of written instruments, it is not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents. (8)

**Duplicate by
means of a
copying ma-
chine.**

The duplicate of a writing, taken from the autograph at one impression by means of a copying machine, cannot be read in evidence as an original. (9)

**Shipbroker's
card.**

A defendant's card, shewing that he acted in the character of a shipbroker, cannot be given in evidence, unless it can be proved to have been given to the witness by the defendant himself. A notice should be given him to produce his cards, and one of them should be proved as a copy, or parol evidence given of the contents. (10)

**Action by a
seaman to
recover his
wages.**

Another exception may be mentioned, in the case of an action by a seaman to recover wages, in which the captain is compellable to produce the ship's articles at the trial, though he has not received a notice for that purpose, if he would found any objection upon them, or resort to them in making his defence: the statute having introduced an exception to the general rule upon this subject. (11)

(1) *Rex v. Moors*, 6 East, 419. n.

(2) *Leeds v. Cook*, 4 Esp. N. P. C. 256.
Doe d. Pearson v. Ries, 7 Bing. 724.

(3) *Per* Bayley J. in *Colling v. Treweek*, 6 B. & C. 398. *Per* Lord Ellenborough in *Philipson v. Chuce*, 2 Camp. 110.

(4) *Burleigh v. Stibbs*, 5 T. R. 465. *Roe d. West v. Davis*, 7 East, 363. *Carlisle (Mayor of) v. Blamire*, 8 East, 487.

(5) *Jory v. Orchard*, 2 B. & P. 41. *Kine v. Beaumont*, 3 B. & B. 288. *Ackland v. Pearce*, 2 Camp. 601. *Roberts v. Bradshaw*,

1 Stark. 28. *Langdon v. Hulls*, 5 Esp. N. P. C. 157.

(6) *Colling v. Treweek*, 6 B. & C. 394.

(7) *Rex v. Watson*, 2 Stark. 129.

(8) *Jolley v. Taylor*, 1 Camp. 143.

(9) *Nodin v. Murray*, 3 ibid. 228.

(10) *Clark v. Capp*, 1 C. & P. 199.

(11) *Bowman v. Manzelman*, 2 Camp. 315. Stat. 2 Geo. 2. c. 36. s. 8. as to foreign voyages. Stat. 31 Geo. 3. c. 39. s. 6. as to the coasting trade.

The notice should be unambiguous respecting the documents required, and the reference to them should be specifically made: thus, when a notice was given to produce "all letters, papers, and documents touching and concerning the bill of exchange mentioned in the declaration," or "all letters and copies of letters, and all books relating to this cause" (1), the description was held to be too general.

SECONDARY EVIDENCE.

FORM OF NOTICE.

Must be unambiguous;

But in *Jacob v. Lee* (2), where the notice was to produce "all and every letters written by the plaintiff to the defendant, relating to the matters in dispute," secondary evidence of a particular letter was admitted, though it did not specify the date of such letter. And under a notice to produce "all accounts [for work and labour] relating to the matter in question in this cause," secondary evidence of an account for work done is evidence, although it be not specified by date or otherwise. (3)

may be either parol or written.

If the title of the cause be misdescribed, it will be a bad notice, as "*A. assignee of B. and C. v. D.*" instead of "*A. assignee of B. v. D.*" (4)

The notice may be either parol or written, and proof of either will be sufficient. (5)

Notices to produce ought to be served on the attorney if there be one (6), and not upon the party in the cause. (7) It is not even necessary in penal actions to give notice to the defendant himself to produce papers, &c.; notice to his agent or attorney is sufficient. (8) When the attorney has been changed, a notice to produce served on the first attorney is sufficient to entitle the party to call for the production of the document on the trial. (9)

SERVICE ON WHOM.

It is sufficient to leave the notice with a servant of the party at his dwelling-house. (10)

One party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit (11): but where a party has done all in his power to produce the best evidence, by giving notice to the opposite party or his attorney to produce the originals (12), an examined copy, or parol evidence of their contents, will be permitted: thus in *Mills v. Oddy* (13) it appeared, that A. had purchased at an auction an under-lessee's interest in a house, and refused to pay a check which he had given for the deposit, because the ground rent payable to the superior landlord was greater than it was stated to be at the sale:—It was held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as equitable mortgagee, could not be compelled to produce the lease itself; but that, if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling a person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor.

WHERE A PARTY HAS DONE ALL IN HIS POWER TO PRODUCE THE BEST EVIDENCE OF ORIGINAL DOCUMENTS, EXAMINED COPIES, OR PAROL EVIDENCE OF THEIR CONTENTS, IS ADMISSIBLE.

(1) *France v. Lucy*, R. & M. 341. *Jones v. Edwards*, 1 M'Clel. & Y. 139.

(2) 2 M. & Rob. 33.

(3) *Rogers v. Custance*, 2 M. & Rob. 179.

(4) *Harvey v. Morgan*, 2 Stark. 17.

(5) *Smith v. Young*, 1 Camp. 439.

(6) *Houseman v. Roberts*, 5 C. & P. 394.

(7) *Phillipp's Ev.* 665.

(8) *Cates, q. t. v. Winter*, 3 T. R. 306.

(9) *Doe d. Martin v. Martin*, 1 M. & Rob. 242.

(10) *Evans v. Sweet*, R. & M. 83. *Hughes v. Budd*, 4 Jur. 150.

(11) *Entick v. Carrington*, 19 Howell's St. Tr. 1073.

(12) *Cates, q. t. v. Winter*, 3 T. R. 306. *Att. Gen. v. Le Marchant*, 2 ibid. 201. n. *Rex v. Stoke Golding (Inhab. of)*, 1 B. & A. 173.

(13) 6 C. & P. 728.

**SECONDARY
EVIDENCE.****Effect of non
production of
documents.**

A party called upon to produce a paper, must either produce it when called upon, or not at all; he cannot avail himself of it in a subsequent stage of the cause: thus, it has been held, that a party, after refusing to produce a document, could not put it into the hands of a witness at a later period of the cause, in order to ask him at what time an interlineation was made in it (1), in order to shew that the instrument was attested by witnesses who ought to be called. (2)

**PROOF OF DEED
IN PARTY'S
POSSESSION.**

The degree of evidence, in order to establish the fact of possession, must be dependent upon the particular circumstances of every case. Slight evidence of possession is only generally required, where it is sought to establish, that the written instrument is in possession of a person to whom of right it belongs.

In *Henry v. Leigh* (3) the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that, looking at the entry of charges, he had no doubt the certificate was allowed: it was therefore presumed, that the certificate came into the defendant's possession.

**POSSESSION OF
THIRD PERSONS.**

If the written instrument be in the custody of a third party, but such a privity exist between such party and the owner of the instrument, that it be under the control of the latter, a notice to the owner may answer: thus, if a paper be traced into the hands of the agent of a party in a suit, and notice has been given to such party to produce it, he is bound to do so; and the other side are not bound to call the agent; and if he has delivered it to the Stamp Office to get certain duties allowed, and does not tell that circumstance to the party serving the notice to produce, parol evidence of the contents may be given. (4)

Agent.**Stamp office.****Captain of a
ship.**

In *Baldney v. Ritchie* (5), a notice to the defendant to produce an order relating to a ship, which it appeared the defendant had delivered to the captain, was held to be sufficient (in default of production) to enable the plaintiff to give parol evidence of the order, since the possession of the captain was for this purpose the possession of the defendant.

Under-sheriff.**Judgment by
default.**

Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it:—It was held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. (6) Where a notice had been served upon two jointly, and one had suffered judgment by default:—It was held, that the plaintiff might give secondary evidence of a receipt in the possession of that defendant, who had suffered the judgment by default. (7)

Bankers.

Notice to a defendant to produce a check drawn by him and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands (8); and he need not call the banker's clerk to produce it. (9)

(1) *Doe d. Higgs v. Cockell*, 6 C. & P. 525.(2) *Jackson v. Allen*, 3 Stark. 74., vide etiam *Lewis v. Hartley*, 7 C. & P. 405., post, 1592.(3) 3 Camp. 502., vide etiam *Sturge v. Buchanan*, 2 P. & D. 573.(4) *Sinclair v. Stevenson*, 1 C. & P. 582. 2 Bing. 514. 10 Moore, 46.

(5) 1 Stark. 338.

(6) *Tuplin v. Atty*, 3 Bing. 164. 10 Moore, 564.(7) *Beckwith v. Benner*, 6 C. & P. 682.(8) *Partridge, q. t. v. Coates, R. & M.* 156. 1 C. & P. 534.(9) *Burton v. Payne*, 2 C. & P. 520.

But where an indenture of apprenticeship, made in 1797, having been only signed by one overseer of the appellant parish, the respondent parish, to shew that only one had been appointed in that year, called upon the appellants to produce the original appointment (having given them notice to produce all books and writings relating thereto); one book only was produced, and that was not for the year 1797:—It was held, that the respondents, not having taken any means to procure the testimony of the overseer himself (who must be presumed to have the custody of the original appointment), were not entitled to give secondary evidence of its contents. (1)

SECONDARY
EVIDENCE.

Overseers.

Secondary evidence of a document, even after notice, is inadmissible, if the document be in the possession of a stakeholder, between the party in the cause and a third person (2); because, where a paper is in the possession of a person acting in an independent character, although the party to the suit justifies under the authority of that person, notice to the party is insufficient. (3)

INDEPENDENT
POSSESSION.
Stakeholder.

If the instrument be in the possession of a party at the time of the service of notice, he cannot afterwards voluntarily part with it, so as to get rid of the effect of notice: but when the plaintiff was nonsuit in a cause, in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and, on a second trial, plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment:—It was held, that secondary evidence was inadmissible. (4)

Voluntary
assignment to
avoid the effect
of notice.

The notice must appear to have been served within a reasonable time; but a service on a Sunday is bad. (5)

TIME OF SER-
VICE.

Notice to produce must be served, before the commission day, on parties living away from the assize town (6): thus upon a trial for arson, the commission day was on the 15th of March, the trial came on upon the 20th, a notice to produce, served on the defendant in goal on the 18th (his residence being ten miles distant), was held insufficient. (7)

In term causes, "service of a notice on the evening previous to the trial is in general sufficient" (8); but it has been held, that service on the party on Saturday evening for Monday was insufficient. (9)

A notice served on the attorney at nine o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland at the time, is too late. (10)

A notice to produce deeds was served on defendant's attorney in Essex on Saturday, the commission day of the assizes being Monday; the attorney went to London and procured them. A notice was served on

Refusing to
produce docu-
ments, unless
incidental ex-

(1) *Rex v. Stokes Golding (Inhab. of)*, 1 B. & A. 173.

(2) *Parry v. May*, 1 M. & Rob. 279. *Sinclair v. Stevenson*, 1 C. & P. 585.

(3) *Evans v. Sweet*, R. & M. 83., vide etiam *Whitford v. Tutin*, 10 Bing. 395. *Rex v. Pearce*, Peake's N.P. C. 106. *Pritchard v. Symonds*, Bull. N. P. 254.

(4) *Knight v. Martin*, Gow, N.P.C. 104.

(5) *Hughes v. Budd*, 4 Jur. 150.

(6) *Trist v. Johnson*, 1 M. & Rob. 259. *George v. Thompson*, 4 Dowl. P. C. 656.

(7) *Rex v. Ellicombe*, 5 C. & P. 522. 1 M. & Rob. 260. *George v. Thompson*, 4 Dowl. P. C. 656. *Leader (Lessee of) v. Duggan*, 1 Irish Circuit Cases, 124.

(8) Per Gurney B. in *Atkins v. Meredith*, 4 Dowl. P. C. 659.

(9) *Houseman v. Roberts*, 5 C. & P. 394., et vide etiam *Sims v. Kitchen*, 5 Esp. N. P. C. 46. *Atkinson v. Carter*, 2 Chitt. 403.

(10) *Vice v. Anson (Viscountess)*, 3 C. & P. 19. M. & M. 96.

**SECONDARY
EVIDENCE.**

penses of pro-
curement be
paid.

New trial
granted when
notice to pro-
duce instru-
ments served
too late.

Where de-
fendant a
foreigner.

Where docu-
ments will and
will not be pre-
sumed to be in
the possession
of the attorney.
Partnership
property.

Tradesman's
books.

Client abroad.

the Monday evening to produce another deed. The attorney stated he had been to town to fetch the deeds; and if the plaintiff would pay the expense of sending for the one which was then required from town, where it was, it should be delivered. No offer to pay was made, and the trial was on Thursday:—It was held, that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last-mentioned deed. (1)

A cause came on to be tried at the assizes on a Wednesday morning; on the previous Monday evening the defendant's attorney, being at the assize town, was served with a notice to produce a book which would probably be at his office, which was nineteen miles from the assize town:—It was held, that this service was too late. (2)

Where a defendant four days before the trial was served with a notice to produce certain of the plaintiff's letters to him, it was held sufficient, although it was objected, that the defendant was a foreigner, and had only been in England since the time the letters were received by him, and that therefore he might have left them abroad (3); and such notice was considered to be sufficient to allow secondary evidence of the contents of such letters, although they were written eighteen years ago, and addressed to the defendant at his residence abroad. (4)

It is material, in cases respecting the time of service of the notice, to consider whether the document required to be produced is from its nature to be presumed to be in the possession of the client or the attorney. (5)

In an action against partners on a bill of exchange, where the defence was, that one partner, with the knowledge of the plaintiff, accepted the bill in the partnership firm for his private debt:—It was held, that, other bills accepted by that partner and paid by the other, were not so necessarily connected with the subject of the trial as to render a notice served on the attorney of the defendant, too late for him to procure the bills from the defendant himself, sufficient to let in secondary evidence. (6)

Where a document was such, as it would not be presumed to be in the possession of the attorney, such as a tradesman's books, service on the attorney at seven o'clock on the evening previous to the trial, was held not to be sufficient, although the client resided in London. (7)

If a party to a cause be abroad, but employ an attorney to conduct it, he will be presumed to have left in the hands of that attorney, all papers material to the cause; and therefore, if on the 13th of December, between the hours of five and six in the afternoon, notice be given to his attorney to produce a paper material to the cause, and the trial comes on, on the 15th of December, this notice to produce is sufficient; and if the paper be not produced, the other party may give secondary evidence of its contents. (8)

Notice to produce a letter relating to the matters in dispute, served on

(1) *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182.

(2) *Hargest v. Fothergill*, 5 C. & P. 303., where rule for a new trial was granted on payment of costs, *vide ante*, 1529. n. (5) and (6).

(3) *Drabble v. Donner*, 1 C. & P. 188. R. & M. 47.

(4) *Ibid.*

(5) *Doe d. Wartney v. Grey*, 1 Stark. 283.

(6) *Aflalo v. Fourdrinier*, M. & M. 335. n.

(7) *Atkins v. Meredith*, 4 Dowl. P. C. 659.

(8) *Bryan v. Wagstaff* (*in error*), 8 D. & R. 208. 5 B. & C. 314. R. & M. 339. 2 C. & P. 126.

the attorney of the party on the evening next but one before the trial, was held sufficient to let in secondary evidence of the contents, though the party was out of England. (1)

SECONDARY
EVIDENCE.

But the rule, that all papers relating to the cause must be presumed to be placed in the hands of the attorney, must be confined to the attorneys of persons residing abroad while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purposes of the cause. (2)

It is the province of the judge to decide, whether the papers required to be produced were so necessarily connected with the cause, as to render it probable, that they would be delivered to the attorney. (3)

Where notice has been given to produce books or writings, if the party merely call for them, it does not therefore make them evidence for the party whose property they are (4); but it may be matter of observation to the counsel on the opposite side, that the entries in the books were in favour of his client. (5)

EFFECT OF
PRODUCTION
AND NON-PRO-
DUCTION.

EFFECT OF
PRODUCTION.

Books called
for but not
used

Books in-
spected.

A party who calls for books belonging to his opponent and inspects them, has not the option to use them or not; he thereby makes them evidence (6); and he cannot ask for such books, and be determined upon their inspection, whether he will use them or not. (7)

Although the plaintiff's counsel, if he call on the defendant to produce a paper, and inspect it, is bound to give it in evidence; yet if it be collateral to the question in issue, he cannot be required to give it in evidence. (8)

Under a notice to produce a letter, which upon inspection appears to have covered other papers, those papers are not thereby made evidence, unless they are referred to in the letter. (9)

Letter covering
other papers.

Where the plaintiff having declared upon articles of agreement, calls upon the defendant to produce them, and they do not contain the contract stated in the declaration, he cannot afterwards object to the authority under which they were executed; nor can he be let in to give parol evidence under a general count of any contract arising out of those articles. (10)

Execution of
agreement, and
its clauses, ad-
mitted by
notice to pro-
duce.

An indorsement on a feoffment (purporting to have been made by the attorney thereby appointed to deliver seisin), that the indorser had done so in the presence of A., is not evidence of that fact, although the deed is produced by the defendant at the desire of the plaintiff, unless the defendant claims under it. (11)

The regular time of calling for the production of papers and books is not until the party who requires them has entered upon his case; till that period arrives, the other party may refuse to produce them; and there can be no cross-examination as to their contents, although the notice to produce them

TIME FOR DE-
MANDING PRO-
DUCTION OF
DOCUMENTS AT
TRIAL.

(1) *Bryan v. Wagstaff* (in error), 8 D. & R. 208. 5 B. & C. 314. R. & M. 329. 2 C. & P. 126.

(2) *Vice v. Anson* (Viscountess), 3 C. & P. 19. M. & M. 96. 7 B. & C. 409. 1 M. & R. 114.

(3) *Vice v. Anson* (Lady), M. & M. 97.

(4) *Sayer v. Kitchen*, 1 Esp. N. P. C. 210.

(5) *Calvert v. Flower*, 7 C. & P. 386.

(6) *Wharam v. Routledge*, 5 Esp. N. P. C. 295.

(7) *Ibid.*

(8) *Wilson v. Bowie*, 1 C. & P. 10.

(9) *Johnson v. Gilson*, 4 Esp. N. P. C. 21.

(10) *Scrimshaw v. Grantham Canal Comp.* Forrest, 67.

(11) *Doe d. Wilkins v. Cleveland* (Marquess of), 9 B. & C. 864.

**SECONDARY
EVIDENCE.****EFFECT OF
NON-PRODUC-
TION.**

is admitted. (1) In *Sideways v. Dyson* (2) Lord Ellenborough thus observed upon the foregoing principle, "In strictness the evidence could not be anticipated, although it was rigorous to insist upon the rule, and a close adherence to it might be productive of inconvenience."

A party is not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it (3); and the mere refusal of a witness to produce a document which he is not justified in withholding, is not a ground for going into secondary evidence of that document. (4)

**Books of ac-
count.**

If upon a notice to produce books of account, they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. (5)

**Matter for ob-
servation to the
jury.**

But the refusal to produce a written instrument after notice, is matter for observation to the jury. (6)

**Deed in court
in possession of
the other party.**

In *Doe d. Wartney v. Grey* (7) it was held, that, although a party has a written instrument in court, no parol evidence of it can be given, if there have been no notice to produce, and the opposite party may object to such parol evidence of the contents on account of his not having received a previous notice to produce the original; because, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference which the production of the deed might have raised against him; and besides, the witness would be speaking to the contents of a deed, when there had been no notice given to produce the original. (8)

**VERBAL TES-
TIMONY TO VARY
OR DISCHARGE
WRITTEN IN-
STRUMENTS.****GENERALLY.
Instrument
considered as
containing the
true agreement.****IV. Verbal Testimony to vary or discharge written Instruments.**

It is an inflexible principle, that a written instrument furnishes better evidence than any which can be supplied by parol (9): thus Chief Justice Popham (10) says, "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally impart the certain truth of the agreement of the parties, should be controlled by an averment of parties to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such nude averments against matter in writing should be admitted." (11)

(1) *Graham v. Dyster*, 2 Stark. 23.

(2) *Ibid.* 49.

(3) *Law v. Wells*, Peake's N. P. C. 128.

(4) *Jesus College v. Gibbs*, 1 Y. & C. 145.

(5) *Cooper v. Gibbons*, 3 Camp. 363.

(6) *Per Lord Lyndhurst in Bate v. Kinsey*, 1 C. M. & R. 41.

(7) 1 Stark. 283.

(8) *Vide Bate v. Kinsey*, 1 C. M. & R. 41., et *vide etiam Cook v. Hearn*, 1 M. & Rob. 201. *Doe v. Morris*, 4 N. & M. 298. *Doe d. Haldame v. Harvey*, 4 Burr. 2484. *Phillipp's Ev.* 671—673.

(9) 2 Atk. 383. *Hesketh v. Gray*, Say. 189. *Woolam v. Hearn*, 7 Ves. 218. *Kiss v. Old*, 2 B. & C. 634. *Pickering v. Dawson*, 4 Taunt. 786. 2 Bro. C. C. 219.

(10) *Countess of Rutland's case*, 5 Co. 26.

(11) *Vide etiam Brydges v. Chandos (Duchess of)*, 2 Ves. jun. 417. *Haynes v. Hare*, 1 Hen. Black. 659. *Exp. Hooper*, 2 Rose, B. C. 328. *Buchler v. Millard*, 2 Vent. 107. *Finney v. Finney*, 3 Atk. 8. 1 Wils. 34. *Irnham (Lord) v. Child*, 1 Bro. C. C. 92. *Clifton v. Walmesley*, 5 T. R. 567.

In general, every matter which in law avoids an instrument, whether it be fraud, illegality, want of stamp, &c. may be proved by parol, however contradictory to its tenor, provided the pleadings be adapted to such evidence; because the rejection of such evidence would enable a party to defeat the objects of the law. This principle applies to instruments, whether under seal or not; but if the instrument be under seal, it is not avoided by shewing that it was made without consideration (1); but if the instrument be not under seal, unless there be a consideration for the obligation it professes, the instrument may be rendered invalid by shewing that no consideration passed between the parties. (2)

SECONDARY EVIDENCE.

Parol evidence is always admissible to shew that a written instrument never had any legal existence.

Any written instrument may be impeached by evidence which shews, that it was made for the furtherance of objects, which the common or statute law has forbidden: thus, a contract may be impeached for simony, for usury, for composition of a felony; or because it was obtained from the party by fraud, felony, or duress; or because the instrument was invalid, as made when the party was incapable of entering into an obligation, being an infant, or under coverture. (3)

Deeds for the performance of that, which the common or statute law has forbidden.

In *Doe d. Chandler v. Ford* (4) the question was, whether the provision of the Annuity Act, which avoids an annuity deed unless it is enrolled, had been complied with?; it was contended, that the act did not apply, on the ground, that the deed came within an exception of the act, as being a grant of an annuity secured on premises of greater value than the annuity:— but it was held, that a covenant by the grantor, that the premises were of greater value than the annuity, did not preclude him from shewing that they were of inferior value, Mr. Justice Patteson observing, “I do not say whether, in a different case, this covenant would have been an estoppel or not; but the question here arises on a statute, which says, that an annuity deed, if no memorial is enrolled, shall be void, unless it falls under certain provisions contained in the tenth section. To enforce the deed, where there is no memorial, the parties must shew that it comes within one of these provisions; in the present case, that the lands are of equal annual value with the annuity, or greater. To establish that here, the defendant refers to a covenant, by which, as he says, it is stated, that the lands are of such value. But that is not sufficient for the purpose. If it were held so, an instrument which the parties might choose to prepare, would defeat the statute from beginning to end.”

Non-enrolment of an annuity.

Judgment of Mr. Justice Patteson in *Doe d. Chandler v. Ford*.

Evidence is sometimes admissible to shew a mistake in writing: thus, a contract, usurious on the face of it, may be explained by shewing, that it was made so by a clerical error. (5)

Where mistakes exist.

The same principle applies to criminal cases: thus, a witness can explain what he has sworn in his deposition (6); and where upon cross-examination

Inaccurate depositions can be explained

(1) *Foster v. Jolly*, 1 C. M. & R. 703. *Pike v. Street*, 2 M. & M. 226. (2) *Baker v. Dewey*, 1 B. & C. 707. *Rowntree v. Jacob*, 2 Taunt. 141. *Lampon v. Corke*, 5 B. & A. 606. (3) *Phillipp's Ev.* 758. *Rex v. Mattingley (Inhab. of)*, 2 T. R. 12. *Doe d. Chandler v. Ford*, 3 A. & E. 649. *Collins v. Blantern*, 2 Wils. 347. *Bull. N. P.* 173. *Buckler* 190. *Millerd*, 2 Vent. 107. *Rex v. Olney*, 1 M. & S. 387. *Catlin v. Bell*, 4 Camp. 183. *Biggs v. Lawrence*, 3 T. R. 454. *Waymell v. Reed*, 5 T. R. 600. (4) 3 A. & E. 649. (5) *Anon.* 1 Freem. 253. *Booth v. Cooke*, *ibid.* 264. (6) *Wade's case*, 1 Irish Circuit Cases, 190.

SECONDARY
EVIDENCE.by parol evi-
dence.Judgment of
Mr. Justice
Crampton in
Curtin's case.WHERE WRIT-
ING APPEARS
INCOMPLETE.SUPPLETORY
MATTER.Judgment of
Lord Ellen-
borough in
*Jeffery v. Wal-
ton*.WRITTEN IN-
STRUMENTS
CANNOT BE
ADDED TO BY
WHAT HAS VER-
BALLY OCCUR-
RED BETWEEN
THE PARTIES.

a variance appeared between a witness's testimony and his deposition, the crown were allowed to re-examine the witness, to shew that the deposition produced was incorrect, Mr. Justice Crampton observing, "It is an error to imagine, that, in the eye of the law, a deposition is conclusive as to every thing it contains; the law, by no means looks upon it as an estoppel, which cannot be made the subject of examination. (1) I admit that it is the presumption of law, that the depositions contain an accurate account of what the witness said before the magistrate; but this is only a presumption, and the presumption may be encountered and successfully rebutted; in the present case I shall admit the questions which the crown proposes to put to the witness; but I must say, that as the object is to shew the deposition which the magistrate has returned is incorrect, it would be much better if the magistrate who took it was produced." (2)

Where a writing evidently appears to express only some parts of an agreement entered into between the parties, parol evidence, it seems, would be admissible to prove the other parts of the agreement on which it is silent; as for example, if there were a written order to make a chattel, parol evidence would be admissible of the acceptance of the order, and of the price, at which the other party agreed to make it. (3)

In *Jeffery v. Walton* (4) an action was brought against the defendant for not taking proper care of a horse he had hired of the plaintiff; at the time of the hiring, the following memorandum was made — "Six weeks, at two guineas. WILLIAM WALTON, jun.:" — It was held, that parol evidence was admissible, that the defendant at the time of the hiring agreed to be responsible for all accidents; Lord Ellenborough observing, "The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion, that it is competent to the plaintiff to give in evidence suppletory matter as part of the agreement."

In *Knapp v. Harden* (5) it appeared, that A. sent to B.'s agent a list of prices at which he would do work. B. wrote a letter to his agent, stating that he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent shewed this letter to A., and said to him, that he might consider the 100*l.* to be payable on the "1st of November." A. afterwards did the work for B. It was left to the jury to say, whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent.

Upon the principle that parol evidence cannot be received to vary a written contract, evidence is inadmissible of what occurred between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. (6) Thus, where the

(1) Vide *Rex v. Bentley*, 6 C. & P. 148. *contrd.*(2) *Curtin's case*, 1 Irish Circuit Cases, 188.; the magistrate was afterwards produced. Ibid. Vide etiam *Rowland v. Ashby*, R. & M. 231. *Harris's case*, 1 Moody, C. C. 338. *Venafrá v. Johnson*, 1 M. & Rob. 316.(3) Phillipp's Ev. 772. *Ingram v. Lea*, 2 Camp. 521.

(4) 1 Stark. 267.

(5) 6 C. & P. 745.

(6) *Goss v. Nugent* (Lord), 5 B. & Ad. 64., vide S. C. post, 1535.

rent for a house was specified in a written agreement to be 26*l. per annum*, and the landlord in an action for use and occupation proposed to shew by parol evidence, that the tenant had also agreed to pay the ground rent, the court refused to admit the evidence. (1)

SECONDARY
EVIDENCE.

Landlord and
tenant.

So where a tenant, having paid the land tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's handwriting, which specified the rent and terms, but was silent respecting the payment of taxes; the defendant offered parol evidence, that previously to the drawing up of the memorandum it had been mentioned, and was understood by the parties, that the rent was to be paid clear of all taxes:—this evidence was rejected; and the court of Common Pleas afterwards, on a motion for a rule to shew cause why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule. (2)

The verbal declarations of an auctioneer at the time of sale are not evidence in order to vary, or add to, or explain the printed conditions of sale. (3) Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not permitted to shew that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight (4); Lord Ellenborough observing, "The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement?—which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

Verbal declarations of an auctioneer not admissible for the purpose of varying, adding to, or explaining the printed conditions of sale.

Judgment of Lord Ellenborough in *Powell v. Edmunds*.

A distinction is to be observed between contracts in writing under the Statute of Frauds and contracts at common law. In the former case a parol contract will not be admitted to shew a subsequent variation in the written contract; as where several lots of land were bought together, it cannot be shewn that the purchaser has by parol waved the contract as to one lot to which the vendor could not make title (5); but in that case the court said it would have been otherwise, if the contract had not been subject to the control of an act of parliament; "but after the agreement has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either altogether to wave, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

Distinction between contracts in writing under the Statute of Frauds and contracts at common law.

(1) *Preston v. Mercan*, 2 W. Black. 1249.

(2) *Rich v. Jackson*, 4 Bro. C. C. 515. 6 Ves. 334. n.

(3) *Gunnis v. Erhart*, 1 Hen. Black. 289. *Jenkinson v. Pepys*, cit. 6 Ves. 330. *Higginson v. Clowes*, 15 ibid. 516. *Clowes v.*

Higginson, 1 Ves. & B. 524. *Winch v. Winchester*, ibid. 378. *Ogilvie v. Foljambe*, 3 Meriv. 53. *Shelton v. Livius*, 2 C. & J. 416. *Bradshaw v. Bennett*, 5 C. & P. 48.

(4) *Powell v. Edmunds*, 12 East, 6.

(5) *Goss v. Nugent (Lord)*, 5 B. & Ad. 58.

SECONDARY
EVIDENCE.Fraudulent in-
struments.

If fraud be imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to shew the fraudulent nature of the transaction. (1) Thus, if a will be fraudulently made, parol evidence may be given of what passed at the time of the testator's signing, and what the testator said. (2) So, likewise, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly stated, it may be proved, that a greater sum than is mentioned was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted for the purpose of evading the provisions of the stamp acts.

Where a conveyance of land was expressed to be for the consideration of 30*l.*, yet, in order to avoid the settlement of a pauper, it may be shewn, that the purchase money did not in fact amount to 30*l.* (3)

PROOF OF AN-
OTHER CONSI-
DERATION.

Where an existing written contract, or obligation upon the parties, is once proved, questions may arise as to the admissibility of evidence to shew, that the parties have subsequently consented to vary it.

Such evidence is not open to the objection which is made to contemporaneous parol evidence, viz. that it is offered in opposition to that written evidence, to which by the policy of the law a greater degree of weight is attached, than to the uncertain memory of a witness. In general, such evidence of a subsequent alteration of the terms of a written agreement is receivable in evidence. Where, however, the parties have defined the terms by a writing under seal (which must be taken to be made with great care and formality), the policy of the law will not permit it to be altered by matter of a lower nature,—“*Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine, quo ligatum est.*” (4)

Simple con-
tracts may be
varied by parol
agreement be-
fore breach
without any
new consider-
ation, *sed aliter*,
after it is
broken.

A simple contract, whether in writing or not, may be varied in its terms by a subsequent parol agreement entered into before the breach of it, without any new consideration (5); but after it is broken it cannot be discharged without satisfaction, for by the breach there is a wrong done to the party which the words cannot release without satisfaction; but before the breach no injury was done to either party, nor any of them injured by such a discharge. (6) After a breach there must be a new consideration to set up a new agreement in substitution of the one that was broken.

Whatever is wanting to shew the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed, where such evidence does not contradict the deed. (7) Thus, the consideration expressed in the deed of conveyance was 28*l.*, but parol evidence was admitted to prove that 30*l.* was the real consideration. (8)

But evidence will not be permitted to shew a condition different from that expressed in a bond, or to vary the positive language of a deed.

But another consideration can be averred, which is consistent with the consideration expressed in a deed. Thus, a deed operating under the Statute

(1) Bull. N. P. 173. *Paxton v. Popham*, 9 East, 421. *ibid.* 79. (b.) *Blemerhasset v. Pierson*, 3 Lev. 234. *Blake's case*, 6 Co. 44. (a.) *Braddick*

(2) *Doe d. Small v. Allen*, 8 T. R. 147. *v. Thompson*, 8 East, 344.

Doe d. Ellis v. Hardy, 1 M. & Rob. 525.¹ (5) Vin. Abr. Contract, 17.

(3) *Rex v. Mattingley (Inhab. of)*, 2 T. R. (6) *Ibid.*

12. *Rex v. Olney*, 1 M. & S. 387. (7) *Hartopp v. Hartopp*, 17 Ves. 192.

(4) *Phillipp's Ev.* 774. *Countess of Rutland's case*, 5 Co. 26: (a.) *Peytoe's case*, 9 R. 474. (8) *Rex v. Scammonden (Inhab. of)*, 3 T.

of Uses, and reciting no consideration, may be supported by shewing that a pecuniary consideration passed. (1)

SECONDARY
EVIDENCE.

If a deed of bargain and sale be expressed generally to be made "for divers good considerations," it may be proved, that the bargainee gave money or other valuable consideration. (2) And if a deed recite only a pecuniary consideration, it may be shewn to have been also founded on the consideration of marriage (3); because such averments are but an explanation and particularising of the general words of the deed, which include every manner of consideration; and in all these cases the matter so averred is traversable and issuable. (4)

which is consistent with the consideration expressed.
Deed of bargain and sale.

But although a party who impeaches a deed for fraud may prove a different consideration, the party charged with the fraud will not be allowed to prove any other consideration in support of the instrument. (5)

Written instruments are considered as positively defining the intentions of the contracting parties at the time of the contract; therefore, no parol evidence can be received to explain the time of holding stated in a deed, or lease. (6)

Time of holding under a lease.

Written contracts of hiring between masters of ships and seamen cannot, for perquisites, additional labour, or other causes, be varied or added to by parol. (7)

Seaman's wages.

Evidence cannot be received to vary a written contract for the sale of goods, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered.

Sale of goods.

Parol evidence is also inadmissible to shew that a note, purporting to be payable on demand, was intended by the parties to be payable only on a contingency (8); or that a note, payable on a certain day, was intended to be payable on some other day (9); or that a bill or note should be renewable. (10)

Bills or notes.

A deed takes effect from the delivery, not from the date; and in *Steele v. Mart* (11), evidence was received to shew, that a lease dated on Lady-day, 1783, and purporting to commence on *Lady-day last past*, was in fact executed after the date, and that the term therefore commenced on Lady-day, 1783, and not 1782. (12)

TIME OF DELIVERY OF DEED.

Deed may be proved to have been delivered, either before or after the date.

(1) Phillipp's Ev. 761. 2 Rol. Abr. Uses (N.), 786. *Bedel's case*, 7 Co. 40. *Lord Cromwel's case*, 2 ibid. 76. *Mildmay's case*, 1 ibid. 176. *Doe d. Milburn v. Salkeld*, Willes, 677.

(2) 2 Rol. Abr. Uses (N.), 786. *Mildmay's case*, 1 Co. 176.

(3) *Craythorne v. Swinburne*, 14 Ves. 170. *Tull v. Parlett*, M. & M. 472. *Vernon's case*, 4 Co. 3.

(4) In *Peacock v. Monk*, 1 Ves. sen. 128. Lord Hardwicke held, that where no consideration is expressed in a deed, a party claiming the benefit of a trust under the deed may prove a valuable consideration.

(5) *Clarkson v. Hanway*, 2 P. Wms. 203. *Doe d. Roberts v. Roberts*, 2 B. & A. 368.

(6) *Doe d. Spicer v. Lea*, 11 East, 312.

(7) *White v. Wilson*, 2 B. & P. 116.

(8) *Rawson v. Walker*, 1 Stark. 361. *Woodbridge v. Spooner*, 3 B. & A. 233. *Moseley v. Hanford*, 10 B. & C. 729. *Foster v. Jolly*, 1 C. M. & R. 703. *Adams v. Wordley*, 1 M. & W. 378.

(9) *Free v. Hawkins*, 1 Moore, 535. 8 Taunt. 92.

(10) *Hoare v. Graham*, 3 Camp. 57. *Hogg v. Snaith*, 1 Taunt. 347., ante, tit. BILLS OF EXCHANGE AND PROMISSORY NOTES.

(11) 4 B. & C. 272.

(12) *Stone v. Bale*, 3 Lev. 348. *Hall v. Cazenove*, 4 East, 477. *Goddard's case*, 2 Co. 4. (b.)

SECONDARY
EVIDENCE.LATENT AM-
BIGUITY.

*Ambiguitas la-
tens et ambigui-
tas patens* de-
fined.

LIMITATION OF
SENSE OF
WORDS.TECHNICAL
EXPRESSIONS.

Instrument
written by a
person of a par-
ticular class, or
with reference
to a particular
subject-matter.

No evidence to
counteract de-
scription.

Latent ambi-
guity may be
removed by
parol evidence.

Where a de-
scription is in
every respect
erroneous, it
cannot take
effect.

V. *Latent Ambiguity.*

Ambiguities may be classified into *ambiguitas latens* and *ambiguitas patens*: *ambiguitas latens* is, where a deed is good upon its face, but the ambiguity is raised by extrinsic evidence; *ambiguitas patens* is, where the defect appears upon the face of the deed.

Terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, or by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words. (1)

If the instrument be written by a person of a particular class, or with reference to a particular subject-matter, evidence is admissible to shew, that among that class of persons, or with reference to that subject-matter, a particular sense is by usage attached to the words, different from the popular sense. Thus, where the lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point:"—It was held, that parol evidence of the understanding amongst miners was admissible to shew, that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line." (2)

On the comparison of the description with the subject-matter, that which most nearly agrees with it must be taken to have been meant, and evidence is inadmissible to rebut that inference. The rule as stated by Lord Bacon is, "That if there be some land, wherein all the demonstrations in a grant are true, and some, wherein part are true, and part false, the words of such grant shall be intended words of true limitation, to pass only those lands, wherein all the circumstances are true." (3)

Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of parol evidence, the same description of evidence is admitted to explain it. Thus, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence may be admitted to shew, which of the Blackacres is meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to shew which of them the testator intended (4);—because parol evidence when so admitted, does not vary or contradict the written instrument, but determines merely to what set of facts it applies.

If a description be in every respect erroneous, the instrument cannot take effect; yet where the description of the devisee or thing devised is true in part, but not true in every particular, parol evidence is admissible

(1) *Robertson v. French*, 4 East, 135., vide etiam *Bold v. Rayner*, 1 M. & W. 343. *Blackett v. Royal Exch. Assur. Comp.* 2 C. & J. 249. *Taylor v. Briggs*, 2 C. & P. 525. *Smith v. Wilson*, 3 B. & Ad. 728.

(2) *Clayton v. Greyson*, 4 N. & M. 602., vide etiam *Robertson v. French*, 4 East, 135. *Taylor v. Briggs*, 2 C. & P. 525. *Lane v. Stanhope (Earl)*, 6 T. R. 345. *Richardson v. Watson*, 4 B. & Ad. 787. 1 N. & M. 567. *Lethulier's case*, 2 Salk. 443. *Gabay v. Lloyd*,

3 B. & C. 793. *Noble v. Kennoway*, Doug. 510. *Vallance v. Dewar*, 1 Camp. 503. *Haynes v. Holliday*, 7 Bing. 587.

(3) Per Parke J. in *Doe d. Ashforth v. Bower*, 3 B. & Ad. 459., vide *Doe d. Pready v. Holtom*, 4 A. & E. 81. *Newton v. Lucas*, 6 Sim. 60. *Gill v. Shelley*, 2 Russ. & M. 336. *Blackwell v. Bull*, 1 Keen, 176.

(4) Per Gibbs C. J. in *Doe v. Chichester*, 4 Dow, 93. *Doe d. Morgan v. Morgan*, 1 C. & M. 235.

to shew the person or thing intended, provided there is enough on the face of the will to justify the application of the evidence. (1)

In *Thomas v. Thomas* (2) Lord Kenyon observed, "I alluded to the maxim, that *falsa demonstratio non nocet*, but in doing so, I wished that the sense of that maxim should be attended to; I have always understood that such *falsa demonstratio* should be superadded to that, which was sufficiently certain before: there must *constat de personâ*; and if to that an inapt description be added, though false, it will not avoid the demise."

So likewise Mr. Justice Parke in *Doe d. Smith v. Galloway* (3) said, "The rule is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular description be added, the latter controls the former." (4)

Thus, an error in a christian or surname may be proved. (5) And where the grantor had no lands agreeing with the description in the deed, the lands intended to be conveyed may be shewn by the contract of sale, or by letters written between the parties and their agents. (6)

In *Doe d. Templeman v. Martin* (7) Mr Justice Parke said, "It may be laid down as a general rule, that all facts relating to the subject-matter and object of the devise, such as that it was, or was not, in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in a will (8);" in fact, evidence is admissible to shew, not what a testator intended, but what he understood to be signified by the words he used in his will. (9) Thus, by a will of a musical instrument maker, giving his household furniture, a pianoforte would, or would not pass, according to the circumstance of its being in his warehouse or in his dwelling-house. (10)

In *Blackwell v. Bull* (11) a testator directed that his business of a cheesemonger should be carried on by his "wife Sarah Bull, and his son John Bull jointly, for the mutual benefit of my family." The testator died shortly after the date of his will, leaving his widow Sarah Bull and the said John Bull, and five other children, infants, surviving him:—It was held, that the widow as well as the children, were comprised in the word "family." Lord Langdale said, "under different circumstances it (the

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Falsa demonstratio non nocet.

Judgment of Lord Kenyon in *Thomas v. Thomas*.

Judgment of Mr. Justice Parke in *Doe d. Smith v. Galloway*.

Evidence of circumstances.

Judgment of Mr. Justice Parke in *Doe d. Templeman v. Martin*.

Sense of words in instruments.

Judgment of Lord Langdale in *Blackwell v. Bull*.

(1) *Miller v. Travers*, 8 Bing. 248. Respecting inaccurate descriptions, vide *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. *Selwood v. Mildmay*, 3 Ves. 306. *Bradwin v. Harpur*, Amb. 374. *Doe d. Gore v. Langton*, 2 B. & Ad. 680. *Parsons v. Parsons*, 1 Ves. jun. 265. *Dobson v. Waterman*, 3 ibid. 308. n. *Day v. Trig*, 1 P. Wms. 286. *Hampshire v. Pierce*, 2 Ves. sen. 216. *Doe d. Smith v. Galloway*, 5 B. & Ad. 43. Dict. Littledale and Parke Js. in *Doe d. Ashforth v. Bower*, 3 ibid. 459. 2 Rol. Abr. Graunt (P.), 52. 14 Vin. Abr. Grant (Q.), 87. *Doddington's case*, 2 Co. 33. *Druce v. Denison*, 6 Ves. 82. *Shuttleworth v. Greaves*, 4 M. & C. 39. *Penticost v. Lee*, 2 J. & W. 207. *Evans v. Tripp*, 6 Madd. 91. *Doe d. Chevalier v. Huthwaite*, 3 B. & A. 632.

(2) 6 T. R. 676.
(3) 5 B. & Ad. 51.
(4) Vide *Stukeley v. Butler*, Hob. 171.
(5) Ibid., et vide *Careless v. Careless*, 1 Meriv. 384.
(6) *Beaumont v. Field*, 1 B. & A. 247., vide etiam *Doe d. Chevalier v. Huthwaite*, 3 ibid. 632. *Doe d. Bulkeley v. Wilford*, R. & M. 88.
(7) 4 B. & Ad. 785.
(8) Vide etiam *Eden (Sir John) v. Bute (Earl of)*, 7 Bro. P. C. 445.
(9) *Richardson v. Watson*, 4 B. & Ad. 800.
(10) *Le Farrant v. Spencer*, 1 Ves. sen. 97.
(11) 1 Keen, 176.

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word *family*) may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding the wife, or in the absence of wife and children, it may mean his brothers and sisters, or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word, and some others, are found in common parlance; and in the case of a will, we must endeavour to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will; and applying these considerations to the present case, I am of opinion, that in the words 'my family' the testator clearly intended to comprise his wife." (1)

Various operations of a will.

The operation of a will may vary in some cases according to the estate, or the quantity of interest which a grantor or deviser had at the time of making his deed or will. (2) So it may vary according to the situation or interest of the grantee or devisee.

When evidence admissible to shew, what was the state of property at the time the testator made his will.

Evidence is sometimes admissible to shew the state of the property at the time the testator made his will: thus, if a testator bequeath such a sum in a particular stock, it will not be a specific legacy unless he have that stock at the time. (3)

If a person grant an estate for life generally, without saying whether for his own life or for the life of the grantee, evidence is admissible to shew what interest the grantor had in the premises; for if he was tenant in fee, the grantee would have an estate for his own life; but if he was tenant in tail, or for life only, then the grantee would have an estate for the life of the grantor. (4)

In *Smith v. Doe d. Jersey (Earl of)* (5), where the principal question was on a clause of re-entry on a lease, under the execution of a power in a deed of marriage settlement, by which the settler was authorised to demise by indenture such premises as were then leased for lives, &c. and so as the accustomed rents were reserved, &c. and so as the lease contained a *power of re-entry* for non payment of the rent reserved, &c. — the House of Lords determined, that it was allowable to prove, that the usual and accustomed form of leases (by which the estate, settled in the marriage settlement, had been demised, as well before as after the date of the settlement), had contained a conditional *proviso of re-entry* similar to the one in the indenture, whose validity was then disputed; Mr. Justice Bayley observing (6) "This is not admitted, to produce a construction against the direct and natural meaning of the words; nor to control a provision, which was distinct, and accurately described; but because there is an ambiguity upon the face of the instrument; and because an indefinite expression is used capable of being satisfied in more ways than one, and I look to the state of the property at the time, to the estate and interest

Judgment of Mr. Justice Bayley in *Smith v. Doe d. Jersey (Earl of)*.

(1) Vide etiam *Pratt v. Jackson*, 1 Bro. P. C. 222. *Carr v. Carr*, 1 Meriv. 541. n. *Kelly (Sir George) v. Powlet*, Ambl. 610. *Doe d. Gore v. Langton*, 2 B. & Ad. 695. *Hobson v. Blackburn*, 1 M. & K. 571. *Abbot v. Massie*, 3 Ves. 148. *Newton v. Lucas*, 6 Sim. 54. *Thompson v. Lawley (Lady)*, 2 B. & P. 303. *Edge v. Salisbury*, Ambl. 70. *Doe d. Hayter v. Joinville*, 3 East, 173.
(2) Vide per Bayley J. in *Smith d. Jersey (Earl of) v. Doe*, 2 B. & B. 551.
(3) Ibid.
(4) Ibid.
(5) Ibid. 473.
(6) Ibid. 553.

which the settler had, and the situation in which the settler stood with regard to the property she was settling, to see whether that estate, or interest, or situation, will assist us in judging what the settler meant by that indefinite expression."

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"In expounding a will the court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he has used." (1) "Although parol evidence cannot be read to prove instructions of the testator, after the will is reduced into writing, or declarations, as to the persons whom he meant by the written words of the will, yet that is different from reading it to prove, that the testator knew he had such relations; to establish which fact it may be read, but not to go any further. And though this is a nice distinction, yet it is a distinction in the reason of the thing, nor can any mischief arise from admitting it." (2)

A will is expounded by the meaning of the words the testator has used.

The foregoing principle respecting direct evidence of intention seems however to have been extended by *Doe d. Gord v. Needs* (3), in which a testator by his will gave several legacies to George Gord the son of George Gord, and to George Gord the son of John Gord, and there was also in the will a devise to George Gord the son of Gord. It seems, though not expressly stated in the report of the case, that there were two persons living at the time of the making of the will, George the son of John Gord, and George the son of George Gord. The latter was the lessor of the plaintiff, and claimed the land in question under the devise to George Gord the son of Gord; and "he offered evidence of declarations by the testator, shewing that he, the lessor of the plaintiff, was the intended devisee." The evidence having been received, the propriety of its admission was brought before the court of exchequer by a motion for a new trial; and judgment was given, that the evidence had been properly received. "The point to be considered," said Mr. Baron Parke, "is, whether evidence was properly admitted, to shew what person the testator meant to designate by the description of 'George Gord the son of Gord;' and we are of opinion that such evidence was properly admitted. If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual, such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule (4); which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here, on the face of the devise, no such doubt arises.

Judgment of Mr. Baron Parke in *Doe d. Gord v. Needs*.

(1) *Per* Parke J. in *Doe d. Gwillim v. Gwillim*, 5 B. & Ad. 129.

(2) *Dict.* Lord Hardwicke in *Goodinge v. Goodinge*, 1 Ves. sen. 231., vide etiam *Challoner v. Bowyer*, 2 Leon. 70. *Vernon's case*, 4 Co. 4. (a.) *Towers v. Moor*, 2 Vern. 98. *Strode (Sir Litton) v. Russel (Lord)*, *ibid.* 625. *Lord Lansdown's case*, 10 Mod. 99. *Bertie v. Faulkland*, 1 Salk. 231. *Lawrence v. Dodwell*, 1 Ld. Raym. 438. *Bengough*

v. Walker, 15 Ves. 514. *Herbert v. Reid*, 16 *ibid.* 486. 489. *Doe d. Sewell v. Parratt*, 3 B. & Ad. 472. *Richardson v. Watson*, 4 *ibid.* 800. *Thompson v. Lawley (Lady)*, 2 B. & P. 308. *Lane v. Stanhope (Earl)*, 6 T. R. 353. *Doe d. Gore v. Langton*, 2 B. & Ad. 693. *Brett v. Rigdon*, Plowd. 345.

(3) 2 M. & W. 129.

(4) Maxims, 25.

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Judgment of
Mr. Baron
Parke in *Doe
v. Gord v.
Needs*.

There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider, what would have been the case, if there had been no mention in the will of any *other* George Gord the son of a Gord: on that supposition there is no doubt, upon the authorities, but that evidence of the devisor's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the court to place itself in the situation of the devisor, and to construe his will, it would have appeared, that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is, that he has manors both of North S. and South S.; in which case Lord Bacon says (1), 'it shall be holpen by averment, whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in *Altham's case* (2), 'If A. levies a fine to William his son, and A. has two sons named William, the averment that it was his intent to levy the fine to the younger is good, and stands well with the words of the fine.' Another case is put in *Counden v. Clerke* (3), which is in point: 'if one devise to his son John, where he has two sons of that name:' and the same rule was acted upon in *Doe v. Morgan*. (4) The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects, or objects, to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will." "There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George the son of Gord' had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance, that there are two persons named in the will, each answering the description of 'George the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known; and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe v. Morgan* above referred to, precisely the same circumstances occurred."

(1) *Maxims*, 25.

(2) 8 Co. 155. (a.)

(3) *Hob.* 32.

(4) 1 C. & M. 235.

SECONDARY
EVIDENCE.

Judgment of
Chief Justice
Tindal in
Miller v.
Travers.

Miller v. Travers (1) is the leading case respecting latent ambiguities, and in which it was held, that where the description of the devisee or thing devised was true in part, but not true in every particular, parol evidence was admissible to shew the person or thing intended, provided there was enough on the face of the will to justify the application of the evidence; Chief Justice Tindal observing, *inter alia*, "Upon examination of the decided cases it will be found, that an uncertainty, which arises from applying the description, contained in a will, either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

"Thus, in the case of *Lowe v. Huntingtower (Lord)* (2), in which it was held, that evidence of collateral circumstances was admissible (as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will), such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will, consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke (3), '*stand well* with the words of the will.'" (4)

The cases of *Selwood v. Mildmay* (5), *Goodtitle d. Radford v. Southern* (6), and *Day and Trig* (7), decide only that, where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that any thing may be added to the will: thus, following the rule laid down by Chief Justice Anderson (8), "an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator."

"It is well established, that where a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator: as in *Hunt v. Hort* (9), and in many other cases.

"Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank, and it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in *Clare*." (10)

Evidence of usage for construing ancient instruments seems to be nothing more than secondary evidence of facts. The meaning also of language used in ancient instruments may have changed in lapse of time, or have become doubtful. The reason for the admission of evidence of usage will determine the limits within which it is confined; if the usage be not

EVIDENCE OF
ANCIENT
USAGE.

(1) 8 Bing. 244.

(2) 4 Russ. 581. n.

(3) 8 Co. 155.

(4) Vide etiam *Standen v. Standen*, 2 Ves. jun. 589. *Mosley (Bart.) v. Massey*, 8 East, 149.

(5) 3 Ves. 306.

(6) 1 M. & S. 299.

(7) 1 P. Wms. 286.

(8) Godb. 131.

(9) 3 Bro. C. C. 311.

(10) *Per* Tindal C. J. in *Miller v. Travers*,

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EVIDENCE.

Continued
usage a practical
exposition
of the meaning
of the parties.

Where the
penning of a
statute is
dubious.

Grant of tithes.

USAGE TO EX-
PLAIN PRIVATE
INSTRUMENTS.

Ancient admis-
sions of copy-
holders.

Judgment of
Lord Ellen-
borough in
Stammers v.
Dixon.

consistent with that meaning of the instrument, which, by the rules of law, might at the time of its date have been attributed to it, the evidence cannot be received; in other words, it is inadmissible to control or contradict the express provisions of the instrument. (1) And in the case of modern deeds, evidence of the acts of the parties is not admissible in the construction of the instrument to shew their understanding of it. (2)

In *Chad v. Tilsed* (3) Mr. Justice Richardson observed, "Modern usage of forty years' duration is evidence not only for that period, but evidence from which it may be presumed, that the same course was pursued in earlier times, if nothing is shewn to the contrary."

"Where the penning of a statute is dubious, long usage is a just medium to expound it by; *jus et norma loquendi* is governed by usage: and the meaning of things spoken or written must be, as it has constantly been received to be, by common acceptation. But if usage hath been against the obvious meaning of an act of parliament by the vulgar and common acceptation of the words, then it is rather an oppression of those concerned, than an exposition of the act, especially as the usage may be circumstanced." (4) And in the *Bank of England v. Anderson* (5), which was a question upon the statutes relating to the Bank of England, and usage was offered in evidence to support their construction, Chief Justice Tindal said, "If no other argument was brought forward, we attribute great weight to the maxim of law, *contemporanea expositio fortissima est in lege*."

In a court grant of "tithes," contemporaneous documents, proceedings in causes, and parol testimony may be resorted to, in order to shew the species of tithes intended to be conveyed. (6)

In the reception of evidence as to usage, no distinction exists between a private deed and a king's charter, and, for their exposition, evidence of usage can be given. (7)

In *Stammers v. Dixon* (8) it was held, that one may hold the *prima tonsura* of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold; and that ancient admissions of the copyholder, and those under whom he claims the land, by the description of "*tres acras prati*," may be construed only to carry the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains, though the copyholder may have paid all the rates and taxes, which was in his own wrong (9); Lord Ellenborough observing, "we must construe the rights of the parties, however derived from ancient grants, consistently with the possession; and there will then exist a copyhold interest in the *prima tonsura* for the defendant, and every other freehold interest in the land for the plaintiff. But this, it is said, is inconsistent with the entries on the court rolls, which grant an

8 Bing. 254. *Doe d. Oxenden v. Chichester*, (Sir Arthur), 4 Dow. 65. *Newburgh v. Newburgh*, Dom. Proc. June 16. 1825.

(1) *Rex v. Salway*, 9 B. & C. 424.

(2) Vide *Clifton v. Walmsley*, 5 T. R. 564. *Iggulden v. May*, 9 Ves. 333. 2 N. R. 452.

(3) 2 B. & B. 409., vide Merew. & Steph. Hist. of Boroughs, Index, tit. USAGE.

(4) *Sheppard v. Gosnold*, Vaughan, 169., et vide *Rex v. Scott (Clerk)*, 3 T. R. 602.

(5) 3 Bing. N. C. 666.

(6) *Luton School (Governors of) v. Scarlett*, 2 Y. & J. 330.

(7) *Withnell v. Gartham*, 6 T. R. 388.

(8) 7 East, 200.

(9) *Stammers v. Dixon*, 7 East, 200.

interest in the soil to the tenant, and were evidence for the jury to shew in what right the defendant claimed and took the fore-crops. The admissions are to '*tres acras prati*;' but can it be said that the word '*prati*' is not open to receive any construction which will carry a less interest than the whole right to the soil? The judge thought, that if the usage in fact were, that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the fore-crop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment; and I think he was right in that opinion. And then he properly put the question to the jury to say, how the fact of the enjoyment was; and when they found that the possession of every thing but the *prima tonsura* had been with the plaintiff, he gave it as his opinion, that the word *prati* would admit of such a construction as to pass only the fore-crop to the defendant, and that therefore, notwithstanding those admissions, the jury might find for the plaintiff, reserving for the judgment of this court the simple question of law upon the legality of such construction. With that direction, so understood, I do not find fault, thinking it substantially right."

VI. Patent Ambiguity.

If, notwithstanding the reception of parol evidence, the instrument be doubtful, such obscurity cannot be removed by parol evidence.

PATENT AM-
BIGUITY.

"*Ambiguitas patens* (that is, an ambiguity apparent on the deed or instrument) can never be holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of higher account in law; for that were to make all deeds hollow, and subject to averment, and so in effect to make that pass without deed which the law hath appointed shall not pass but by deed." It holds generally, that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election, but never by averment; but rather shall make the deed void for uncertainty. (1)

Ambiguitas pa-
tens can never
be holpen by
averment.

If a devise be expressed ambiguously, it may be compared with the other parts of the will. The declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention; as for example, if the devise be to "one of the sons of J. S.," who has several sons, the devise is void, and the description of the devisee cannot be explained by parol proof. (2)

Uncertainty in
a devise.

In a case where the testator made dispositions in his will to several persons, among others to his wife and niece, who were the only women mentioned in the will, and then devised "to her" a particular estate for life, the question was, whether parol evidence could be admitted to shew which of the two was intended: the lord chancellor refused to receive it, on the ground, that it would tend to put it in the power of witnesses to make

(1) Bac. Elem. rule 23. *Cholmondeley* (2) *Strode* (*Sir Litton*) v. *Russel* (*Lord*),
(*Lord*) v. *Clinton* (*Lord*), 2 Meriv. 343. Doe 2 Vern. 624. *Altham's case*, 8 Co. 155. (a.)
d. *Tyrrell* v. *Lyford*, 4 M. & S. 550.

**SECONDARY
EVIDENCE.**

Omission of
name in a will.

Demise with a
printed blank
form filled up
and altered for
use.

Where refer-
ence is made to
another instru-
ment, such ex-
trinsic matter
will receive the
same effect as
if it were in the
writing.

Judgment of
Lord Lynd-
hurst in *Hodges*
v. *Horsfall*.

Where there is
no reference to
a foreign in-
strument, or
where the de-
scription of it
is insufficient.

wills for testators. The court held, that though the term "her" was relative, it was to be referred in this case to the wife, because in other parts of the will it seemed to relate to the wife: but expressly excluded the parol evidence offered to explain the will. (1)

Where a blank was left in a will for the devisee's name, it was held, that parol evidence could not be admitted to shew the name of the person which the testator intended to insert. (2)

But where a demise offered in evidence was a printed blank form, filled up and altered for use, it was held, that the court might look at the parts struck out, in order to ascertain the intent of the parties in what remained (3), and that the inapplicable terms must be considered as expunged.

If an instrument profess to refer to some additional expression of the intention of the writer, such extrinsic matter is as cogent, as if it were in the writing. The additional terms sought to be engrafted, must, however, be in writing, if the instrument referring to it is required to be in writing. (4)

In *Hodges v. Horsfall* (5), an instrument purporting to be an agreement for a lease contained a clause for the erection of additions according to a plan agreed upon; it appeared, that three distinct plans existed for making the additions alluded to: and an objection was made that parol evidence was inadmissible to determine which plan was meant; upon which Lord Lyndhurst in giving judgment said, "I am of opinion on the authority of all the cases, and especially the case in 1 Sch. & Lef., where Lord Redesdale has considered the subject very fully, that as the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it." (6)

But where there is no reference to a foreign instrument, or where the description of it is insufficient, parol evidence is not admissible, because it would be to give it an effect independent of the writing, and contrary to the provision of law, which requires the whole disposition to be expressed (7): thus "a will cannot refer to words only without writing, but it ought to be a will in writing for all; and therefore there cannot be any averment to add any thing thereto by words, *dehors*, nor to abridge it by a condition added thereto by words." What has been *said* is sometimes in itself a fact, and not merely a statement. (8)

In every case where parol evidence raises a latent ambiguity, it may be, and often has been, fatal; the evidence may be sufficient to raise the ambiguity, but not to remove it, and then the instrument is void for uncertainty. (9)

(1) *Castledon v. Turner*, cit. 2 Ves. sen. 917.

(2) *Baylis v. Att. Gen.* 2 Atk. 239. *Castledon v. Turner*, 3 ibid. 257. *Hunt v. Hort*, 3 Bro. C. C. 311., per Tindal C. J., ante, 1543.

(3) *Strickland v. Maxwell*, 2 C. & M. 539., sed vide *Doe d. Spencer v. Pedley*, 1 M. & W. 670.

(4) Phillipp's Ev. 750. *Molineux v. Molineux*, Cro. Jac. 144.

(5) 1 Russ. & M. 116.

(6) Vide etiam *Coles v. Trecothick*, 9 Ves.

249. *Boydell v. Drummond*, 11 East, 153.

Smart v. Prujean, 6 Ves. 566. *Oliver v. Cooke*, 1 Sch. & Lef. 22. *Brodie v. St. Paul*, 1 Ves. jun. 336. Per Holroyd J. in *Kenworthy v. Schofield*, 2 B. & C. 948.

(7) *Sandford v. Raikes*, 1 Meriv. 646. 659. Phillipp's Ev. 751.

(8) *Molineux v. Molineux*, Cro. Jac. 144.

(9) Phillipp's Ev. π. 753., vide etiam *Saunderson v. Jackson*, 2 B. & P. 238. *Dillon v. Harris*, 4 Bligh, N. S. 343. *Shortrede v. Cheek*, 1 A. & E. 57.

The foregoing cases elicit the principle, that reference can be made to a fact merely as a mode of describing what is meant by a written instrument; but reference cannot be made to a foreign expression of an intention not contained in a written instrument.

SECONDARY
EVIDENCE.

VII. *Mercantile Contracts.*

MERCANTILE
CONTRACTS.

Generally.
Where a legal obligation is contracted by matter in writing between the parties, whether under seal or not, parol evidence is inadmissible to contradict the express terms.

When a legal obligation is contracted by matters in writing between the parties, whether under seal or not, parol evidence is admissible to contradict the expressed terms. But though an instrument appears on its face to be the sole exposition of the intention of the parties, and to be a complete instrument in all its parts, and though in general, parol evidence is inadmissible to add to such an instrument, yet evidence of a custom regulating the matter to which the instrument relates may be admitted to "annex incidents" to it (1), though no allusion to any custom be made in the writing, provided the custom be not inconsistent with it: but if any condition is found in the lease necessarily repugnant to, or inconsistent with the custom, the latter is excluded, for it can only be called in aid where the former is silent upon the subject. (2)

Judgment of
Mr. Baron
Parke in *Hut-*
ton v. Warren.

In *Hutton v. Warren* (3) Mr. Baron Parke observed, "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority; and the relations between landlord and tenant have been so long regulated upon the supposition, that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed."

Contract construed as having been made with reference to known usages.

If a word have acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting the trade; but it must be distinctly proved, that the word has acquired that particular meaning. (4)

Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject. (5) Therefore, if it be said in a letter, that a ship will sail from St. Domingo in the month of October, it is generally understood, that she will not sail till the 25th of the same month. (6)

(1) *Hutton v. Warren*, 1 M. & W. 466.

(4) *Taylor v. Briggs*, 2 C. & P. 525. M.

(2) *Per Tindal C. J. in Holding v. Pigott*, 7 Bing. 474. *Webb v. Plummer*, 2 B. & A. 749.

& M. 28.

(5) *Chaurand v. Angerstein*, Peake's N.P.C. 61.

(3) 1 M. & W. 475.

(6) *Ibid.*

**SECONDARY
EVIDENCE.**

A clerk in a merchant's counting-house may be called as a witness to explain the meaning of a particular entry in the books of the office made by a fellow-clerk since deceased (1): but it seems that evidence of mercantile men as to the effect of the words "about" and "more or less," in describing quantity in a contract of sale, is not admissible. (2)

Thus, where a broker gave the following bought and sold notes:—
1. "We have this day bought for your use, from J. O. B., one hundred tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c. in cash, at fourteen days from delivery, less 2½ per cent. discount: the above oil to be delivered from the Speedy or Charlotte, expected to arrive about November or December next." 2. "We have this day sold for your use, payment in fourteen days by cash, less 2½ per cent. discount from delivery, one hundred tons of dry palm oil, at 31*l.* 10*s.* per ton, ex Speedy and Charlotte, to arrive:"—It was held, that evidence of mercantile usage was admissible to explain all the variances between these notes; and that, being so explained, the variances were not material, and did not avoid the contract. (3)

Lord Hardwicke (4) says, "Courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction." (5)

Thus, where an artist gave by his will all his "bankers," evidence was admitted, which shewed that "bankers" were solid pieces of wood on which were placed blocks of marble about to be worked. (6) In the same will the word "mod" was found, and liberty was given for trying to ascertain its meaning by evidence of persons generally conversant with the subject-matters to which the will related.

In *Whittaker v. Mason* (7) Chief Justice Tindal said, "How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of the general course and usage of the trade within the limits of which the contract was made and to which it relates, is a question which it would be difficult to answer with exactness and precision."

Evidence of custom and usage to annex incidents to a written contract has, however, been admitted. Thus, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the court held, that this clause of warranty must be construed according to the usage among merchants, that is, from such places where convoys are to be had, as from the Downs. (8)

(1) *Hood v. Reeve*, 3 C. & P. 532.

(2) *Cross v. Eglin*, 2 B. & Ad. 106.

(3) *Bold v. Rayner*, 1 M. & W. 343.

(4) 1 Ves. sen. 459.

(5) Vide etiam *Smith v. Wilson*, 3 B. & Ad. 733.

(6) *Goblet v. Beechey*, 3 Sim. 24. This case was reversed by Lord Chancellor Brougham, seemingly, because the evidence was not sufficiently conclusive in defining the language of the testator, but without impugning the principle of the vice-chancellor's decision. *Wigram on Wills*, 185.

(7) 2 Bing. N. C. 369, 370.

(8) *Lethulier's case*, 2 Salk. 443., vide etiam *Noble v. Kennoway*, Doug. 510. *Valance v. Dewar*, 1 Camp. 503. Where a plaintiff relies upon a mercantile custom to support his claim for commission to a certain amount, the defendant may, without any special plea, produce evidence to shew that, under certain circumstances, the custom is to pay but half that amount; if the evidence be offered to shew that the contingent reduction was part of the original contract, and not that it was a subsequent alteration, so as to create a new contract. *Broad v. M'Aylmer*, 5 N. & M. 413.

Evidence admissible to explain mercantile terms or conventional language.

Custom and usage admissible to annex incidents to a written contract.

SECONDARY
EVIDENCE.

Cutter v. Powell (1) is illustrative of the principles upon which evidence of usage is admitted to explain and construe mercantile contracts, and which was an action of *assumpsit* brought by an administratrix for work and labour done by the deceased. It appeared, that the captain of a ship had given a note to the deceased, by which he promised to pay a sum of money to the deceased, provided that he proceeded on a voyage, and continued to do his duty as second mate to the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An inquiry had been made by the direction of the court relative to the usage of merchants on this kind of agreement, but no settled usage could be ascertained one way or the other: upon which Lord Kenyon observed, "The principle, that, where the parties have come to an express contract, none can be implied, has prevailed so long, as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate 30 guineas, provided *he proceeded, continued, and did his duty* as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are, that the common rate of wages is 4*l.* per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been 8*l.*; whereas here, the defendant contracted to pay 30 guineas, provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance."

Judgment of
Lord Kenyon
in *Cutter v.*
Powell.

Mr. Justice Lawrence said, "With regard to the common case of a hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year. So, if the plaintiff in this case could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover any thing."

Judgment of
Mr. Justice
Lawrence in
Cutter v. Powell.

Evidence of usage must not be repugnant to, or inconsistent with, the clear and unequivocal words of the contract: thus, where a policy of insurance was "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence that, by the custom of the trade, the risk on the goods, as well as on the ship, expired in twenty-four hours, was held to be inadmissible. (2)

The rule for
admitting evi-
dence of usage
must be taken
with the quali-
fication, that
the evidence
proposed is not
repugnant to,
or inconsistent
with, the con-
tract.

(1) 6 T. R. 320.

N. P. C. 95. *Blackett v. Royal Exch. Assur.*

(2) *Parkinson v. Collier*, Park. Insur. 314.

Comp. 2 C. & J. 244.

4th ed. *Yeats v. Pim*, 2 Marsh. 141. Holt's

SECONDARY EVIDENCE.

Policies of insurance or charter parties cannot be varied by any written agreement made previously to the policy.

take on board "forthwith," evidence is inadmissible to show that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to show how soon she might reasonably be expected to be ready. (1)

Policies of insurance cannot be contradicted or varied by any written agreement made by the parties before the time of signing the policy.

Where in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to show that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, the court would not admit the evidence. Pemberton C. J. observed, "Policies were sacred things, and that a merchant should be no more allowed to go from what he had subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say it was agreed to be upon a condition, &c. when it may be that the bill had been negotiated; for though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advantage of trade." (2)

So, likewise, where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not permit a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. (3)

AGRICULTURAL CONTRACTS.

As between landlord and tenant, all customary obligations, not altered by contract, nor inconsistent with it, remain in force.

VIII. *Agricultural Contracts.*

In agricultural contracts, customs not altered by a repugnant contract remain in force. Thus, it may be shown, that a heriot is due by custom on the death of a tenant for life, though not expressed in the lease (4), or that a lessee by deed is entitled by custom to an away-going crop, though not alluded to in the deed. (5)

Difficulties arise as to what is such an expression of the intention as to exclude evidence of the custom as inconsistent with or repugnant to it.

In *Roberts v. Barker* (6) the tenant claimed compensation for manure left on a farm under a custom which bound the away-going tenant to leave the manure, and under which he was entitled to be paid for it by the landlord, or the incoming tenant. The lease contained a condition, that the manure should not be sold or taken away, but should be left, to be expended on the land by the landlord or incoming tenant. Lord Lyndhurst observed, "that the custom of the country was excluded; and if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was alto-

Judgment of Lord Lyndhurst in *Roberts v. Barker*.

(1) *Simpson v. Henderson*, M. & M. 300.

(2) *Kaines v. Knightly* (Sir Robert), Skin. 54. *Weston v. Emes*, 1 Taunt. 115. *Uhde v. Walters*, 3 Camp. 16.

(3) *Leslie v. De la Torre*, cit. 12 East, 583.

(4) Per cur. in *White v. Sayer*, Palm. 211.

(5) *Wigglesworth v. Dallison*, Doug. 201., vide etiam *Hughes v. Gordon*, 1 Bligh, 287. and *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(6) 1 C. & M. 808., vide etiam *Wigglesworth v. Dallison*, Holt's N. P. C. 197. *Senior v. Armitage*, ibid. *Holding v. Pigott*, 7 Bing. 465. *Webb v. Plummer*, 2 B. & A. 746.

gether idle, therefore, to provide for one part of that, which was sufficiently provided for by the custom, unless it was intended to exclude the other part."

SECONDARY
EVIDENCE.

In *Hutton v. Warren* (1) it appeared, that the custom was for the tenant to be paid for the last year's ploughing and sowing, and to leave the manure if the landlord would buy it; and the lease provided, that the tenant should spend more manure than the custom required, leaving the rest to be paid for by the landlord at the end of the term:—It was holden, that the tenant was still entitled to be paid for the last year's ploughing and sowing under the contract; Mr. Baron Parke observing "The question is, whether, from the terms of the lease, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour." The stipulation, obliging the tenant to lay out the manure arising from the tithes, "imposes a new obligation on the tenant, *dehors* that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration by repurchasing a part of the produce on a particular event. It is by no means to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing; or to plough, sow, and manure, he being paid for the manuring; the principle of *expressum facit cessare tacitum* which governed the decision in *Webb v. Plummer* (2) would have applied; but that is not the case here. The custom of the country, as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that, which the custom required him to spend."

Judgment of
Mr. Baron
Parke in *Hut-*
ton v. Warren.

On the lease of a rabbit warren, parol evidence was admitted to show that, by the custom of the country, the word "thousand" means "twelve hundred" when applied to rabbits. (3)

Construction of
the word
"thousand."

4. PRESUMPTIVE EVIDENCE. (4)

PRESUMPTIVE
EVIDENCE.

A presumption, as it is defined by civilians, is an inference resulting from a certain sign of a fact, which is taken to be proved on account of its connection with a fact directly proved. For, when the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily or usually attend such facts, and

Defined.

(1) 1 M. & W. 466.

(2) 2 B. & A. 746.

(3) *Smith v. Wilson*, 3 B. & Ad. 728.

(4) Information will be acquired on presumptive evidence generally, from a perusal of Burnet's Criminal Law of Scotland;

Evans's Appendix to Pothier, 339.; 5 Bentham's Rationale of Judicial Evidence; Paley's Moral Philosophy; Harris's Criminal Law of Scotland; 7 Howell's St. Tr. 1529. n., 14 *ibid.* 1230. 1246., 17 *ibid.* 1430., 33 *ibid.* 506.

**PRESUMPTIVE
EVIDENCE.**

Regard must be had to the facility that appears to be afforded for explanation or contradiction.

Circumstantial evidence in many cases of greater weight than oral testimony.

these are called presumptions, and not proofs, for they stand instead of the proofs of the facts till the contrary be proved.

“ In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such, as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends.” (1)

Circumstances are in many cases of greater force, and more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions, naturally and necessarily arising out of a given fact, cannot lie. (2) It is likewise the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognisance of a jury, and to require a greater number of witnesses than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. (3)

But circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences: there is also a kind of pride or vanity felt in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanour, and expressions of a suspected person, when scrutinised by those who suspect him. Besides, circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence; and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences, each of which may be fallacious. (4)

**RELEVANCY OF
PRESUMPTIONS.**

Evidence of character.

Civil suits.

In civil suits, evidence of the character of the parties, except where the character is directly in issue, is not admissible. Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined as to the defendant's good character. (5) So on the trial of an information against the defendant for keeping false weights, where it was proposed to call witnesses on behalf of his character, it was held, that such evidence was not admissible in a civil suit (6), Chief Baron Eyre observing, that “ The offence imputed is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this, that in a direct prosecution for a

(1) *Dict.* Lord Tenterden in *Rex v. Burdett*, 4 B. & A. 162.

(2) 17 Howell's St. Tr. 1430.

(3) Phillipp's Ev. 458.

(4) *Ibid.* 459.

(5) *Goodright d. Faro v. Hicks*, Bull. N. P. 296. 298.

(6) *Att. Gen. v. Bowman*, 2 B. & P. 532. n.

crime, such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws."

**PRESUMPTIVE
EVIDENCE.**

In general no reasonable presumption can be formed as to the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. Thus, if the question between a landlord and his tenant be, whether the rent was payable quarterly or half yearly, it is irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due (1): but it may be often requisite to examine previous transactions for making a just inference as to the knowledge of the parties, their motives, or intentions. (2)

Presumptions cannot be formed as to the executing of a contract by a party with one person, from the mode in which he has executed it with another.

Acts of ownership in one place sometimes afford a presumption of the right of ownership in another. In an action of trespass, the plaintiff claimed the whole bed of a river flowing between his land and the land of the defendant, contending that each was entitled *ad medium filum aquæ*. It was held, that it was allowable for the plaintiff to give in evidence, acts of ownership exercised by him upon the bed and banks of the river on the defendant's side, lower down the stream, and where it flowed between the plaintiff's land and a farm adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided that farm from the river, and which was in continuation of a fence dividing the defendant's land from the river. (3) For, generally, acts of ownership submitted to by the holder of one portion of land cannot be proof that the person exercising them has any right to the adjoining land. (4)

Acts of ownership in other lands.

In *Furneaux v. Hutchins*, which was an action respecting the custom of tithing (5), Lord Mansfield stated it as a general rule, that "proof of the custom of one parish was not evidence to affect another parish, unless the custom had been laid as a general custom of the county." Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another. (6)

Custom of tithing.
Parochial customs.

If a right be claimed by custom in a particular manor or parish, evidence of a similar custom in an adjoining parish or manor is not, in general, admissible evidence (7), unless some connection be proved to have existed between them, such as having been held under the same lord. (8)

Manorial customs.

But where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage which prevails in any of the other manors within the district. (9)

(1) *Carter v. Pryke*, Peake's N. P. C. 130. *Spenceley, q. t. v. De Willott*, 7 East, 108. *Holcombe v. Hewson*, 2 Camp. 391. *Balcetti v. Serani*, Peake's N. P. C. 192. *Viney v. Barss*, 1 Esp. N. P. C. 293.

(2) *Hunter v. Gibson*, 2 Hen. Black. 187. 288. 290. 295.

(3) *Jones v. Williams*, 2 M. & W. 331. *Evans v. Butt*, K. B. H. T. 1837, cit. *ibid*.

(4) Vide *per* Bayley and Best Js. in *Hollis v. Goldfinch*, 1 B. & C. 218. 222.

(5) Cowp. 808.

(6) *Rex v. Ellis*, 1 M. & S. 662., vide etiam *Noble v. Kennoway*, Doug. 510.

(7) *Somerset (Duke of) v. France*, Str. 661. *Ruding v. Newell*, *ibid*. 957. *Furneaux v. Hutchins*, Cowp. 807. *Per* Buller J. in *Noble v. Kennoway*, Doug. 512. *Doe d. Foster v. Sisson*, 12 East, 63. *Erskine v. Ruffle*, 3 Gwill. 965.

(8) *Moulin v. Dallison (Sir George)*, Cro. Car. 484.

(9) *Champion v. Atkinson*, 3 Keb. 90.

PRESUMPTIVE
EVIDENCE.

But although a custom of tithing, &c. in one parish will not be evidence of a custom in another, yet such an inquiry may be allowed in cross-examination: thus, where a *modus* is alleged on one side, it may be relevant on the opposite side to make such an inquiry, in order to shew, that such payments cannot be a *modus* consistently with the evidence, which has been previously adduced. (1)

All presumptions may be rebutted by facts, or by stronger presumptions.

All presumptions may be rebutted by facts, or by contrary and stronger presumptions (2); and an equitable presumption may be rebutted by parol evidence. (3)

Every thing not contrary to the known fact is to be presumed against one who will not shew his title (4): and where there has been no fraud on the part of the defendant, the presumption of law is against the demand of the plaintiff. (5)

Presumptions have been classified under three divisions, viz. 1. Presumptions *juris et de jure*; 2. Presumptions of law (*juris*); 3. Presumptions of fact (*nominis*).

PRESUMPTIONS
JURIS ET DE
JURE.

Presumptions *juris et de jure* cannot be destroyed by negative evidence. Thus, it seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape (6); and also that an infant under the age of seven cannot be guilty of felony (7); and it is a *prima facie* presumption of law, that a person under the age of fourteen is not guilty of a felonious intention, until evidence be produced to shew that he is *doli capax*, for then it is said, *malitia supplet etatem*. (8)

PRESUMPTIONS
OF LAW.

Presumptions in law arise either from general principles, or from positive institution. Thus, that the averments of a record are true, is an irrefragable presumption, against which every other species of evidence, being inferior and subordinate from this, must contend in vain.

Where presumptions of law arise, the court will direct a jury to presume certain facts, although no evidence respecting such facts may have been given. (9)

Legitimacy.

It is presumed that a child born during *wedlock* is legitimate, until illegitimacy be shewn by proof of circumstances rendering it physically impossible that the husband can be the father of the child; and children born during a divorce *a mens et thoro*, are presumed to be illegitimate. (10) If a husband and wife have had opportunities for sexual intercourse at a time when the husband might have become the father of the child, a court or jury are at liberty to infer from the circumstances of the case, that no sexual intercourse took place. (11) But where a jury believe that a husband and wife have had sexual intercourse within the requisite limits of time, "the

(1) *Blundell (Clerk), v. Howard*, 1 M. & S. 292.

(2) *Jayne v. Price*, 5 Taunt. 326. 1 Marsh. 68. *Rex v. St. Mary, Leicester*, 5 N. & M. 215. *Rex v. Stallard*, 7 C. & P. 263.

(3) *Longfield d. Banton v. Hodges*, Lofft. 230.

(4) *Archer (Lord) v. Whitehouse*, *ibid.* 521.

(5) *Clunnes v. Pezzey*, 1 Camp. 8., et vide *Aubert v. Walsh*, 4 Taunt. 293.

(6) 1 Hale's P. C. 630. *Rex v. Groom-*

bridge, 7 C. & P. 582. *Rex v. Eldershaw*, 3 *ibid.* 396.

(7) 1 Hale's P. C. c. iii. 1 Russ. on Crimes, 2—6.

(8) *Rex v. Owen*, 4 C. & P. 236.

(9) *Vide post*, 1557. OUTSTANDING TERMS.

(10) *St. George (Parish of) v. St. Margaret*, 1 Salk. 123.

(11) *Pendrell v. Pendrell*, Str. 925. *Rex v. Reading*, R. T. H. 82. *Rex v. Luffe*, 8 East, 193. *Cope v. Cope*, 1 M. & Rob. 275. *Mor-*

law will not under such circumstances allow a balance of the evidence as to who is most likely to have been the father." (1)

PRESUMPTIVE
EVIDENCE.

The fact of marriage is generally considered as sufficiently proved by presumptive evidence of cohabitation, or even by general reputation (2); but in actions for adultery and in indictments for bigamy, an actual marriage must be proved. (3)

Marriage.

The innocence of a person is presumed until proof of guilt. (4)

Innocence.

Where an act is done injurious to an individual, malice is *prima facie* to be presumed in the person doing that act. Thus, a new trial has been granted because a judge left it to the jury to say, whether a defendant intended to injure the plaintiff by the publication of a libel, the court determining that the law would presume the intention. (5) But the want of probable cause is only presumptive evidence of malice, and ought not to be left to the jury as conclusive; or, to adopt the language of Mr. Justice Patteson, "It is essential for a plaintiff to prove facts from which the judge may decide, that there is want of probable course, and the jury that there is malice." (6)

Malice.

A good consideration is always presumed to have been given for a bill of exchange (7)

Presumptions of fact are questions for the determination of the jury, and they occur whenever direct proof of a fact is offered to the jury as evidence of another fact, which is the usual consequence or accompaniment of the former. (8)

PRESUMPTIONS
OF FACT.

Where actual knowledge cannot be proved, it will be presumed. Thus, if the rules of a club be contained in a book, kept by the master of the club, and accessible to the members, every member of the club will be presumed as being acquainted with them. (9)

Where actual
knowledge will
be presumed.

In *Doe v. Jesson* (10) Lord Ellenborough said, "According to the stat. 19 Car. 2. c. 6. with respect to leases dependent on lives, and also according to the Statute of Bigamy (11), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." "But," as observed by Lord Denman in *Doe d. Knight v. Nepean (Bart.)* (12), "absence for that period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a *rule of law*, that such a presump-

CONTINUANCE
OF LIFE.

Judgment of
Lord Ellen-
borough in *Doe*
v. Jesson.

ris v. Davies, 3 C. & P. 215. *Goodright v. Saul*, 4 T. R. 356.

(1) *Per* Alderson B. in *Cope v. Cope*, 1 M. & Rob. 275. *Head v. Head*, 1 S. & S. 152. 1 Turn. & Russ. 139. As to period of gestation, vide *Gardiner's Peerage case*, Harg. Co. Litt. 123. (b.) n. 1, 2. *Alsop v. Bowtrell*, Cro. Jac. 541. Presumption as to a widow having a child within nine months, Harg. Co. Litt. 8. (a.) n. 7.

(2) *Doe d. Fleming v. Fleming*, 4 Bing. 266.

(3) *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, Doug. 170.

(4) *Case of the Chancellor of the University of Oxford*, 10 Co. 56. *Rex v. Twynning (Inhab. of)*, 2 B. & A. 386., sed vide *Rex v. Harborne (Inhab. of)*, 2 A. & E. 545.

(5) *Haire v. Wilson*, 9 B. & C. 643. *Rex v. Dixon*, 3 M. & S. 11. 15. *Rex v. Philipps*, 6 East, 464. As to distinction between malice in fact and malice in law, vide *Bromage v. Prosser*, 4 B. & C. 253., vide etiam *Burley v. Bethune*, 5 Taunt. 583. *Turner (Bart.) v. Turner*, Gow. N. P. C. 20. *Crozer v. Pilling*, 4 B. & C. 26.

(6) *Mitchell v. Jenkins*, 5 B. & Ad. 588.

(7) *Philliskirk v. Fluckwell*, 2 M. & S. 395.

(8) *Roscoe's Ev.* 19.

(9) *Raggett v. Musgrave (Bart.)*, 2 C. & P. 556. *Alderson v. Clay*, 1 Stark. 405.

(10) 6 East, 85.

(11) Stat. 1 Jac. 1. c. 11.

(12) 5 B. & Ad. 86.

**PRESUMPTIVE
EVIDENCE.**

tion ought to be made, or in which, in point of fact, any such effect has been given to evidence of absence abroad." (1)

In all questions upon the existence of life at a particular time, the presumption in favour of life must be governed, and the weight that is to be attached to it regulated by the circumstances of each particular case; and the determination of the question is for a jury. (2)

After the lapse of a period of more than one hundred years, and in the absence of evidence to the contrary, the death of a party without issue will be presumed (3); and in pedigree cases, persons presumed to be dead, in the absence of evidence to the contrary, are presumed to have died unmarried and without issue. (4)

Survivorship.

No positive rule exists respecting survivorship; but survival of the strongest has been seemingly presumed. (5)

Missing ships.

If it appear that a person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, it is presumptive evidence that the person is dead; but the time of the death, if material, must depend upon the particular circumstances of the case. (6)

A practice prevails among underwriters, that a ship shall be deemed to be lost if not heard of for six months after her departure for any part of Europe, or in twelve months after departure for any greater distance. (7)

The fact of the party being alive or dead at any *particular period* within, or at the end of the seven years, must be proved by the party asserting that fact. (8)

**Person in
possession of
property, pre-
sumed to be
the owner.**

A person in possession of land is *prima facie* presumed to be seised in fee. This presumption, however, may be rebutted by a stronger presumption arising from circumstances, as from subsequent possession; it is not conclusive evidence of a seisin, requiring to be diverted by deeds. (9) Possession of personal property affords a *prima facie* presumption of ownership. Thus, although a documentary title is essential to the ownership of ships, it is sufficient, in an action upon a policy, for the plaintiff to rest upon the mere fact of possession, unless further proof be rendered necessary by contrary evidence being adduced (10); and to prove a right to the soil, acts of ownership exercised by one party are conclusive evidence against a supposed title from boundaries which have never been ascertained. (11)

**Endowment of
a vicarage.**

An endowment of a vicarage may be presumed from the long and continued possession of tithes and other profits. (12)

(1) Vide etiam *Wilson v. Hodges*, 2 East, 312. *Throgmorton v. Walton*, 2 Rol. Rep. 461.

(2) *Rex v. Harborne (Inhab. of)*, 4 N. & M. 341. 2 A. & E. 540. The sessions were justified in presuming that a first wife was alive at the time of a second marriage of the husband, on evidence being given of a letter from her, dated at Van Dieman's Land, twenty-five days before the time of the second marriage. Ibid.

(3) *Doe d. Oldham v. Wolley*, 8 B. & C. 22. S. C. nom. *Doe d. Oldnall v. Deakin*, 2 M. & R. 195. 3 C. & P. 402.

(4) Ibid. *Rex v. Harborne (Inhab. of)*, 2 A. & E. 544. *Doe v. Griffin*, 15 East, 293. *Rowe v. Hasland*, 1 W. Black. 404. *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. *Hopewell v. De Pinna*, 2 Camp. 113.

(5) *General Stanwix' case*, Fearn's Posthumous Works, 38. 1 Meriv. 309. n. *Broughton v. Randall*, Cro. Eliz. 503. n.

Taylor v. Duplock, 2 Phil. 263. *Colben v. H. M. Proc. Gen.* 1 Hagg. 92. *Rex v. Hay*, 1 W. Black. 640.

(6) *Watson v. King*, 1 Stark. 121.

(7) *Park. Ina*, 63. 433. 4th ed. *Green v. Brown*, Str. 1199. *Cohen v. Hinckley*, 2 Camp. 51. *Koster v. Innes*, R. & M. 333. *Twemlow v. Oswin*, 2 Camp. 85. *Houstman v. Thornton*, Holt's N. P. C. 242. *Koster v. Reed (Sir Thomas)*, 6 B. & C. 19.

(8) *Doe d. Knight v. Nepean (Bart.)*, 5 B. & Ad. 86.

(9) *Jayne v. Price*, 5 Taunt. 326. 1 Marsh. 68.

(10) *Robertson v. French*, 4 East, 130.

(11) *Curzon v. Lomax*, 5 Esp. N. P. C. 60.

(12) *Roscoe's Ev.* 20., cit. *Crimes v. Smith*, 12 Co. 4., et vide *Wolley v. Brownhill*, M'Clel. 332.

There are certain *prima facie* presumptions in respect of the ownership of property, which seem to have the force of rules of law, though a jury must draw the conclusion which is derived from them. Thus, the ownership of a road, *ad medium filum viæ*, presumptively belongs to the owner of the adjacent land (1); and there is the like presumption in respect of the property in rivers. (2) It is a presumption, that strips of waste land which adjoin a road belong to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor, unless the strips communicate with open commons, or larger portions of land. (3) In speaking of the latter presumption, Mr. Justice Bayley says, it is very desirable that there should be one certain and definite rule applicable to all cases of this description (4); and Mr. Justice Holroyd remarks, that it was of considerable importance, that the *prima facie* presumption should be constant and uniform. (5)

PRESUMPTIVE
EVIDENCE.

Boundaries.

Presumptions of conveyances are made in favour of the party who has proved a right to the beneficial ownership, if the possession has been consistent with the existence of the surrender required, and has made it not unreasonable to believe, that the surrender should have been made in fact, and the presumption has been made accordingly, in order to prevent justice from being defeated by a mere formal objection. (6) But where the original possession of property may be accounted for, and is consistent with the fact of there having been no conveyance, a conveyance or not is presumed, according to the actual belief of the jury on the subject. (7)

Private con-
veyances.

A surrender of an outstanding term will in general be presumed where the trustees ought to convey to the beneficial owner (8), or where a term is satisfied, and is set up by a mortgagor against a mortgagee. (9) But such a presumption will not be made where it would have been a breach of trust in the trustees to have surrendered the term (10); or in general where the surrender would have been against the interests of the owner of the inheritance, especially if the term has been recognised as subsisting at a late period. (11)

Surrender of
an outstanding
term.

The mere fact of a term having been satisfied does not afford sufficient ground upon which a jury can presume it surrendered. (12)

In *Doe v. Hilder* (13) Chief Justice Abbott said, "Where acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term

(1) *Berry and Goodman's case*, 2 Leon. 148. *Per Gibbs C. J. in Grose v. West*, 7 Taunt. 41., vide *Headlum v. Hedley*, Holt's N. P. C. 463.

(2) *Hale, de Jure Maris*, p. i. c. 1. *Callis on Sewers*, 74.

(3) *Doe d. Pring v. Pearsey*, 7 B. & C. 304. *Steel v. Prickett*, 2 Stark. 463. *Gross v. West*, 7 Taunt. 40. *Cook v. Green*, 11 Price, 736. *Rex v. Hatfield (Inhab. of)*, 4 A. & E. 165.

(4) *Doe d. Pring v. Pearsey*, 7 B. & C. 304.

(5) *Ibid. Newcastle (Duke of) v. Clark*, 8 Taunt. 613. *Wiltshire v. Sidford*, cit. 8 B. & C. 259. *Matts v. Hawkins*, 5 Taunt. 20. *Callis on Sewers*, 74. *Masters v. Pollie*, 2 Rol. Rep. 141. *Holder v. Coates*, M. & M. 112. *Waterman v. Soper*, 1 Ld. Raym.

737. Bull. N. P. 85. *Harrison v. Parker*, 6 East, 154. Lofft. 364. *Vowles v. Miller*, 3 Taunt. 138. *Guy v. West*, 2 Selw. N. P. 1342. *Godmanchester (Bailiffs of) v. Phillips*, 4 A. & E. 556.

(6) *Per Tindal C. J. in Doe v. Cooke*, 6 Bing. 180.

(7) *Doe d. Fenwick v. Reed*, 5 B. & A. 233., vide *Livett v. Wilson*, 3 Bing. 115.

(8) *Per Lord Kenyon in Doe v. Staple*, 2 T. R. 696. *Doe v. Sybourn*, 7 *ibid.* 2.

(9) *Ibid.*

(10) *Keene v. Deardon*, 8 East, 267.

(11) *Doe d. Graham (Clerk) v. Scott*, 11 *ibid.* 478., vide *Doe v. Wrighte*, 2 B. & A. 720.

(12) *Evans v. Bicknell*, 6 Ves. 184. 2 Sug. V. & P. 47.

(13) 2 B. & A. 794.

**PRESUMPTIVE
EVIDENCE.**

Length of possession.

License from the lord of a manor for an inclosure.

Right of way.

Where acquiescence of owner in fee will be presumed.

Trustees.

Limited dedication.

Stat. 2 & 3
Will. 4. c. 71.
Incorporeal rights.

existed in the hands of a trustee; and if there do not appear to be any thing that should prevent a surrender from having been made, in such cases the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and therefore a surrender may be presumed."

If length of possession be the only ground upon which, as between private individuals, a conveyance is to be presumed, a possession of land for any period less than twenty years by a feoffee is not sufficient to ground a presumption, that livery of seisin has accompanied the feoffment. (1) But a license from the lord of a manor for an inclosure from a waste has been made after twelve or fourteen years, where such appropriation was frequently seen and unobjected to by the lord and his steward. (2)

If a person unreservedly permit the public to pass over his land, and use it as a way, an absolute dedication to the public will be presumed. Thus, in *Rex v. Lloyd* (3) Lord Ellenborough said, "If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public;" and six years have been holden sufficient to presume such dedication. (4)

But where a public footway over crown land was extinguished by an inclosure act, but for twenty years after such inclosure the public had continued to use the way, it was holden, that this user was no evidence of a dedication to the public, as it did not appear to have been done with the knowledge of the crown. (5)

Although a tenant cannot dedicate the land which he holds in tenancy to the public (6), yet, after a long lapse of time, united with a change of tenants, and an uninterrupted user, the acquiescence of the owner in fee will be presumed. (7)

Trustees can dedicate land to the use of the public, if such dedication be not inconsistent with the object or nature of their trusts. (8)

There may be a limited dedication of a highway to the public as a way excluding carriages (9); and proof of a bar having been placed is sufficient to raise the inference that no dedication was intended. Thus, in *Roberts v. Karr* (10) Mr. Justice Heath observed, that "The putting up of the bar rebutted the presumption of a dedication to the public; such a dedication must be made openly and with a deliberate purpose. Nor could there be a partial dedication to the public, although there might be a *grant* of a footway only." (11)

By stat. 2 & 3 Will. 4. c. 71. various presumptions which juries had been ordinarily recommended, if not directed, to make from modern user, as to the existence of immemorial rights, or of modern rights founded on supposed non existing grants, have been converted into positive rules of law. Pre-

(1) *Doe d. Wilkins v. Cleveland (Marquis of)*, 9 B. & C. 871.

(2) *Doe d. Foley v. Wilson*, 11 East, 56. *Goodtitle v. Baldwin*, *ibid.* 488. *Ditcham v. Bond*, 3 Camp. 525.

(3) 1 Camp. 262.

(4) *Rugby Charity (Trustees of) v. Mer-ryweather*, 11 East, 376. n. *British Museum (Trustees of) v. Finnis*, 5 C. & P. 460.

(5) *Harper v. Charlesworth*, 4 B. & C. 574.

(6) *Wood v. Veal*, 5 B. & A. 454.

(7) *Rex v. Barr*, 4 Camp. 16.

(8) *Rex v. Leake (Inhab. of)*, 5 B. & Ad. 469.

(9) *Stafford (Marquis of) v. Coyney*, 7 B. & C. 257.

(10) 1 Camp. 262. n.

(11) *Vide etiam Woodyer v. Hadden*, 5 Taunt. 125.

vious to this act a technical effect was given to the evidence of enjoyment of certain incorporeal rights for the period of twenty years, which though in theory only presumptive evidence, was in practice and effect a bar. (1)

The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. (2)

Faculties are presumed for regulating the right to pews or vaults, copyhold customs, and the liability to repair fences. (3)

It has been considered that to support long user an act of parliament may be presumed (4), if there be no person capable of making an indefeasible grant, as in the case of the duchy of Cornwall. (5) Where a road obstructing a navigable channel had existed for so long a time that the state of the channel could not be proved, it was thought that an act of parliament, or a writ of *ad quod damnum*, might be presumed, which had extinguished the public right in the channel. (6)

Charters and grants from the crown may be presumed if a long period have elapsed; as for instance one hundred years, in suits between private parties, and even against the crown itself. (7)

Upon the principle that illegality will not be presumed, it has been holden, that when a burgess assumes a corporate office, he has performed all previous solemnities. (8) So, likewise, where performances appeared to have taken place at a theatre, a license was presumed, in an action against a performer for not acting. (9)

But where the act directing the license also directs that a notice of it shall be painted on the outside of the house, and there is no such license painted, it will be presumed, in an action for the penalty, that there is no license. (10)

"The rule, that in inferior courts, and proceedings by magistrates, the maxim, *omnia præsumuntur rite esse acta*, does not apply to give jurisdiction (11), has never been questioned."

Upon evidence of a mere usage for sixty years, a jury have been directed to presume the existence of a bye-law. (12)

It has likewise been holden, that long and constant usage was a ground of presumption against the positive words of a bye-law, or very strong ones of a charter, if it be in restraint of trade. (13)

Payment of money will in a variety of cases be presumed: thus, if parties have been accustomed to make payments that frequently become due, without taking written vouchers, and a long time has elapsed without any complaint being made of non payment, the fact of payment will be presumed. (14)

PRESUMPTIVE EVIDENCE.

Immemorial custom.

Faculties.
Fences.

Act of parliament.

Writ of *ad quod damnum*.

Grants from the crown.

Corporate offices.

Theatrical performances.

Jurisdiction of inferior courts will not be presumed.

Bye-law.

Where payment of money will be presumed.

(1) *Bright v. Walker*, 1 C. M. & R. 217.

(2) *Rex v. Joliffe*, 2 B. & C. 54. *Jenkins v. Harvey*, 1 C. M. & R. 877.

(3) *Phillipp's Ev.* 474.

(4) *Per Lord Mansfield in Eldridge v. Knott*, Cowp. 215.

(5) *Lopez v. Andrew*, 3 M. & R. 329.

(6) *Rex v. Montague*, 4 B. & C. 599. *Chalmer v. Bradley*, 1 J. & W. 63. *Lopez v. Andrews*, Hayes's Conv. 11. n. *Stafford (Viscountess) v. Llewellyn*, Skin. 78. *Hillary v. Waller*, 12 Ves. 265. *Vooght v. Winch*, 2 B. & A. 662. *Weld v. Hornby*, 7 East, 199.

(7) *Rex v. Brown*, cit. Cowp. 110. *Kingston (Mayor of) v. Horner*, ibid. 102. *Jenkins v. Harvey*, 1 C. M. & R. 877.

(8) *Rex v. Hawkins*, 10 East, 211.

(9) *Rodwell v. Redge*, 1 C. & P. 220.

(10) *Gregory v. Tuffs*, 6 ibid. 271.

(11) *Per Holroyd J. in Rex v. All Saints, Southampton*, 7 B. & C. 790. *Rex v. Helling, Str. 8.*, overruling *Regina v. Gouche*, 2 Salk. 441. *Rex v. Hulcott (Inhab. of)*, 6 T. R. 583.

(12) *Rex v. Head*, 4 Burr. 2518. *Rex v. Bird*, 13 East, 368. Bull. N. P. 211. *Le Case de Corporations*, 4 Co. 78. Cowp. 110., vide *Stephens's Corporation Acts*, 418—428.

(13) *Berwick v. Johnson*, 1 Offt. 334.

(14) *Lucas v. Novosilieski*, 1 Esp. N. P. C. 296. *Sellen v. Norman*, 4 C. & P. 80. *Evans v. Birch*, 3 Camp. 10. *Topham v. Braddick*, 1 Taunt. 572.

PRESUMPTIVE EVIDENCE.	<p>If a landlord give a receipt for the rent last due, it is a presumption, that all former rent due from the tenant has been paid. (1) ; Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it (2); but not without proof of circulation after acceptance. (3)</p> <p>The mere production of a check drawn by the defendant on his banker, and payable to the plaintiff, with proof that he indorsed his name upon it, and that it has been paid, affords <i>prima facie</i> evidence of payment to him. (4) But the mere proof of a check being made payable to A., and of A. having received payment of it, is not evidence of the payment of money by the maker to A., for it might have been given to a third person, and by him to A. (5)</p>
<p>Receipt for rent. Bills of exchange. Checks.</p>	
<p>Public appointments. Surrogate.</p>	<p>" All public officers who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shewn." (6)</p> <p>The fact of a person acting in an official capacity as a surrogate, is <i>prima facie</i> evidence that he was duly appointed, and had competent authority (7); and a similar presumption extends to magistrates, constables (8), and commissioners for taking affidavits. (9)</p>
<p>Presumption, <i>omnia rite acta</i>. Acts of an official nature. Parochial certificates.</p>	<p>It is a general principle, that " the law never presumes illegality." (10)</p> <p>If acts be of an official nature, or require the acquiescence of official persons, their due execution will be presumed. Thus, in order to support a parish certificate, a custom was presumed contrary to the common law, of the parish having only one churchwarden ; and it was also presumed, that a party to the instrument had died within a very short period, on the ground that the certificate had been sanctioned by justices (11); and an indenture executed thirty years before has been presumed to be stamped against strong negative evidence. (12)</p>
<p>Indentures.</p>	
<p>Acts of private individuals.</p>	<p>Similar presumptions will be made to uphold the acts of private individuals, particularly a formal character, as writings under seal. Thus, in <i>Doe d. Griffin v. Mason</i> (13), in an action in which the plaintiff's title was founded, on the assignment of a term to secure an annuity, it was objected that there was no proof of the annuity being enrolled; but Lord Ellenborough observed, " If the annuity was not duly enrolled, that proof, should come from the other side. Here is an assignment executed by the defendant. I will presume it to be valid till the contrary is shewn." Where there was proof that a party had signed a deed, which purported to have been sealed and delivered :—It was held, that the judge at Nisi Prius had not done wrong in leaving it to the jury to infer, that the deed had been sealed and delivered. (14)</p>

(1) Gilb. Ev. 309.

(2) *Gibbon v. Featherstonhaugh*, 1 Stark. 225.(3) *Pfiel v. Vanbatenberg*, 2 Camp. 439.(4) *Egg v. Barnett*, 3 Esp. N. P. C. 196. *Boswell v. Smith*, 6 C. & P. 60.(5) *Lloyd v. Sandilands*, Roscoe's Ev. 21.(6) *Per Parke B. in M'Gahey v. Alston*, 2 M. & W. 211.(7) *Rex v. Verelst*, 3 Camp. 432. *Pritchard v. Walker*, 3 C. & P. 212.(8) *Berryman v. Wise*, 4 T. R. 366. *Doe**v. Haddon*, 3 Doug. 310. *Butler v. Ford*, 1 C. & M. 662.(9) *Rex v. Howard*, 1 M. & Rob. 187.(10) *Per Bayley J. in Gleadow v. Alkin*, 1 C. & M. 418.(11) *Rex v. Catesby (Inhab. of)*, 2 B. & C. 820. *Rex v. Morris*, 4 T. R. 550. *Rex v. Hinckley (Inhab. of)*, 12 East, 361. *Rex v. Bestland*, 1 Wils. 128.(12) *Rex v. Long Buckby (Inhab. of)*, 7 East, 45. *Crisp v. Anderson*, 1 Stark. 35.

(13) 3 Camp. 7.

(14) *Talbot v. Hodson*, 7 Taunt. 251.

The regular course of business at a public office will in general be presumed. Thus, where the custom-house would not permit an entry to be made, unless there had been an indorsement made upon a license:— It was held, after proof that the license had been lost, that the indorsement might be presumed from the entry. (1) “If a letter is sent by the post, it is *prima facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course.” (2) Postmarks are evidence that the letters were in the office at the times which the dates specify. (3) And presumptions are frequently drawn from the usual course of private offices, that letters have been sent by the post, or notices delivered, where the persons are dead, who alone could give direct evidence of the fact. (4)

PRESUMPTIVE EVIDENCE.

Course of business at a public office.

Postmarks.
Private offices.

A letter is presumed to be written on the day on which it is dated, as against the writer (5); and the *onus probandi* that it was not, is cast upon him.

Dates.

Indorsements on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date (6); and a bill is presumed to be made on the day of its date. (7)

5. HEARSAY EVIDENCE.

HEARSAY EVIDENCE.

I. Generally.

GENERALLY.

The term “hearsay evidence” is used with reference both to that which is written, and to that which is spoken; but in its legal sense it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information.

Defined.

It is to be observed, also, that persons communicating such evidence are not subject to the danger of a prosecution for perjury, on which a contradiction by two witnesses is requisite; for, where the hearsay statement is stated to have been made when no third person was present, or purports to be that of a deceased person, the witness has no cause to be apprehensive of punishment, even though he entirely fabricates it. (8)

From the misconstructions to which evidence of oral matters is subject from the criminal motives, ignorance, or inattention of hearers, no evidence is admissible but what is upon oath or affirmation; and if the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice. (9)

(1) *Butler v. Allnutt*, 1 Stark. 222.

(2) *Per Parke B. in Warren v. Warren*, 1 C. M. & R. 252.

(3) *Phillipp's Ev.* 471. *n. cit.* R. & R. 264. 3 Stark. 64. 2 Camp. 23. M. & M. 276.

(4) *Doe d. Patteshall v. Turford*, 3 B. & Ad. 895. As to the course of business in proving that letters have been sent by the post when the clerks of an office are dead, vide *Pritt v. Fairclough*, 3 Camp. 305. *Hagedorn v. Reid*, *ibid.* 377. *Toosey v. Williams*, M. & M. 129. Respecting the effect of the like course of business when the clerks are

living, vide *Hetherington v. Kemp*, 4 Camp. 193. *Hawkes v. Salter*, 4 Bing. 715.

(5) *Hunt v. Massey*, 5 B. & Ad. 902. 3 N. & M. 109.

(6) *Smith v. Battens*, 1 M. & Rob. 341.

(7) *Owen v. Waters*, 2 M. & W. 91., *ante*, tit. BILLS OF EXCHANGE AND PROMISSORY NOTES, 781, 782.

(8) *Phillip's Ev.* 197. 217.

(9) *Bull. N. P.* 294. (b.) *Per Abbott C.J. in Doe v. Ridgway*, 4 B. & A. 55. *Per Bayley and Littledale Js. in Spargo v. Brown*, 9 B. & C. 938.

**HEARSAY
EVIDENCE.**

**HEARSAY,
WHEN PART OF
THE TRANSAC-
TION.**

Generally.

II. Hearsay, when Part of the Transaction.

Where a declaration accompanies an act, it is frequently admissible as part of the act itself. Such declarations are more frequently used as collateral or indirect evidence from which some other fact is to be inferred, than as direct evidence of a fact. Declarations are usually admissible, where the fact which they accompany is material and admissible, and where the nature and quality of the act are also material; for, in such instances, a declaration accompanying the act may either be regarded as part of the act itself, or as the most proximate and satisfactory evidence for explaining and illustrating the fact.

Experience supplies a reasonable presumption, that a declaration made by a person in doing an act, as to his intention and object, and where that person laboured under no temptation to deceive, was spontaneous, natural, and consistent with truth. The most usual example adduced in illustration of this doctrine, is that of a declaration made by a trader, at the time of deserting his house or place of business, as to his intention and object in so doing, in order to prove an act of bankruptcy. Here it is observable, the fact of departure is material: the question is, as to the nature and quality of the act, that is, as to the object and intention of the trader in doing that act; and to prove this, the declarations which he made at the time of leaving his house or counting-house are constantly admitted in proof of his design, as being natural and spontaneous indications of the truth, although his subsequent declarations even upon oath would be absolutely rejected. (1)

These classes of mediate evidence are distinguishable from all others by this characteristic difference, that such evidence may be resorted to in the first instance as original evidence, whilst all other mediate testimony is admissible only on a principle of necessity, as *secondary* evidence, after the failure of evidence of a higher and more satisfactory nature. (2)

Subject of ex-
pressions in
issue.

Where the expressions of persons are the matter in issue, proof of their having been used is in its nature original evidence; and therefore, hearsay evidence is admissible to prove the existence of a public rumour, or reputed ownership under the bankrupt laws (3); and where a picture was destroyed which was publicly exposed, the declarations of the spectators are admissible to shew a libellous meaning in the picture (4), the subject of the inquiry being as to the impression produced by the picture on the minds of the public; but where the question in issue was, whether a road was public, a declaration of a deceased tenant of the land over which it passed, while planting a tree on it, "that he planted it to shew where the boundary of the road was when he was a boy," was held inadmissible. (5)

Expressions

If it be essential to ascertain the demeanour, conduct, or mental feelings

(1) 1 Stark. Ev. 36. *Lewis v. Rogers*, 1 C. M. & R. 48. 710. *Whitehead v. Scott*, 1 M. & Rob. 2. *Shott v. Strealfeld*, *ibid.* 9. 1 Stark. Ev. 36.

(2) *Charington v. Brown*, 11 B. Moore, 341. *Att. Gen. v. Good*, M'Clel. & Y. 286. *Kee (Assignee of Sherwin) v. Shaw*, 8 Bing. 320. *Gillingham v. Laing*, 6 Taunt. 532. *Jameson v. Eamer*, 1 Esp. N. P. C. 381. *Vincent v. Prater*, 4 Taunt. 603. *Fisher v. Boucher*, 10 B. & C. (3) *Jones v. Perry*, 2 Esp. N. P. C. 482. *Gurr v. Rutton*, Holt's N. P. C. 327. *Oliver v. Bartlett*, 1 B. & B. 269. 2 B. Moore, 592. *Foulkes v. Sellway*, 3 Esp. N. P. C. 236. (4) *Du Bost v. Beresford*, 2 Camp. 512. (5) *Regina v. Bliss*, 7 A. & E. 550.

of a person at a definite period, the language uttered by such person at that time is in its nature original evidence (1): thus, where a will is disputed on the ground of fraud, circumvention, or forgery, declarations by the testator respecting his intentions are admissible. (2)

In actions for criminal conversation, the declarations of the wife at the time of her elopement, and which state her reason for so doing, are evidence against the husband. (3)

The expressions of a person afflicted with bodily pain or illness, relative to his health and sensations, have been considered to be in their nature original evidence, such expressions being ordinarily the natural consequence, and the outward indication of co-existing sufferings. (4)

Thus, in actions of assault, what a patient has said to an intimate friend or his surgeon, is evidence to show the extent of injury received by an assault (5); but the evidence of a medical man is entitled to greater weight, because his professional skill will enable him to ascertain whether the symptoms correspond with the assertions of the sufferer; so likewise in an action of assault by husband and wife, for an assault upon the wife, her declarations immediately upon receiving the hurt are evidence. (6)

In an action by a husband upon a policy of insurance on the life of his wife, her declarations made at the time it was effected are evidence, to shew her own opinion of her health at that time. (7)

Declarations of persons in possession of property are sometimes received as original evidence, explanatory of the nature of their possession.

On a question of legitimacy, the declaration of a lady, whose marriage was in question, that a certain box contained her marriage certificate, was by Dallas C. J. and Lord Tenterden received as evidence, that she was then in possession of a document of a particular description. (8) Here the fact of possession was inferred from the declaration, which was not merely explanatory of a known possession.

Although the declarations of a widow (9) in possession of certain premises, that she held them for life, and that after her death they would go to the heirs of the husband, have been admitted to negative the fact of her having had twenty years' adverse possession, because they were not used to shew the *quantum* of her estate, but only to explain the nature of her possession: — but it seems, such declarations are not evidence, unless they are against the interest of the person making them. (10)

Conversations and letters may explain acts, which, according to the intentions of the party at the time, may or may not amount to acts of bankruptcy. (11) Declarations explanatory of a bankrupt's motives, where a payment made by him is sought to be invalidated as a fraudulent preference, his declarations as to the state of his affairs in question, but unconnected

HEARSAY EVIDENCE.

accompanying mental feelings.

Expressions accompanying bodily feelings.

Declarations accompanying possession.

Possession inferred from declaration.

Declarations of bankrupt.

(1) Phillipp's Ev. 200.

(2) *Doe v. Hardy*, 1 M. & Rob. 525.

(3) *Hoare v. Allen*, 3 Esp. N. P. C. 276.

Aveson v. Kinnaird (Lord), 6 East, 193., *antè*, tit. ADULTERY, 25.

(4) Phillipp's Ev. 202.

(5) *Aveson v. Kinnaird* (Lord), 6 East, 188. *Gardiner's Peerage case*, 79.

(6) *Thompson v. Trevanion*, Skin. 402., *vide etiam Rex v. Foster*, 6 C. & P. 325.

(7) *Aveson v. Kinnaird*, 6 East, 188.

(8) Phillipp's Ev. 205.

(9) *Doe d. Human v. Pettett*, 5 B. & A. 224. *Doe v. Rickarby*, 5 Esp. N. P. C. 4.

(10) *Doe v. Payne*, 1 Stark. 86. *Doe d. Sweetland v. Webber*, 1 A. & E. 738.

(11) Bull. N. P. 40. *Robson v. Rolls*, 9 Bing. 649. A bankrupt cannot explain an act affecting his commission. *Sayer v. Garnett*, 7 Bing. 103., *antè*, tit. BANKRUPTCY.

**HEARSAY
EVIDENCE.**

with it, are admissible for the plaintiff (1); and a declaration accompanying a purchase of goods is admissible evidence, to shew whether a person sought his living by buying or selling. (2)

So in an action to recover fraudulent payments, answers to letters written by the bankrupt requesting assistance may be read to prove the refusal to give assistance, and his consequent knowledge of the state of his affairs. (3)

**Misrepresent-
ation of sol-
vency.**

In an action on the case for fraudulently representing the solvency of a person, whereby the plaintiffs trusted him with their goods, their declarations at the time they were applied to for the goods are admissible, to shew that they gave trust in consequence of the representation. (4)

**Fraudulent
conveyance.**

Where a trader being in embarrassed circumstances executed an assignment for the benefit of his creditors:—It was held, in an action after his death against the assignee, treating him as an executor *de son tort*, that a list of creditors made out about the time of the execution of the assignment by the direction of the assignor, was evidence as part of the transaction for the purpose of disproving fraud. (5)

In an action against a sheriff for a false return to a writ of *fiery facias*, where the defence was a fraudulent bill of sale, declarations by the party executing the bill of sale, made by him at the time of execution, were held to be admissible, but not those made at another time. (6)

**TIME OF DE-
CLARATION.**

Whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act, is a question for the court; and the court can make inquiry into the existence of any connecting circumstances between the declaration and the act (7), the rule not being confined to the precise time of the act in question. (8) The declarations or letters must, however, be connected with the state of the party's mind at the time (9); and where there was no evidence as to the time when declarations explanatory of an act of bankruptcy were made, they were rejected. (10)

Where the act of bankruptcy insisted on is a fraudulent transfer, which is not capable of being proved by any single incident, but depends on the situation of the bankrupt, and his conduct and language with reference to the whole transaction, a considerable interval may frequently elapse between the date of a disputed act of bankruptcy and that of the declarations calculated to explain it. (11)

In *Ridley v. Gyde* (12), a conversation with a bankrupt was, under the peculiar circumstances of the case, allowed to be given in evidence, which

(1) *Herbert v. Wilcocks*, M. & M. 355. n. *Vacher v. Cocks*, *ibid.* 353. *Cook v. Rogers*, 7 Bing. 438. *Harman v. Fishar*, Cowp. 117. *Guthrie v. Crossley*, 2 C. & P. 301.

(2) *Gale v. Halfknight*, 3 Stark. 58.

(3) *Vacher v. Cocks*, M. & M. 353.

(4) *Fellowes v. Williamson*, *ibid.* 306. *Moore v. Strong*, 1 Bing. N. C. 441., *antè*, tit. DECEIT, 1307, 1308.

(5) *Lewis v. Rogers*, 1 C. M. & R. 48. 4 Tyrw. 872. *Prideaux v. Collier*, 2 Stark. 57. *Ryle v. Haggie*, 1 J. & W. 234.

(6) *Phillips v. Eamer*, 1 Esp. N. P. C. 357., et vide etiam *Irving v. Greenwood*, 1 C. & P. 350. *Tilk v. Parsons*, 2 *ibid.* 201. *Ashley v. Harrison*, 1 Esp. N. P. C. 50. *Re*

Whitehead, 1 C. & P. 69. *Bibb v. Thomas*, 2 W. Black. 1043. *Penn v. Scholey*, 5 Esp. N. P. C. 243. *Phillipp's Ev.* 207.

(7) *Ridley v. Gyde*, 9 Bing. 349. *Rawson v. Haigh*, 2 *ibid.* 99.

(8) *Robson v. Kemp*, 4 Esp. N. P. C. 233. *Ridley v. Gyde*, 9 Bing. 349.

(9) *Rawson v. Haigh*, 2 Bing. 99.

(10) *Marsh v. Meager*, 1 Stark. 353. *Robson v. Kemp*, 4 Esp. N. P. C. 233. *Lees v. Marton*, 1 M. & Rob. 210.

(11) *Bateman v. Bailey*, 5 T. R. 512., recognised in *Rawson v. Haigh*, 2 Bing. 99. *Robson v. Gyde*, 9 *ibid.* 349., vide etiam *Maylin v. Eyloe*, Str. 809. *Smith v. Cramer*, 1 Bing. N. C. 585.

(12) 9 Bing. 349.

HEARSAY
EVIDENCE.

had passed twenty-six days after the disputed act of bankruptcy, which was a fraudulent transfer. And, in cases of continuing acts of bankruptcy, as departing the realm, or remaining abroad with the intent to defeat or delay creditors, letters or declarations may be received during the continuance of the act of bankruptcy, and long after the commencement of it. Thus, in *Rawson v. Haigh* (1), where the alleged act of bankruptcy consisted in departing the realm, with intent to delay creditors, two letters were received, one sent from Calais and the other from Paris, the latter having been written upwards of a month after the time of the bankrupt quitting England.

The death-bed declarations of paupers respecting their settlements are evidence; as also, when they are dead, their general declarations. (2)

Death-bed
declarations.

Whether a declaration made by a person *in articulo mortis* be receivable or not in evidence, is a question for the court. (3)

III. *Declarations of Persons in Pari Jure.*

DECLARATIONS
OF PERSONS IN
PARI JURE.

In *Monkton v. Attorney General* (4) Lord Brougham said, "It will be no valid objection on the ground of bias, that the party making the declaration may have stood, or thought he stood (for that would be equally bias) *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it. With the exception of what is said in *Drummond's case* (5), where the evidence was clearly inadmissible upon other grounds, I can find no warrant for asserting, that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it."

Judgment of
Lord Brough-
am in *Monk-
ton v. Attorney
General*.

If the rejection of evidence of persons *in pari jure* were permitted, it would destroy evidence of reputation (6); and in the absence of interest and excitement of litigation, the testimony is less suspicious than that which is generally given on a trial; and where there is not an open examination, as in the proceedings of courts of equity, it seems entitled to nearly equal weight. (7)

In matters of public or general interest (8), evidence of reputation cannot be received during the lifetime of the declarant, because the best evidence must always be produced. (9)

In matters of
public interest,
evidence of re-
putation cannot
be received
during the life-
time of the
declarant.

(1) 2 Bing. 99.

(2) *Rex v. Bury*, Cald. 486.

(3) *Rex v. Hucks*, 1 Stark. 521.

(4) 2 Russ. & M. 159., *post*, 1566. 1568.

(5) 1 Leach's C. C. 378.

(6) *Harewood v. Sims*, Wight. 112. *Moseley v. Davies* (Clerk), 11 Price, 162. 13 *ibid.* 236.

(7) *Zouch of Haryngworth Peerage*, Printed Minutes, 1804, p. 207. *Doe d. Tilman v. Tarver*, R. & M. 141. *Monkton v. Att. Gen.* 2 Russ. & M. 160.

(8) *Nicholls v. Parker*, 14 East, 331. *Moseley v. Davies*, 11 Price, 162. *Deacle v. Hancock*, 13 *ibid.* 226. *Harewood v. Sims*, Wight. 112. *Davies v. Morgan*, 1 C. & J. 593. *Freeman v. Phillipps*, 4 M. & S. 491. *Crease v. Barrett*, 1 C. M. & R. 927. *Chapman v. Cowlan*, 13 East, 10. *Roe d. Beebe v. Parker*, 5 T. R. 26. *Reed v. Jackson*, 1 East, 355. *Phillipp's Ev.* 284.

(9) *Woolway v. Roe*, 1 A. & E. 117.

HEARSAY
EVIDENCE.

IV. *Declarations post Litem motam.*

DECLARATIONS
POST LITEM MO-
TAM.

Hearsay declarations, to be receivable, must have been made *ante litem motam*, because, as observed by Lord Eldon in *Whitelocke v. Baker* (1), the admissibility of traditionary evidence is founded upon the presumption, that the words given in evidence "are the natural effusions of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But there may be many circumstances, forming part of the tradition, which you would reject, taking the body of the tradition."

In *Freeman v. Phillipps* (2) Mr. Justice Bayley says, "Where there is a *lis mota* you cannot be sure that, in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources."

Lis mota de-
fined.

Declarations *post litem motam*, not merely after the commencement of the lawsuit, but *after the dispute has arisen* (that is the primary meaning of the word *lis*), are not receivable in evidence.

Judgment of
Lord Broug-
ham in *Monk-*
ton v. Attorney
General.

In *Monkton v. Attorney General* (3) Lord Brougham said, "It has been asked, 'if a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, *non constat*, he may not have been in the act of making evidence for himself, by preparing a document which should afterwards profit him, or those in whom he is interested?' To that I answer, shew me that the pedigree in question was prepared with that view; bring it within the rule either of *Whitelocke v. Baker* (4), or of the *Berkeley Peerage case* (5); prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold, that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question, then, always will be, was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?"

In *Walker v. Beauchamp (Countess of)* (6) it appeared, that A. in the year 1798, died possessed of property, which, many years afterwards, B. commenced a suit to recover. In the year 1799 a relation of B. made a declaration, the effect of which was to shew, that B. was the heir and next of kin to A.:—It was held, that this declaration was not receivable in evidence, as the *lis mota*, or commencement of controversy, must be taken to be the arising of that state of facts on which the claim is founded, without any thing more.

Knowledge of
lis mota by de-
clarant.

Declarations *post litem motam* are not receivable, although the declarant was ignorant of any dispute. Thus, Chief Justice Mansfield in the *Berkeley*

(1) 13 Ves. 514.

(2) 4 M. & S. 497.

(3) 2 Russ. & M. 161., *post*, 1568.

(4) 13 Ves. 511.

(5) 4 Camp. 417.

(6) 6 C. & P. 552.

case (1) stated, "The line of distinction is the *origin of the controversy*, and not *the commencement of the suit*. After the controversy has originated, all declarations are to be excluded, whether it was or was not *known to the witness*. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced." (2)

HEARSAY
EVIDENCE.

In *Freeman v. Phillipps* (3) an action was brought by a copyholder against the lord of a manor, in which the copyholder relied upon a custom, that the lord could not assess a fine, upon filling up lives, upon copyholds held for life, without the intervention of the homage. The lord gave in evidence the proceedings in an ancient suit brought by a copyholder against the then lord, in which the copyholder insisted on a particular custom relative to the filling up of lives, not being that which was in dispute in the latter suit; and throughout the former suit no mention was made of the approbation of the homage being necessary. The court held, there was no valid objection to the proceedings being given in evidence, because the *lis mota* was not on the very same point, and that the proceedings were not evidence of any thing affirmed by the witnesses, but were material on account of what the witnesses omitted to declare; that is to say, that where a dispute existed concerning the copyholder's right to renew on some terms, it was never made a term that the fine should be assessed by the homage. (4)

Lis mota upon
another point
of controversy.

A coincidence of statements between parties *post litem motam* does not make the admission evidence, because it might be equally for the interest of each to admit a particular statement, though contrary to truth; and moreover, the declaration not being a spontaneous effusion, but made for a particular object, and in contemplation of litigation. (5)

Coincidence of
statements *post*
litem motam.

The principle, that hearsay must be the declarations of an unprejudiced person, must be received in a qualified sense.

Declarations
with a view to
future contro-
versy.

In *Goodright v. Moss* (6) Lord Mansfield says, "I have known advice given to a father and mother to make attested declarations in writing under their hand, of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance."

In the *Berkeley Peerage* case (7) the following questions were propounded to the judges by the House of Lords:—

Berkeley Peer-
age case.

"Upon the trial of an ejectment respecting Long Acre, between E. and F., in which it was necessary for E. to prove, that he was the legitimate son of W., the said W. being at that time dead. E., after proving by other evidence, that W. was his reputed father, offered to give in evidence an entry in a bible, in which bible W. had made such entry in his own handwriting, that E. was his eldest son, born in lawful wedlock from G. the wife of W., on the 1st day of May 1778, and signed by W. himself.

"Could such entry in such bible be received to prove, that E. is the

(1) 4 Camp. 417.

(2) Vide etiam *Nicholls v. Parker*, 14 East, 331. n. *Rex v. Cotton*, 3 Camp. 444. *Brett v. Beales*, M. & M. 418. *Richards v. Bassett*, 10 B. & C. 657.

(3) 4 M. & S. 493.

(4) Vide etiam *Newcastle (Duke of) v. Broxtowe (Hundred of)*, 4 B. & Ad. 279.

(5) *Slane Peerage*, Printed Minutes, 1830, ii. 35. iii. 6.

(6) Cowp. 591.

(7) 4 Camp. 403.

HEARSAY
EVIDENCE.

Judgment of
Chief Justice
Mansfield in
the *Berkeley*
Peerage case.

legitimate son of W. as evidence of the declaration of W. in matter of pedigree?"

To which Chief Justice Mansfield replied, "I cannot answer this question without adding something to the answer beyond what is in the question; because it supposes that an entry written by a father in a *bible* would be of more weight, than the same written in any other book. Now I know no difference between a father writing any thing respecting his son in a bible, and his writing it in any other book, or on any other piece of paper; and therefore the answer I would give is, that such a writing by a father in a bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father might be admitted in evidence. Were it to appear in your lordships' journals, that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its being written in a bible; and therefore I submit that the answer should be, 'that such a writing in a bible, or any other book, or any other piece of paper, would be admissible in evidence as a declaration of the father in matter of a pedigree.'"

Judgment of
Lord
Brougham in
Monkton v. At-
torney General.

In *Monkton v. Attorney General* (1) Lord Brougham said, "Adverting more particularly here to the authority of Lord Mansfield in *Goodright v. Moss* (2), 'An entry in a father's family bible,' says his lordship, 'an inscription on a tomb-stone, a pedigree hung up in the family mansion, are all good evidence.' What follows clearly shows, that Lord Mansfield did not consider publicity indispensable; and it is equally clear, that he did not consider the circumstance of a man who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, provided that object be not connected with a controversy touching the matter in question, a sufficient ground to exclude such evidence. His Lordship's words are, 'I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance.' This may be said, perhaps, to be going great lengths; but at all events it sanctions the doctrine that the having a distinct object in view, in making a declaration in writing or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient, *per se*, to exclude that declaration; for, continues Lord Mansfield, 'If the credit of such declarations is impeached, it must be left to the jury to judge of it.' In plain terms, if a father or a mother make a pedigree for the purpose of preventing disputes in the family, his lordship says he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay declarations); and the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the court."

(1) 2 Russ. & M. 163., *anté*, 1566.

(2) Cowp. 591.

V. *Declarations of Witnesses at a former Trial.*

Where there is a second trial between the same parties, and in which the point at issue is precisely the same (1), hearsay evidence is admissible as to what a witness said at the former trial, if he be dead, or do not appear upon his *subpœna*, from having been kept away by the contrivance of the opposite party. (2)

DECLARATIONS
OF WITNESSES
AT A FORMER
TRIAL.

In order to let in evidence of the examination of a deceased witness, upon a former trial upon the same question, it is sufficient if the parties be substantially the same. (3)

Therefore it is sufficient, if, in the former action, a party is plaintiff or defendant, and in the other, lessor of the plaintiff in ejectment. (4) Nor is it material that one of the parties to the second action was in the former action joined with several others who are not parties to the second action (5); nor that the former evidence was given upon the trial of an issue arising out of a bill in Chancery, which has been dismissed upon the motion of the plaintiff in equity. (6) If the parties and the title in issue are the same, the evidence is admissible, though the land sought to be recovered is different. (7) But where the parties are neither the same, nor in privity with each other, such testimony is not admissible, though the original title and one of the parties are the same. (8)

The modes in which the previous testimony of a witness can be proved, are either by reading the judge's notes, or by any person who heard him give his evidence, if such person will swear to the precise words used by the witness; but swearing to the effect of the testimony will not be sufficient (9), because the jury are the exclusive judges as to that fact. (10)

Modes in which
the previous
testimony of a
witness can be
proved.

Where a witness examined on the trial of an issue out of Chancery died, and a new trial was granted, parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of those witnesses who had died since the first trial. (11)

Depositions in
equity.

If, by a rule of court, made by consent of parties previously to the trial of an ejectment, it be ordered that the short-hand writer's notes of the evidence on the trial of an issue out of Chancery shall be read in evidence as to such witnesses as might be dead or beyond sea, evidence given by the short-hand writer of the examination at the former trial of an attesting witness since dead, who proved the execution of a will, the due execution of which was in controversy on both occasions, is not only

Short-hand
writer's notes.

(1) *Doncaster (Mayor of) v. Day*, 3 Taunt. 262.

(2) *Strutt v. Bovingdon*, 5 Esp. N. P. C. 56. Bull. N. P. 243. Harrison's Ev. 154.

(3) Ibid. *Wright v. Doe d. Tatham*, 1 A. & E. 3. 3 N. & M. 268.

(4) Ibid.

(5) Ibid.

(6) Ibid.

(7) *Doe d. Foster v. Derby (Earl of)*, 1 A. & E. 791. n.

(8) Ibid. 783.

(9) *Doncaster (Mayor of) v. Day*, 3 Taunt. 262. *Rex v. Jolliffe*, 4 T. R. 290.

(10) The proper course for a party who wants a transcript of the evidence adduced at the former trial appears to be, to apply to the clerk of the judge who presided for a copy of such judge's notes, and the expense of obtaining such copy would, it seems, be allowed in costs. *Crease v. Barrett*, 1 Tyrw. & G. 112.

(11) *Tod v. Winchelsea (Earl of)*, 3 C. & P. 387.

HEARSAY
EVIDENCE.

admissible in evidence on the ground of the agreement in the rule, but, being admitted, is not secondary evidence, but is evidence of as high a nature as that of a living attesting witness. (1)

A short-hand writer having been allowed to refer to his notes as to the testimony of witnesses at the trial of an indictment:—It was held, that such evidence was improperly received, as the witnesses themselves ought to have been called. (2)

Statements of
a deceased
witness.

A confession of forgery by a witness before his death may be admissible evidence (3); but, generally, evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible. (4)

For the purpose of introducing an account of what a deceased witness swore on the first trial, the *Nisi Prius* record with the *postea* indorsed is good evidence to show, that the cause came on to be tried, or that it actually was tried. (5)

VI. *Declarations against Interest.*

DECLARATIONS
AGAINST IN-
TEREST.

Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth; in fact, if a man voluntarily admit a debt or confess a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief.

Mr. Phillipps (6) justly remarks, "It is presumed, where declarations are made under these circumstances, that they are entitled to credit, because the regard, which men pay to their own interests may safely be considered as a sufficient guarantee against their prejudicing themselves by any *erroneous* statement, and the assumed tendency of the declarations precludes the possibility of any *fraudulent* statement. Indeed, the apprehension of fraud in such cases is in a great measure removed without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the lifetime of the authors of them; and that it is always competent for the party, against whom they are produced, to point out any sinister motive for making them. It is true, the great tests of the fidelity, accuracy, and completeness of judicial evidence, are here wanting. But the inconveniences which would result from the extinction of evidence are considered as outweighing, in the generality of cases, the inconvenience of admitting such hearsay declarations, under the limitations and securities above mentioned.

"The circumstance, that the declarations are against a person's own interest, affords a very insufficient guarantee of fidelity and accuracy, unless it clearly appear, not only that a particular fact stated in the declaration, but the whole declaration, in every view of it, is prejudicial to the interest of the maker, and unless it appear, further, that the means will be afforded to others of using the declaration against him, and that others will probably have occasion to use it.

(1) *Wright v. Doe d. Tatham*, 3 N. & M. 268. 7 A. & E. 315. *Tod v. Winchelsea (Earl of)*, 3 C. & P. 387.

(2) *Willans v. Taylor*, 3 M. & P. 350.

(3) *Clymer v. Littler*, 1 W. Black. 345.

(4) *Garnem v. Barnard*, 1 Anst. 298.

(5) *Pitfon v. Walter*, Str. 162.

(6) Ev. 307, 310.

"The doctrine concerning declarations against interest appears to have been extended somewhat beyond the reason upon which it is founded, in those cases where the person making the declaration could not have promised himself any advantage, either by admitting to make it, or by stating it in a different way."

It may be laid down as a general principle, that declarations of persons contrary to their interest, at whatever time made, are, after their deaths, receivable in evidence. And it seems such declarations are admissible as evidence of all the facts so stated, though some of them may not have been within the parties' own knowledge, for the whole declaration must be taken together. (1)

It is not essentially requisite for the admissibility of declarations, that the declarant should have a positive interest, capable of being diminished or endangered. (2) Hence, a declaration accompanied by an admission apparently against interest, would be receivable, although in point of fact the author of the declaration did not compromise his interest at all, but only made an admission apparently against interest, and without any real transaction to which it could relate, in order to render his declaration receivable.

Not requisite that the declarant should have a positive interest.

Declarations have been held as being against interest, where they have been made in private books retained within the custody of their owners, and not, as in the case of receiver's accounts, subjected to the inspection of others. (3)

Declarations in private books.

In such cases, the declarations could only have been available against interest in the event of accident or mistake, or possibly in case of receiving notice to produce books on a trial. (4) Under such circumstances, a regard to self-interest appears to be not a sufficient guarantee against fraud, and a very inadequate one against negligence or mistake. (5)

It is an important question, how far declarations against interest are receivable in respect of matters forming a part of the declaration, but not in themselves affecting the interest of the declarant.

Parts of entry not affecting interest.

Where declarations of deceased persons acknowledging the receipt of money have been admitted, it appears that they are evidence, not merely of the fact of the deceased having received the money, but also of the circumstances accompanying the payment. (6)

In *Gleadow v. Atkin* (7) Mr. Baron Bayley repudiates the doctrine, that declarations cannot be received, except where the declarant might have been examined in his lifetime, referring to *Middleton v. Melton* (8), *Doe d. Reece v. Robson* (9), and *Bosworth v. Cotchett*. (10)

COMPETENCY OF DECLARANT.

In *Short v. Lee* (11) the entries of a deceased member of an ecclesiastical corporation were admitted on behalf of that corporation in a suit brought by them for tithes.

The declarations of a person who, at the time of making them, stood in the same situation and interest as the party to the suit, are evidence against

(1) *Crease v. Barrett*, 1 C. M. & R. 919.

(2) *Barker v. Ray*, 2 Russ. 67. n., sed vide *Higham v. Ridgway*, 10 East, 109. *Doe d. Gallop v. Vowles*, 1 M. & Rob. 261. *Crease v. Barrett*, 1 C. M. & R. 919.

(3) *Higham v. Ridgway*, 10 East, 109. *Middleton v. Melton*, 10 B. & C. 328.

(4) *Roe d. Brune v. Rawlings*, 7 East, 290.

(5) *Phillipps' Ev.* 309.

(6) Cases collected in *Barker v. Ray*, 2 Russ. 67.

(7) 1 C. & M. 420.

(8) 10 B. & C. 326.

(9) 15 East, 32.

(10) Dom. Proc. May 6, 1824.

(11) 2 J. & W. 464.

**HEARSAY
EVIDENCE.**

Necessity to
prove death of
declarant.

Written entries
must be pro-
duced from
proper custody.

Proof of de-
clarant's situa-
tion.

It should ap-
pear by evi-
dence *aliunde*,
that the per-
sons making
the entries
filled that cha-
racter at the
time when the
entries were
made.

Illustration of
the principle of
the admissibi-
lity of declara-
tions against
interest for the
purpose of
proving every

that party: thus, the declaration of a former owner of plaintiff's land, that he had not the right claimed by plaintiff in respect of it, is admissible (1); though the maker be alive, and not produced. (2)

But the entries of a person still living, against his interest, are not evidence between other parties, though it be shewn that he is abroad, or that he has absconded from a criminal charge, or that it be altogether out of the power of the party to produce him as a witness.

Where the declarations are in the nature of written entries, they should be produced from the proper custody. (3)

Where plaintiff showed payment of rent to A. B. in order to prove a tenancy under A. B., and not under the defendant, the defendant was not allowed to rebut the evidence by producing written accounts rendered by A. B. to him of these very rents, A. B. being alive and not called. (4)

It may be observed, that in *Doe d. Linsey v. Edwards* (5) it was held, that attornment in writing by a tenant to L. is evidence of L.'s ownership, even as between third parties, *but it did not appear whether the tenant was dead.*

The character of the evidence must be established before the entry is read. (6)

Thus, in *De Rutzen v. Farr* (7) it was held, that accounts of rent signed by a person styling himself clerk to a steward, but not shewn to have been employed by such steward otherwise than by the accounts themselves, were not evidence to prove that the rent had been received.

If the entries produced in evidence be offered, as being those of receivers of private individuals, it should appear by evidence *aliunde*, that the persons making the entries filled that character at the time when the entries were made. Thus, in the case of *Short v. Lee* (8), where the accounts of a tithe collector were produced in evidence, it was held to be necessary to prove *aliunde*, that the person whose book was produced was authorised to collect tithes.

But in the same case, account books in the possession of a corporation, entitled to an impropriate rectory, purporting to be accounts of their collector of tithes, were received without proof *aliunde*, that the accounting party was really the collector; on the ground, that by the charter of the corporation it was their duty to appoint proctors to receive the tithes, and a corporation could have received the tithes themselves.

It seems, that the situation of the declarant may sometimes be established by the internal evidence of the books containing his entries. (9)

The principle of the admissibility of declarations against interest, for the purpose of proving every thing contained in them, is illustrated by *Stead v. Heaton* (10), which respected the existence of a customary payment for the reparation of a parish church: churchwardens' accounts were produced, in which were the following entries, "Received of Haworth, who this year disputed this our ancient custom, but after we had sued them paid it ac-

(1) *Woolway v. Rowe*, 1 A. & E. 114.

(2) *Ibid.*

(3) *Vide post*, 1634. *Stephen v. Gwenap*, 1 M. & Rob. 120., et vide *Harrison v. Blades*, 3 Camp. 457. Incapacity to attend from illness. *Manby v. Curtis*, 1 Price, 225. *Cooper v. Marsden*, 1 Esp. N. P. C. 2.

(4) *Spargo v. Brown*, 9 B. & C. 935.

(5) 5 A. & E. 95.

(6) *Davies v. Morgan*, 1 C. & J. 590.

(7) 4 A. & E. 53.

(8) 2 J. & W. 464. *Manby v. Curtis*, 1 Price, 225.

(9) *Doe v. Thynne* (*Lord George*), 10 East, 208.

(10) 4 T. R. 669.

cordingly, 8*l.* and 1*l.* costs; and at the head of the same page was written, "It is an ancient custom thus to proportion church-lay: 1. the chapelry of Haworth pay one fifth, Bradford a third of the remainder, and the rest to be equally divided according to the churchwardens of the several other townships in the parish;" and upon such facts Lord Kenyon observed, "With regard to the admissibility of the evidence, it is clear that one entry was properly admitted, because it charged the parish officers with the receipt of the money; and then the entry immediately preceding it must also be admitted, because the other refers to it; in fact, they are both parts of one and the same transaction, each explaining the other. Even without this reference, I do not see any objection to admitting the second entry as evidence *proprio vigore*, because usages relating to parishes must be got out of the parish books. It is like the instance of court rolls, which are frequently admitted in evidence, though they affect the rights of third persons." So likewise in *Higham v. Ridgway* (1), in which Lord Ellenborough said, "The question is, whether the books of a man-midwife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c. received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted, namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled, by his entry, a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made, the date of which is the 22d of April, when, it appears by other evidence, that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say, that the word '*paid*,' only shall be admitted in evidence, without the context which explains to what it refers. We must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of the other entry, of which it is explanatory." (2)

A disinclination has been expressed to extend the principles in *Higham v. Ridgway*. (3) Thus, in *Doe d. Gallop v. Vowles* (4), a deceased trades-

HEARSAY
EVIDENCE.

thing contained
in them.

Judgment of
Lord Kenyon
in *Stead v.*
Heaton.

Judgment of
Lord Ellen-
borough in
Higham v.
Ridgway.

(1) 10 East, 109.

(2) Vide etiam *Warren v. Greenville*, Str. 1129. *Doe v. Robson*, 15 East, 32. *Skipwith v. Shirley*, 11 Ves. 65. *Roe v. Rawlins*, 1 East, 291. *Marks v. Lahee*, 2 Bing. N. C. 408. *Calvert v. Canterbury* (Archbishop of), 2 Esp. N. P. C. 646. *Doe d.*

Powell v. Hill, cit. per Taunton J. in *Chambers v. Bernasconi*, 1 C. M. & R. 355. *Blackeler v. Crofts*, Comb. 343. 12 Vin. Abr. Evidence, 85. [A. b. 5.]. *Cook v. Bankes*, 2 C. & P. 481.

(3) 10 East, 109.

(4) 1 M. & R. 261.

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man's bill for repairs, with his receipt thereon, was held not to be evidence of the work not having been done for the person charged, though the paper is found amongst the other papers of the person charged, Mr. Justice Littledale observing, "the cases have gone quite far enough; there would be no limit if such paper as this were admitted; I think the paper inadmissible,"

Distinction between cases where the admission against interest is part of one entire transaction with the rest of the declaration, and to cases where declarations embrace matters perfectly collateral.

Distinctions exist between cases where the admission against interest is part of one entire transaction with the rest of the declaration, and to cases where declarations embrace matters perfectly collateral.

In the case of *Rudd v. Wright* (1) a survey was tendered in evidence, which had been made for the use of Trinity College, Cambridge, who were impropiators of a living of which the plaintiff was vicar; and on this survey, certain closes were stated as being titheable to the vicar. Lord Lyndhurst observed, that although this document would be evidence against the College in a suit between them and the vicar, it would admit of some consideration, whether it was admissible in evidence against a third person: but that it was unnecessary to decide that question, because the object of producing the survey in evidence arose out of a marginal note to the survey: his lordship thought, that the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation, made by the person who framed the survey; and that it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received; the case of *Stead v. Heaton*, observed his lordship, did not by any means go to that extent. (2)

DECLARATIONS OF PERSONS HAVING NO INTEREST TO MISREPRESENT.

It is not sufficient, that, in one or more points of view, a declaration may be against interest, if it appear upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration (3); because evidence of this kind can only be admitted to restrain, not to advance, the right of the party who makes it; in fact, there is only one instance in which this is allowed, viz. the books of an incumbent respecting his tithes, which may be evidence for his successor; but that has always been considered an excepted case. (4)

Entries by a deceased executor.

Judgment of Mr. Justice Alderson in *Spiers v. Morris*.

But entries of receipt of rent made by a deceased executor, who had an interest in land which was claimed, have been held admissible evidence for a person claiming the land under him, when the rent has been received and accounted for by the deceased in his capacity of executor, the entries not having been made by him in his character of landlord: thus, in *Spiers v. Morris* (5) Mr. Justice Alderson said, "The fact of the receipt of rent by Thatcher would be clearly evidence if it could be shewn; and the question is, whether, after his decease, Thatcher's declarations as to that fact are admissible in evidence. He had full means of knowledge, and he makes entries, which, in his character of executor, are against his interest: upon his decease, therefore, these entries become evidence, as in other cases where the courts have been in the habit of admitting entries of deceased persons, made against their interest."

(1) 1 Younge, 147.

(2) Vide etiam *Chambers v. Bernasconi*, 1 C & J. 456.

(3) *Outram v. Morewood*, 5 T. R. 121.

(4) Per Kenyon C. J. *ibid*.

(5) 9 Bing. 690.

Where certain entries of receipt of money, made by proctors who were members of an ecclesiastical corporation, were adduced in evidence by that corporation in a suit commenced by them for tithes:—It was held, that the proctors were interested against the entries, because they charged themselves with the whole amount; whereas, as members of the corporation, they had only an interest in a proportionate share of the moneys receivable (1); but it should be also observed, that, generally speaking, corporation books are not evidence for the corporation. (2)

HEARSAY EVIDENCE.

Entries of receipts of money by proctors, who were members of an ecclesiastical corporation.

When an entry purports to charge a deceased person, and afterwards to discharge him, such an entry cannot be used against the maker of it, unless the whole is read in evidence. (3)

Charge and discharge.

The entries in books of a deceased rector or vicar are frequently admitted as evidence for his successor, because there is an absence of interest; for the person making such entries must know, that they cannot benefit himself or his property, his representatives having nothing to do with the living, but his successor, who stands indifferent to him, and therefore it is not to be presumed that false entries would be made by him for his successor; other reasons have been assigned for their admission, such as the peculiar nature of tithes, the protection due to the clergy, and the *cursus scaccarii*. (4)

Rectorial or vicarial books.

The entry of a deceased lessee of an impropriate rectory, whose interest had expired, is receivable in evidence, seemingly because he had no privity of interest with any succeeding tenant, and the entry could not have been used for himself or his assignee (5); and the entries of collectors of tithes stand upon the same footing as those of other receivers and bailiffs. (6).

Lessee of an impropriate rectory.

Collector of tithes.

By a supposed analogy to the entries in rectors' or vicars' books, it has been supposed that the books of a lay impropriator are evidence (7); but there is an essential difference, because, in the latter case, the entries are available for the representatives of the party making them.

Lay impropriator.

Declarations respecting the right to property are also admissible in evidence; but mere private assertions of right, coupled with no act or visible exercise of it, proved or presumable, are inadmissible as evidence in favour of the right asserted. (8)

DECLARATIONS RESPECTING RIGHTS OF PROPERTY.

Upon an issue, whether A. B. died possessed of certain farming stock, evidence can be given of a conversation, in which A. B. stated that she had

Farming stock.

(1) *Short v. Lee*, 2 J. & W. 464., vide etiam *Anon.* 1 Ld. Raym. 745. *Smart v. Williams*, Comb. 249.

(2) *Marriage v. Lawrence*, 3 B. & A. 142. 2 *ibid.* 189. *Att. Gen. v. Warwick (Corporation of)*, 4 Russ. 222. *Brett v. Beales*, M. & M. 417.

(3) *Bree v. Beck*, 1 Younge, 223. 239. *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 562.

(4) *Glynn v. England (Bank of)*, 2 Ves. sen. 43. *Armstrong v. Hewett*, 4 Price, 216. *Drake v. Smith*, 5 *ibid.* 369. *Short v. Lee*, 2 J. & W. 464. *Pengal v. Nicholson*, Wight. 63. 12 Vin. Abr. Evidence, 255. [T. b. 117.]. *Parsons v. Bellamy*, 4 Price, 190. *Robinson v. Williamson*, 9 *ibid.* 226. *Middleton v. Nuttall*, 6 Bing. 226. *Outram v. Morewood*,

5 T. R. 123. *Woodnorth v. Cobham (Lord)*, 2 Gwill. 563. *Roe d. Brune (Clerk) v. Rawlings*, 7 East, 290. *Le Grose v. Lovemoor*, 2 Gwill. 529.

(5) *Ullingworth v. Leigh*, Gwill. 1615. 3 E. & Y. 1385.

(6) *Woodnorth v. Cobham (Lord)*, Bunb. 180. *Short v. Lee*, 2 J. & W. 490. *Jones v. Waller*, 2 Gwill. 847. *Bullen v. Mitchell*, 2 Price, 399. *Morgan v. Tyler and Finch v. Messing*, cit. in *Short v. Lee*, 2 J. & W. 490.

(7) *Anon.* Bunb. 246. *Anon.* 12 Vin. Abr. Evidence, 117. [A. b. 73.], sed vide *Short v. Lee*, 2 J. & W. 464. *Outram v. Morewood*, 5 T. R. 123.

(8) *Roscoe's Ev.* 33.

**HEARSAY
EVIDENCE.****Satisfaction for
trespasses.**

retired from business, and had given up her farming stock to her son-in-law. (1)

Bill of lading.

Entries by a deceased steward, of money received by him from different persons in satisfaction of trespasses committed on the waste, and thereby charging himself to the amount received, are admissible to prove that the right to the soil of the waste was in the master. (2)

**Landlord's de-
scription of
property in a
lease.**

A bill of lading signed by the deceased master of a vessel, for goods deliverable to a consignee, is evidence of property in the consignee, even in trover for the goods against a third person (3); but, generally speaking, an invoice is only evidence against parties privy to the contents. (4)

**Declarations
by occupiers.**

The landlord's description of property in a former lease is not evidence against a prior lessee, though it is evidence against a subsequent lessee. (5)

Occupation being presumptive evidence of a *seisin* in fee, any declaration claiming a less estate is against the party's interest. (6)

In *Crease v. Barrett* (7) it was observed, that an occupier proved to be in possession of a piece of land is, *prima facie*, presumed to be owner in fee, and his declaration is receivable in evidence, when it shews that he was duly tenant for life or years.

The declarations of occupiers are admissible, also, as explanatory of the fact of occupation, and of whom he rented them. (8) Thus, a declaration by a deceased occupier of land, that he rents it under a certain person, is evidence of that person's *seisin* (9), even in a writ of right to prove the *seisin* by taking *esplees*. (10)

**Declarations of
a wife during
coverture.**

In *Barker v. Ray* (11) the declarations of a wife during coverture were offered in evidence, after the death of her husband (the effect of such declarations being, that her husband was not seised in fee of certain premises in dispute, of which he was then in possession, and that upon a certain event they were to go over to another branch of the family); but they were rejected at *Nisi Prius*.

Acts of tenants.

Before stat. 2 & 3 Will. 4. c. 71. the acts of tenants might be evidence against the reversioners, yet their naked declarations were not so. (12)

**Proof of the
receipt of an-
cient rent.**

In *Roe d. Brune (Clerk) v. Rawlings* (13), upon a question, whether the lease of a tenant for life having a limited power of leasing was void, in consequence of the ancient rent not being reserved, the particulars of a certain estate were received in evidence under the following circumstances: — the contents of the paper containing the particulars shewed, that it had been written by a person having an intimate knowledge of the property in question, and who was in the confidential employ of the person to whom the paper was addressed. The paper was in some degree recognised as

(1) *Ioat v. Finch*, 1 Taunt. 142.

(2) *Barry v. Bebbington*, 4 T. R. 514. *Wynne v. Tyrwhitt*, 4 B. & A. 376. *Ely (Dean and Chapter of) v. Caldecott*, 7 Bing. 433.

(3) *Per* Lawrence J. in *Haddow v. Parry*, 3 Taunt. 305.

(4) *Dicken v. Lodge*, 1 Stark. 226. *Shen-don v. Thompson*, *ibid.* 316.

(5) *Crease v. Barrett*, 1 C. M. & R. 919.

(6) *Ibid.* 931. *Walker v. Bradstock*, 1 Esp. N. P. C. 458. *Carne v. Needle*, 1 Bing. N. C. 430.

(7) 1 C. M. & R. 931.

(8) *Peaceable v. Watson*, 4 Taunt. 16. *Doe v. Pettett*, 5 B. & A. 223. *Chambers v. Bernasconi*, 1 C. & J. 457. *Garnem v. Barnard*, 1 Anst. 298. *Davies v. Pearce*, 2 T.R. 53. *Doe d. Baggaley v. Jones*, 1 Camp. 367. *Doe d. Majoribanks v. Green*, Gow. N. P. C. 227. *Strode v. Winchester*, 1 Dick. 397.

(9) *Uncle v. Watson*, 4 Taunt. 16. *Doe v. Jones*, 1 Camp. 367.

(10) *Carne v. Nicholl*, 1 Bing. N. C. 430.

(11) 2 Russ. 77.

(12) *Per* Patteson J. in *Tickle v. Brown*, 4 A. & E. 378.

(13) 7 East, 279.

HEARSAY
EVIDENCE.

authentic by the person to whom it was addressed, by his indorsement written upon it "from Hobart, a particular of my estate in Cornwall." It showed the existing rent of a particular tenement, the ancient rent of which was the subject in dispute. The paper was addressed to the person who was tenant for life of the property, with a leasing power upon condition of reserving the ancient rent, being the like power to that under which the lease in issue had been made. The paper was preserved among the muniments of the estate by the person to whom it was addressed, and from him it came to the tenant for life whose lease was in issue, and upon his death it passed with the other muniments of the estate to the succeeding proprietor, who questioned the validity of the lease. Upon this fact Lord Ellenborough observed, "There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death." "Now this paper might, if it had ever met the eye, have been used adversely to the former tenant for life by whom it was authenticated, and could not have been evidence in his favour; he could not, therefore, have had any undue motive for preserving it. In like manner ancient deeds (1), proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them *in such a place* is a presumption that they were fairly and honestly obtained, and reserved for use, and *are free from suspicion of dishonesty.*' The paper, therefore, having been found amongst the muniments of the family, accredited by one who could not have used it in his own favour, and preserved by him and by the succeeding tenant for life, against whom it might have been used adversely, we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date. And upon the same grounds we think that the entries in the book of the receipt of rent made by the same person, were also evidence of the fact, which ought to have been submitted to the jury."

Judgment of Lord Ellenborough in *Roe d. Bruns v. Rawlings.*

But the declarations of a person who has parted with his interest in land (as by executing a settlement) are not evidence for the purpose of comparing the rights of persons acquired under the settlement (2), merely because they affect the title to the land.

Declarations of a person who has parted with his interest in land.

It seems to be requisite, in order to make the declaration of a deceased person admissible as being an occupier of land, to prove the fact of his occupation; it is not enough that the declaration purport to be against the interest of the maker; but slight evidence, as of felling timber, has been held sufficient. (3)

Proof of occupation.

Entries of the receipt of money, whereby the deceased has charged himself, are evidence of his having received such moneys: thus, entries made by a deceased collector of taxes in a private book, whereby he charged himself with the receipt of sums of money, are evidence to prove the fact of the receipt of the money in an action between third persons (4), and are evidence against a surety of the receipt of money, though the parties who

RECEIPTS FOR MONEY.

Collector's books.

(1) 12 Vin. Abr. Evidence, 84. [A. b. 5.] 931. *Doe d. Stansbury v. Arkwright*, 5 C. & P.

(2) *Doe d. Sweetland v. Webber*, 1 A. & E. 575.
740.

(4) *Middleton v. Melton*, 10 B. & C. 317.

(3) *Crease v. Barrett*, 1 C. M. & R. cit. per Bayley B. in 1 C. & J. 458.

**HEARSAY
EVIDENCE.**Steward's
books.

paid the money are alive, and might be called (1), such evidence being receivable on the principle of the just credit due to declarations against interest, and of the inconvenience which would result of establishing in every case the non existence of other evidence.

Acknowledgments by deceased stewards, reeves, and bailiffs in their books, of the receipt of money for which they have been accountable, are evidence for their employers, or those claiming under them, or by strangers. (2)

Entries by bailiffs or stewards often acquire additional credit from the circumstance, that such entries would, in the ordinary course of business, be expected to be kept, and that the fact recorded is in some measure to be presumed from the existence of the entry. The accounts of stewards seem to be of greater credit than entries in private books, inasmuch as they are usually subjected to inspection, and are the foundation of transactions between the steward and his employer. (3)

The effect of
the entries
should be to
charge the
bailiff or
steward.

It is, however, requisite that the effect of the entries be to charge the bailiff or steward. Thus, in *Brett v. Beales* (4), where the treasurer of a corporation had returned money in arrear, the entries were rejected, because he had not charged himself with the receipt of the money. (5)

Steward's ac-
counts gene-
rally produced
from the mu-
niments of the
persons to
whom the ac-
counts were
rendered.

Accounts of this nature are commonly produced from the muniments of the persons to whom the accounts were rendered, and then they amount to proof, that the person rendering them has actually put it into the power of his employer to use them against him as evidence of money had and received to the employer's use. But such a test of the authenticity and accuracy of the entries is, however, not essential to their being admitted in evidence; but, as regards the entries in books of some particular classes of persons, such as attorneys, churchwardens, or other public officers they derive some additional weight, because the parties would be expected to keep books, and to produce them upon notice. (6)

RECEIPTS.

Receipts are less objectionable testimonies than entries in private books, in consequence of their having been given to persons interested to preserve them as evidence against the maker; and it was said by Mr. Baron Wood in *Robinson v. Williamson (Clerk)* (7), that receipts are stronger evidence than vicar's books.

Receipts for the payment of money, given to the person making the payment, appear to be admissible, after the death of the receiver of the money, to prove the fact of its having been received, though there exist no privity between the deceased and the party against whom the evidence is tendered. (8)

(1) *Middleton v. Melton*, 10 B. & C. 317.(2) *Edwards v. Rees*, 7 C. & P. 340.
Barry v. Bebbington, 4 T. R. 514. *Manning v. Lechmere*, 1 Atk. 527.(3) *Manning v. Lechmere*, 1 Atk. 527.
Bullen v. Michel, 2 Price, 413. *Wynne (Bart.) v. Tyrwhitt*, 4 B. & A. 376. *Higham v. Ridgway*, 10 East, 116. *Bree v. Beck*, 1 Younge, 225—239. *Doe d. Teynham (Lord) Tyler*, 6 Bing. 562. *Finch v. Messing*, cit. in *Short v. Lee*, 2 J. & W. 464.

(4) M. & M. 418.

(5) Vide etiam *Ely (Dean and Chapter of) v. Caldecott*, 7 Bing. 434.(6) *Gale v. Pakington (Bart.)* M'Clel. &Y. 357. *Rowcroft v. Basset*, Peake's Add. Cas. 199. *Stead v. Heaton*, 4 T. R. 669.

(7) 9 Price, 136.

(8) *Middleton v. Melton*, 10 B. & C. 321.
Harrison v. Blades, 3 Camp. 458., sed vide *Doe d. Gallop v. Fowles*, 1 M. & Rob. 261.
Scarlett in arg. Barker v. Ray, 2 Russ. 70.
Goss v. Watlington, 3 B. & B. 138. *Chambers v. Bernasconi*, 1 C. & J. 456. *Manning v. Lechmere*, 1 Atk. 527. *Ekins v. Dormer*, 3 ibid. 500. *Chapman v. Smith*, 2 Ves. sen. 511. *Jones v. Carrington*, 1 Carr. 327. 497.
Lake v. Skinner, 3 E. & Y. 976. *Manby (Clerk) v. Lodge*, 9 Price, 231. *Taylor v. Fox*, 4 Wood. 322. *Chapman v. Smith*, 9

Entries in the land tax collector's books stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time, on the ground that the entry of payment was made against the interest of the collector. (1)

HEARSAY
EVIDENCE.

Rate books.

In *Plaxton v. Dare* (2), upon a question whether premises were situate in a particular parish, the accounts of deceased overseers, in which there were crosses made against the names for which the tenants of the premises had been assessed, were held to be evidence of actual payment of the rates.

VII. Upon Matters of public, general, or private Interest.

UPON MATTERS
OF PUBLIC, GE-
NERAL, OR PRI-
VATE INTEREST.

Reputation ad-
missible for
public rights.

Evidence of
particular facts
not admissible.

Hearsay, or common reputation, is admissible to prove public rights (3); but hearsay evidence of particular facts is not admissible (4); because particular facts, not in general matters of notoriety, are easily misunderstood or misrepresented, and are commonly connected with other facts by which their effect ought to be explained and limited: thus, on an issue to try whether a farm *modus* of 2*l.* 19*s.* 8*d.* was payable for a certain farm, a former occupier of the farm cannot be asked what he has heard his deceased father say respecting this *modus*, although his father had also occupied the farm, because this would be evidence of reputation of a fact. (5)

Whether a certain state of facts are to be excluded as being the hearsay of a particular fact, or that they came within the rule of evidence as to reputation, is a question of frequent discussion. The essence of reputation is, that if you prove a fact, *e. g.* payment of a sum of money, it must be paid in consequence of a reputation. If evidence be confined to the fact of payment, it is inadmissible, unless the tradition that comes with it was a reputation that it had always been the case. (6)

Hearsay, that certain lands had been originally granted to the vicar in lieu of tithes, is not receivable in evidence (7); it is a particular fact, and limited to a particular occasion; and upon the same principle, though reputation is evidence of the boundaries of a farm, it is not evidence to establish that houses once stood where now there are none. (8)

Lands given in
lieu of tithes.

Upon a question, whether a part of Lincoln's Inn was part of the parish

Entries in a

E. & Y. 141. *Driffeld v. Orrell*, 6 Price 324. *White v. Lisle*, 4 Madd. 214. Discrepancies between early and late receipts. *Manby v. Lodge*, 9 Price, 231.

(1) *Doe d. Smith v. Cartwright*, R. & M. 62. *Harrison v. Blades*, 3 Camp. 458. *Doe d. Strobe v. Seaton*, 2 A. & E. 171.

(2) 10 B. & C. 19.

(3) Where the term "public right" is used, it does not mean "public" in the literal sense, but is synonymous with "general," that is, what concerns a multitude of persons. *Weeks v. Sparke*, 1 M. & S. 679.

(4) *Garnem v. Barnard*, 1 Anst. 298. *Outram v. Morewood*, 14 East, 330. *Nicholls v. Parker*, *ibid.* 331. *Cooke v. Banks*, 2 C.

& P. 481. *Chatfield v. Fryer*, 1 Price, 253. *Moseley v. Davies*, 11 *ibid.* 162. *Dict. Mansfield C. J. in the Berkeley case*, 4 Camp. 415. *Per Lord Kenyon C. J. in Outram v. Morewood*, 5 T. R. 123. *Per Grose J. in Rex v Eriswell (Inhab. of)* 3 *ibid.* 709.

(5) *Wells v. Jesus College, Oxford*, 7 C. & P. 284.

(6) *Harwood v. Sims*, Wight. 112. *Moseley v. Davies (Clerk)*, 11 Price, 162. *Wells v. Jesus College, Oxford*, 7 C. & P. 284.

(7) *Chatfield v. Fryer*, 1 Price, 253. *Crease v. Barrett*, 1 C. M. & R. 919. *Leathes v. Newitt*, 4 Price, 355. 8 *ibid.* 562.

(8) *Ireland v. Powell*, Peake's Ev. cit. 1 Price, 256. *Doe v. Thomas*, 14 East, 323.

HEARSAY EVIDENCE.

book of antiquities as to the repairs of pews and glazing of windows.

PERAMBULATIONS.

Judgments of Lord Ellenborough and Mr. Justice Le Blanc in *Weeks v. Sparke*.

Jurisdiction of a court.

Corporate customs.

Parochial *modus*.

Manorial custom.

Parochial and manorial boundaries.

Ferry.

QUALIFICATION UNDER WHICH HEARSAY ADMISSIBLE IN MATTERS OF PUBLIC OR GENERAL INTEREST.

Judgment of Mr. Baron Parke in *Crease v. Barrett*.

of St. Andrew, Holborn, old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs, &c. done to a chapel in the parish church, alleged to belong to the place in question, are not evidence. (1)

In *Weeks v. Sparke* (2) Lord Ellenborough said, "As to those cases where the evidence of perambulations is admitted, it is certainly in the nature of hearsay evidence, not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot, for that would amount to evidence of ownership; but it is evidence of the *ambit* of any particular place or parish, and of what the persons accompanying the survey have been heard to say and do upon such occasions." Mr. Justice Le Blanc observed (3), "Upon questions of boundary, though the evidence of perambulations may be considered, to a certain degree, as evidence of an exercise of the right, yet it has been usual to go further, and admit the evidence of what old persons, who are deceased, have been heard to say on those occasions. The rule generally adopted upon questions either of prescription or custom is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who were in a situation to know what these rights are, have been heard to say concerning them."

Hearsay evidence is received respecting the jurisdiction of a court, whether it be or be not a court of record (4), a custom of a corporation to exclude foreigners from trading within a town (5), a right claimed by a corporation to collect tolls on a public road (6), a parochial *modus* (7), a manorial custom (8), a boundary between parishes and manors (9), and a right of ferry. (10)

A verdict or judgment of a court of competent jurisdiction touching the same right, although between other parties, is also evidence. (11)

In *Crease v. Barrett* (12) Mr. Baron Parke observed, "that, hearsay evidence upon some subjects cannot be received, unless with the qualification, that it comes from persons, who have a special interest to inquire, is clear. Thus, in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship: it is not admissible if it proceed from servants or friends. (13) And in this description of hearsay evidence the line is clearly defined. So in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived

(1) *Cooke v. Banks*, 2 C. & P. 478., sed vide *Price v. Littlewood*, 3 Camp. 289.

(2) 1 M. & S. 687.

(3) Ibid. 689.

(4) *Goodtitle d. Braine v. Dew*, Peake's N. P. C. 204. *Rogers v. Wood*, 2 B. & Ad. 245.

(5) *Davies v. Morgan*, 1 C. & J. 593.

(6) *Brett v. Beales*, M. & M. 416. *London (City of) v. Clerke*, Carth. 181. Bull. N. P. 233.

(7) *Harwood v. Sims*, Wight. 112. *Chapman v. Smith*, 3 Gwill. 854. 2 Ves. sen. 512.

(8) *Denn v. Spray*, 1 T. R. 466. *Roe d. Beebee v. Parker*, 5 ibid. 26. 31. *Doe d. Foster v. Sisson*, 12 East, 62.

(9) *Nicholls v. Parker*, 14 East, 331. *Barnes v. Mawson*, 1 M. & S. 81. *Plaxton v. Dare*, 10 B. & C. 17. *Coombs v. Coother*, M. & M. 398. *Steel v. Prickett*, 2 Stark. 466. *Barnes v. Mawson*, 1 M. & S. 81.

(10) *Pim v. Curell*, 6 M. & W. 234.

(11) Ibid.

(12) 1 C. M. & R. 927.

(13) *Johnson v. Lawson*, 2 Bing. 86.

from 'persons conversant with the neighbourhood.'" (1) "Where the right is really public, a claim of highway for instance, in which all the king's subjects are interested, it seems difficult to say, that there ought to be any such limitation, and we are not aware, that there is any case in which it has been laid down that such exists. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shewn to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value, and not the admissibility of the evidence. In the present case, the alleged custom does not seem to be one, in which all the king's subjects have an interest, but only such as may choose to become adventurers in mines. Therefore, hearsay from any persons wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible. But those under whose estates the minerals lie, with respect to which the custom exists, and who are more likely than others living at a distance to become adventurers, and, consequently, subject to its operation, are in our opinion sufficiently connected with the subject to make these declarations evidence, more especially as the very form in which they are given, shews that they were consulted as persons having competent knowledge upon the matters inquired into." (2)

If the question be one of boundaries, actual inhabitancy in the immediate vicinity is not essentially requisite: thus, in *Newcastle (Duke of) v. Broxtowe (Hundred of)* (3), justices of the peace, at the sessions of the county within which the district was alleged to be, were deemed *ex officio* to have sufficient connection with the subjects in dispute to render the statements in their orders admissible evidence of reputation, and proof of their residency was not required.

Question re-
specting boun-
daries.

Conflicting opinions exist, as to the influence which should be given to evidence of reputation: thus, Chief Justice Mansfield in the *Berkeley Peerage case* (4) says, "General rights are naturally talked of in the neighbourhood, and therefore, what is thus dropped in conversation upon such subjects may be presumed to be true." (5)

The weight of
evidence of re-
putation.

But Lord Ellenborough in *Weeks v. Sparke* (6) said, "Reputation is in general weak evidence; and when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them, than it ought to have." (7)

Reputation respecting public rights may be shewn by old deeds or other documents, as well as by the oral declarations of deceased individuals: thus, depositions in ancient suits (8), a composition deed between the university of Cambridge and the corporation of Cambridge, regulating the amount of

FORMS OF EVIDENCE.

(1) *Per* Lord Ellenborough in *Weeks v. Sparke*, 1 M. & S. 688.

(2) *Vide* *Rogers v. Wood*, 2 B. & Ad. 245.

(3) 4 B. & Ad. 273.

(4) 4 Camp. 416.

(5) *Vide etiam per* Lord Kenyon in *Morewood v. Wood*, 14 East, 329.

(6) 1 M. & S. 686.

(7) *Vide etiam* *Morewood v. Wood*, 14 East, 330.

(8) *Freeman v. Phillipps*, 4 M. & S. 491. *The Settle Mill and Leeds Mill cases*, cit. *per* Lord Ellenborough, *ibid.*

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payment of tolls (1), manorial documents (2), leases (3), and maps, when public documents (4), have been received as proving reputation.

Respecting the admissibility of oral declarations to prove reputation, *Plaxton v. Dare* (5) will afford an illustration, the question being, whether certain land was in the parish of A. or in that of B., the land in the latter being tithe free, ancient leases granted by the ancestors of the plaintiff's landlord, in which the land was described as being in parish B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situate in that parish. (6)

Proof of modern enjoyment.

With respect to proving acts of modern enjoyment, as a basis for the reception of hearsay evidence in matters of public or general interest, the following cases will afford an illustration:—

Judgment of Mr. Justice Le Blanc in *Weeks v. Sparke*.

In *Weeks v. Sparke* (7) Mr. Justice Le Blanc says, "First, they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons, not any old persons, but persons who have been conversant with the neighbourhood of what they have heard other persons of the same neighbourhood, since deceased, say respecting the right." Again, after a foundation is once laid for the right, by proving acts of ownership, the evidence of reputation becomes admissible. And in *Morewood v. Wood* (8) Mr. Justice Buller observed, "Thus far I agree with Lord Kenyon and Mr. Justice Ashurst, that in no case ought evidence of reputation to be received, except a foundation be first laid, by other evidence, of the right." (9)

Evidence of reputation when unconfirmed by facts. Questions of parochiality.

Evidence of reputation is not inadmissible, because unconfirmed by facts; but it materially affects its weight when received. (10)

In questions of parochiality, proof of reputation, unaccompanied by evidence of acts done, is admissible, because, from the nature of such subjects, positive acts of enjoyment cannot be expected: thus, in *Steel v. Prickett* (11) Chief Justice Abbott intimated an opinion, that the existence of a manor might be proved by reputation alone, without evidence of the exercise of any manorial rights. (12)

Evidence of reputation, without proof of an actual user, is sufficient respecting customs of descents within a manor (13); because, "if no instance were to happen in the memory of man, and the court rolls were to be lost, the custom itself would be entirely destroyed." (14)

Negative reputation.

Hearsay evidence negating a public right is admissible: thus, in *Drinkwater v. Porter* (15) Mr. Justice Coleridge said, "If reputation be evidence

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| (1) <i>Brett v. Beales</i> , M. & M. 416. | (8) 14 East, 330. n. |
| (2) <i>Denn v. Spray</i> , 1 T. R. 466. <i>Chapman v. Cowlan</i> , 13 East, 10. <i>Curzon v. Lomax</i> , 5 Esp. N. P. C. 60. <i>Barnes v. Mawson</i> , 1 M. & S. 79. <i>Arundell v. Falmouth (Lord)</i> , 2 M. & S. 441. <i>Crease v. Barrett</i> , 1 C. M. & R. 923. | (9) Vide etiam <i>White v. Lisle</i> , 4 Madd. 214. <i>Ratcliff v. Chapman</i> , 4 Leon. 242. |
| (3) <i>Clarkson v. Woodhouse</i> , 5 T. R. 412. n. <i>Bullen v. Michel</i> , 2 Price, 399. | (10) <i>Crease v. Barrett</i> , 1 C. M. & R. 923. |
| (4) <i>Alcock v. Cook</i> , cit. Phillipps' Ev. 585. | (11) 2 Stark. 466. |
| (5) 10 B. & C. 17. | (12) Vide etiam <i>Curzon v. Lomax</i> , 5 Esp. N. P. C. 60. |
| (6) Vide etiam <i>Coombs v. Coether</i> , M. & M. 398. <i>Freeman v. Phillipps</i> , 4 M. & S. 486. <i>Arundell v. Falmouth (Lord)</i> , 2 ibid. 443. | (13) <i>Roe d. Beebee v. Parker</i> , 5 T. R. 26. |
| (7) 1 M. & S. 688. | 31. <i>Doe d. Foster v. Sisson</i> , 12 East, 62. |
| | (14) Per Grose J. in 5 T. R. 32. <i>Roe d. Bennett v. Jeffery</i> , 2 M. & S. 92. <i>Doe d. Mason v. Mason</i> , 3 Wils. 63. <i>Joyce's case</i> , Godb. 55. |
| | (15) 7 C. & P. 181. |

to establish a public right, it must be admissible to shew, that the public have not that right."

Ancient documents, purporting to be a part of transactions, and not a mere narrative of them, are sometimes admissible to corroborate modern use or possession. (1)

But it is doubtful whether ancient leases are evidence against strangers, of the boundary of the property conveyed. (2)

Acts of user under the tendered documents is required to be shewn, if the nature of the case will permit: thus, it is not requisite to prove payment under leases as are of such an ancient date, that it cannot reasonably be supposed that evidence of such payments was still preserved. (3) And where the question was, whether certain lands within a manor were subject to a right of common, counterparts of old leases preserved among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under the lord of the manor, to prove that at the time of their respective dates the lord had granted the land free from common, though possession under the leases was not shown. (4)

But where unexceptionable evidence of enjoyment, referable to the document, may reasonably be expected to be found, it is required to be shewn (5); — even in cases where traditionary evidence is receivable, if the document purport to have been made *post litem motam*. (6)

But when it cannot be expected, that proof of acting with reference to the documents should be afforded, it is required that some acts in modern times with reference to similar documents should be proved, or that modern possession or user should be corroborative of the ancient documents. (7)

Maps and surveys of estates (8) are evidence to shew the extent of a man's estate, if made with the privity and consent of the owners of the adjoining lands. (9)

Where maps have been admitted in evidence, their admissibility has depended on the ground of their being public documents, as in the case of the maps of the duchy of Lancaster (10), or of their being in the nature of admissions; but where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient. (11)

A map annexed to a deed is considered as a description contained in the

HEARSAY EVIDENCE.

HEARSAY EVIDENCE OF ANCIENT POSSESSION.

Ancient documents evidence of boundary.

Acts of user.

Proof of modern enjoyment.

MAPS AND SURVEYS.

(1) *Rogers v. Allen*, 1 Camp. 309. *Bidulph v. Ather*, 2 Wils. 23. *Clarkson v. Woodhouse*, 5 T. R. 412. n. 3 Doug. 189. *Barnes v. Mawson*, 1 M. & S. 78. *Leathes v. Newitt*, 4 Price, 355. 562. *Fisher v. Graves*, 3 E. & Y. 1180. *Newburgh v. Newburgh*, 12 Vin. Abr. Evidence, 220. [T. b. 43.] *Woodnoth v. Cobham (Lord)*, Bunb. 180. As to rentals when inadmissible, vide *Lancum v. Lovell*, 6 C. & P. 441. 12 Vin. Abr. Evidence, 88. [A. b. 15.] As to maps, vide *Yates v. Harris*, Hil. Ass. 1702, cit. Gilb. Ev. 78., sed vide *Doe d. Hughes v. Lakin*, 7 C. & P. 481. *Wakeman (Bart.) v. West*, ibid. 479. *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734.

(2) *Clarkson v. Woodhouse*, 5 T. R. 413. n., vide etiam *Prescot v. Phillips*, cit. 2 Evans' Pothier, 292. *Pomfret (Lord) v. Smith*, 6 Bro. P. C. 440.

(3) *Clarkson v. Woodhouse*, 5 T. R. 413. n. *Rogers v. Allen*, 1 Camp. 311.

(4) *Clarkson v. Woodhouse*, 5 T. R. 412. n.

(5) *Alcock v. Cook*, cit. Phillipps' Ev. 585. *Plaxton v. Dare*, 10 B. & C. 19. *Outram v. Morewood*, 5 T. R. 121. *Marriage v. Lawrence*, 3 B. & A. 142.

(6) *Brett v. Beales*, M. & M. 418.

(7) *Clarkson v. Woodhouse*, 3 Doug. 189. 5 T. R. 413. n. *Rogers v. Allen*, 1 Camp. 311.

(8) *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734.

(9) *Outram v. Morewood*, 5 T. R. 123.

(10) *Alcock v. Cook*, cit. Phillipps' Ev. 189.

(11) Phillipps' Ev. 262. *Pollard v. Scott*, Peake's N. P. C. 26. *Doe d. Hughes v. Lakin*, 7 C. & P. 481. *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734. *Donnison v. Elsley*, 2 E. & Y. 1396.

**HEARSAY
EVIDENCE.**

deed itself, and admissible in evidence where it is part of the act by which property is to be conveyed: thus, where two manors were in the hands of one person (1), and a map was made by him, and afterwards one of the manors was conveyed to another person:—It was held, upon a subsequent dispute as to the boundaries, that such map was evidence as to the boundaries. (2) So likewise an old map of lands was allowed in evidence, which came along with the writings, and agreed with the boundaries in an ancient purchase. (3)

**Surveys when
admissible.**

With respect to the admissions by surveys, it has been ruled by Lord Holt, that if A. be seised of the manors of B. and C., and during his seisin of both he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and that there are subsequent disputes between the lords of the manors B. and C. about their boundaries, this old survey would be evidence (4); but such a survey is not evidence against a stranger (5), because survey books of a manor, which are ancient, unless signed by the tenants, or unless they appear to be made at a court of survey, are only private memorials.

If maps be made without the privity or consent of the owners of the adjoining lands, as if a lord describe the boundaries of his waste, or churchwardens (6) cause an engraved map to be made, wherein they describe land which an individual claims to be a highway, they will not be evidence against persons who were not parties to their being made. (7)

**ANCIENT SUITS
AND VERDICTS.**

Proceedings in an ancient suit are evidence of reputation upon matters of public or general interest, and it is not requisite to have recourse to evidence *dehors* the proceedings themselves, to prove that the parties to the suit and the witnesses were in the respective capacities which they purport to have been: thus, in an action by a copyholder against the lord of a manor for a false return to a *mandamus*, in which *mandamus* a custom was set forth in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage to be equal to two years' improved value, and not guilty pleaded, depositions made in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing in *pari jure* with the now copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves that they

(1) *Anon.* Str. 95.

(2) Harrison's Ev. 126.

(3) Gilb. Ev. 3d ed. 78. cit. *Yates v. Harris*, Hil. Ass. 1702, vide etiam *Anon.* Str. 95. *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734., sed vide *Doe d. Hughes*, v. *Lakin*, 7 C. & P. 481. *Wakeman (Bart.) v. West*, ibid. 479. Phillipps' Ev. 288. n.

(4) *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734.

(5) *Anon.* Str. 95. Bull. N. P. 283. *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym.

734. *Outram v. Morewood*, 5 T. R. 123. 12 Vin. Abr. Evidence, 88. [A. b. 15.].

(6) Peake's Ev. 18.

(7) *Anon.* Str. 95. *Bridgman (Sir John) v. Jennings*, 1 Ld. Raym. 734. Bull. N. P. 283. *Pollard v. Scott*, Peake's N. P. C. 26. *Wakeman v. West*, 7 C. & P. 479. *Doe d. Hughes v. Lakin*, ibid. 481. *Doe v. Seaton*, 1 N. & M. 81. *Donnison v. Elaley*, 2 E. & Y. 1396., sed vide 12 Vin. Abr. Evidence, 88. [A. b. 15.].

 HEARSAY
EVIDENCE.

were such, or were persons acquainted with the customs of the manor. And their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made *post litem motam*, because the same custom was not in controversy in the former suit as in the present (1); Lord Ellenborough observing (2), "Considering the depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains; such as that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record." Mr. Justice Bayley also observed, "It appears by the bill, that the complainant claimed as one of the surviving lives, and we must assume at this time of day, that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had, and the depositions made between such parties, as were really litigating their rights in the characters claimed and disclosed on the record." "Then follow the depositions; and these I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume, that the copyholder brought forward witnesses who were ignorant? And I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be copyholders; yet as they were present at the holding of the courts, and therefore knew what passed, they were competent to speak to that. So in the former suit, I cannot infer, that they were incompetent to have a knowledge of the facts they deposed to: on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder. This way of viewing the case seems to me to avoid all objection to the depositions as being made *post litem motam*; but if it were necessary to go into that question, I think the distinction has been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence: because you cannot be sure, that in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply."

Judgment of
Mr. Justice
Bayley in *Freeman v. Phillipps*.

Upon a question of public or general interest, a verdict is evidence of reputation (3), and the admissibility of verdicts in cases where evidence of reputation is admissible, seems to be fully established by the authorities relating to the competency of witnesses to give evidence in proof of customs, from the establishment of which they might themselves derive

When a verdict
is evidence of
reputation.

(1) *Freeman v. Phillipps*, 4 M. & S. 486.

(3) *Reed v. Jackson*, 1 East, 356.

(2) *Ibid.* 491.

HEARSAY EVIDENCE.

Principle on which verdicts are admitted.

Decree by the lord high treasurer.

Effect of verdict.

DECLARATIONS
IN MATTERS OF
PRIVATE RIGHT
HOW QUALIFIED.

a benefit. (1) Lord Holt (2) rested the admissibility of the verdicts which were received in evidence on the ground, that as the payment of the duties by strangers would have been admissible in evidence, so a recovery against a stranger ought to be received.

In *Neal v. Athol (Duke of) v. Wilding* (3) it was held, that a special verdict could not be given in evidence to prove a pedigree, on the ground that it was *res inter alios acta*, and "because the same evidence, for any thing they knew to the contrary, might be ready to be laid before this jury that was before that."

In *Rogers v. Wood* (4), in which a document, purporting to be a decree by the lord high treasurer and certain other public functionaries of the kingdom (not forming any court known to the law), was held to be inadmissible as evidence of reputation, because, as observed by Lord Tenterden, "declarations can only be evidence of reputation when made by those who have personal knowledge of the fact; here the persons acting as judges had no knowledge of the fact, except what they derived in the course of that proceeding."

In *Reed v. Jackson* (5) Lord Kenyon stated, "The effect of evidence supplied by a verdict is not entitled to much weight, and is not conclusive."

The effect of a verdict, whatever it may be, cannot be obviated by any evidence adduced to shew, that the finding of the jury had been indorsed by mistake on the *postea*, and that in fact no evidence had been offered at the former trial under the issue, the finding as to which was relied on. (6)

Declarations in matters of private right are rejected, from the probable absence of competent knowledge; because, as observed by Lord Kenyon, "How is it possible for strangers to know any thing of what concerns only these private titles?" (7) but "upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights." (8) Moreover, in cases of private right, the hearsay would be less likely to be checked and contradicted at the time, if incorrect, than where, as in matters of general interest, it is supposed to be addressed to persons conversant with the subject, or having an interest to inquire into it, with the means of investigation in their power. (9)

In *Talbot v. Lewis* (10) the answer of tenants of a manor to a commission issued by the lord of the manor for surveying the same, in which it was stated, that the lord was entitled to wreck, was rejected, because the right was a private right, and the parties making the declarations possessed no peculiar means of knowledge.

But statements of a deceased occupier touching his title are admissible in evidence generally, without reference to the particular effect they may produce in the cause. (11)

(1) Bull. N. P. 283. *Phillipps' Ev.* 263., *vide etiam* Bull. N. P. 233. *London (City of) v. Clerke*, Carth. 181. *Cort v. Birkbeck*, Doug. 218. *Manchester Mills' case*, *ibid.* 221. *Somerset (Duke of) v. France*, Str. 659. *Berry v. Banner*, Peake's N. P. C. 212. *Clarkson v. Woodhouse*, 5 T. R. 412. n. *Travis v. Chaloner*, 3 E. & Y. 1307. *Biddulph v. Ather*, 2 Wils. 23.

(2) *London (City of) v. Clerke*, Carth. 181,

(3) Str. 1151., *sed vide* Bull. N. P. 233.

(4) 2 B. & Ad. 245.

(5) 1 East, 355.

(6) *Ibid.*

(7) *Morewood v. Wood*, 14 East, 329.

(8) *Per* Lord Ellenborough in *Weeks v. Sparke*, 1 M. & S. 686.

(9) *Phillipps' Ev.* 268, 269.

(10) 1 C. M. & R. 497.

(11) *Carne d. Nicoll*, 1 Bing. N. C. 430. 1 Scott, 466.

Whether hearsay evidence is admissible in support of prescriptive rights strictly private, and not affecting any public or general interest, is a *vexata questio* — a variety of conflicting decisions existing upon the subject.

HEARSAY
EVIDENCE.

In *Williams v. Goodchild* (1) Vice-chancellor Leach allowed as evidence, in support of an exemption from tithes claimed for a particular estate, a catalogue and particulars of sale, and also a map, and said, that every fact which is to be carried beyond time of memory may be proved as matter of reputation, on account of the principle, that it is impossible to bring direct evidence to such a fact. Mr. Justice Buller (2) states, that "in questions of prescription, it is allowable to give hearsay evidence, in order to prove a general reputation; and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed;" and in *Morewood v. Wood* (3), where the question related to a prescriptive right of digging stones on the lord's waste annexed to a particular estate, of digging stones on a waste (4), the court were equally divided, whether general evidence of reputation was admissible.

PRESCRIPTIVE
PRIVATE
RIGHTS.

Evidence of reputation is admissible on a question as to private rights, viz. whether a place is or is not parcel of a sheep-walk. (5)

Reputation of lands being part of a manor and copyhold is good evidence. (6)

In *White v. Lisle* (7) the vice-chancellor said, that "in late times evidence of reputation had not been tendered in cases of prescription as to individual rights, except as to rights of way;" and in *Richards v. Bassett* (8) Mr. Justice Littledale said, that "although reputation be admitted in evidence in questions concerning public rights, it is by no means clear, that, it is admissible in questions of prescriptive rights merely private;" "and where the question is, whether the plaintiff had a right to the soil, it seems to me, that reputation was not admissible to shew, that he had a right of common only." (9)

Except as to
rights of way,
evidence of re-
putation not
tendered in
cases of indi-
vidual rights.

Although evidence of reputation is received respecting the boundaries of parishes or manors, which are generally of remote antiquity, such evidence has been held inadmissible, for the purpose of proving the boundary of a private estate. (10)

Private bound-
aries.

Evidence of reputation is not admissible upon a question, whether by custom the sheriff of a county, or of a city, is bound to do execution upon criminals condemned to death by a judge of gaol delivery, at the assizes for the county. (11)

Duties of she-
riff.

But it is questionable whether, upon a question as to the liability of the

Corporate
duties.

(1) Nov. 23. 1824. 2 Eagle on Tithes, 440.

(2) N. P. 295. cit. in *Skinner v. Bellamont* (Lord), Worcester, 1744.

(3) 14 East, 327.

(4) Vide etiam *Davies v. Lewis*, 2 Chitt. 538. Dict. Bayley J. in *Weeks v. Sparke*, 1 M. & S. 690. 2 Rol. Abr. Prerogative (G.), 186. *Barnes v. Mawson*, 1 M. & S. 77. *Rogers v. Allen*, 1 Camp. 310. *Price v. Littlewood*, 3 ibid. 288. *Biddulph v. Ather*, 2 Wils. 23.

(5) *Davies v. Lewis*, 2 Chitt. 535.

(6) *Doe d. Jones v. Richards*, Peake's Add. Cas. 180.

(7) 4 Madd. 214.

(8) 10 B. & C. 663.

(9) Vide etiam *Reed v. Jackson*, 1 East, 356. *Blackett v. Lowes*, 2 M. & S. 500.

(10) *Clothier v. Chapman*, 14 East, 331. n. *Donnison v. Elsley*, 3 E. & Y. 1396.

(11) *Rex v. Antrobus*, 4 N. & M. 565. 2 A. & E. 798. 6 C. & P. 784., vide stat. 11 Geo. 4. & 1 Will. 4. c. 70. and 5 & 6 Will. 4. c. 1.

**HEARSAY
EVIDENCE.****Transfer of
land.**

mayor and citizens of an incorporated city to perform a certain public duty, declarations of deceased citizens in favour of the existence of such liability, are admissible in evidence? (1)

In an ejectment, where the lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or that the son had acquired it by purchase? evidence of reputation, that the land had belonged to Sir J. S., and had been purchased of him by the father, the first testator, was held to be inadmissible. (2)

Presentation.

Lord Kenyon in *Rex v. Eriswell* (3) said, "I admit that a presentation may be by parol, and that may be proved by parol, that is, by a witness who was present and heard it; but that a common reputation might be given in evidence I must deny; if it could, why might not such evidence decide upon titles to estates, at least before the Statute of Frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom?" (4)

**Evidence of re-
putation ad-
mitted of a
clergyman be-
ing in holy
orders.**

In *Harscot's case* (5), Lord Holt admitted evidence of reputation as to the fact of a clergyman being in orders, observing, the same proof would be allowed to prove orders, as to prove marriage. (6)

**DECLARATIONS
MADE IN THE
COURSE OF
DUTY OR EM-
PLOYMENT.**

Declarations of a person having peculiar means of knowing a fact, and no interest in misrepresenting it, is admissible to prove the fact *à fortiori*.

**DECLARATIONS,
FOR WHOM AD-
MISSIBLE.****VIII. Declarations made in the course of Duty or Employment.**

The declaration of a person having peculiar means of knowing a fact, and no interest in misrepresenting it, is admissible to prove the fact *à fortiori*; and his declarations would be admissible in evidence after his death, even though the declarations did not operate against his interest, provided the declarations appear to have been also made in the ordinary course of official, professional, or other business or duty, and been immediately connected with the transacting or discharging of it, and contemporaneous, or nearly so, with the transaction to which they relate. (7)

Thus, an entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is proof of the fact of dishonour after the clerk's decease. (8) In *Furness v. Cope* (9) a banker's ledger was received in evidence in an action between the assignees of a customer and a third party, to prove that the customer at a certain time had no funds in the banker's hands. So, likewise, contemporaneous entries by a deceased shopman, or servant, in his master's books, in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. (10) But

(1) *Rex v. Antrobus*, 4 N. & M. 565. 2 A. & E. 798. 6 C. & P. 784.

(2) *Doe d. Didsbury v. Thomas*, 14 East, 323. *Withnell v. Gartham*, 1 Esp. N. P. C. 322. *Blackett v. Lowes*, 2 M. & S. 500.

(3) 3 T. R. 723. *Tillard v. Shebbeare*, 2 Wils. 366.

(4) See *vide Meath (Bishop of) v. Bel-
field (Lord)*, Bull. N. P. 295., cit. per
Buller J. in *Rex v. Eriswell*, 3 T. R. 719.

(5) Comb. 202.

(6) *Ibid*.

(7) *Roe d. Bruns v. Rawlings*, 7 East, 290. *Gleadow v. Atkin*, 1 C. & M. 420. *Doe d. Reece v. Robson*, 15 East, 34. *Marks v. Lahee*, 3 Bing. N. C. 418. *Doe d. Gallop v. Vowles*, 1 M. & Rob. 260. *Chambers v. Bernasconi*, 1 C. & J. 456.

(8) *Poole v. Dicus*, 1 Bing. N. C. 649.

(9) 5 Bing. 114.

(10) *Price v. Torrington (Lord)*, 1 Salk. 285. *Pritt v. Fairclough*, 3 Camp. 305.

in order to constitute such entries evidence, it must appear, that the shopman is dead; and it will not be sufficient to prove, that he is abroad and not likely to return. (1)

Such declarations would not be admissible for parties in privity with the persons making them, and can only, seemingly, be made use of by strangers in interest; for although the principle on which such declarations are received does not depend on the future use of the declaration, still the actual event of its being made available for persons in privity with the maker, would, it is conceived, in general, be regarded as proof of such an existing motive of interest as to exclude the evidence. (2) In *Outram v. Morewood* (3) entries admitting a fact adverse to the interest of the person making them, were not allowed to be used for the benefit of persons claiming under the maker. (4)

The principle of admission under the foregoing circumstances is analogous to declarations when received as evidence of co-existing motives and feelings, only it is not necessary that the same intimate connection should exist between the thing proved and the evidence of it; nor is the thing to be proved of the nature of a secret. It is enough if the fact and the declaration are ordinarily and usually connected with each other. (5)

The case of *Doe d. Patteshall v. Turford* (6) will afford an illustration of the foregoing principles; where it appeared that it was the usual practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion; and it was held, on the trial of an ejectment after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice, Mr. Justice Parke observing, "I am also of opinion that this rule ought to be discharged. The only question in the case is, whether the entry made by Mr. Patteshall was admissible in evidence; and I think it was, not on the ground that it was an entry against his own interest, but because the fact, that such an entry was made at the time of his return from his journey, was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. That delivery might be proved by direct evidence, as by the testimony of the person who made it, or saw it made; it might be proved also by circumstantial evidence, as many facts ordinarily are which are of much greater importance to the interests of mankind, and followed by much more serious consequences. In this point of view, it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such

Judgment of
Mr. Justice
Parke in *Doe
d. Patteshall v.
Turford*.

(1) *Cooper v. Marsden*, 1 Esp. N. P. C. sen. 43. 12 Vin. Abr. Evidence, 88. [A. b. 15.]. *Lefebure v. Worden*, 2 Ves. sen. 54.
(2) Phillipp's Ev. 344, 345. (5) *Doe d. Patteshall v. Turford*, 3 B. & Ad. 896.
(3) 5 T. R. 121.
(4) *Glynn v. England (Bank of)*, 2 Ves. (6) *Ibid*.
(5) *Ibid*.

**HEARSAY
EVIDENCE.**

Judgment of
Mr. Justice
Parke in *Doe
v. Patteshall* v.
Turford.

an entry would be made if the principal fact to be proved had really taken place. The making of that written contemporaneous memorandum is one circumstance; the request by the lessor of the plaintiff to Mr. Bellamy to give the notice to quit, the subsequent communication by Bellamy to Patteshall, his departure and return when the entry was made, the actual delivery of other notices to quit to other tenants taken out at the same time, the defendant's request that he might not be obliged to quit, are other circumstances, which, coupled with the proof of the practice in the office, lead to an inference, beyond all reasonable doubt, that the notice in question was delivered at the time stated in the memorandum. The learned counsel for the defendant has contended that an entry is to be received in two cases only: first, where it is an admission against the interest of a deceased party who makes it; and secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place. But it is contended that the facts here do not fall within the latter branch of the rule, because Mr. Patteshall, who served the notice, was not shewn to have been in the habit of serving notices. I agree in the rule as laid down, but I think that, in the second case, a necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with the other; and it appears to me, that the present case is not, in its circumstances, an exception to that part of the rule. It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made, and it is to be presumed that Mr. Patteshall, one of the principals, observed the rules of the office as well as the clerks. It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorise its reception; at whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry. It is on the ground above stated, as I conceive, that similar evidence was received in *Lord Torrington's case* (1), *Pritt v. Fairclough* (2), *Hagedorn v. Reid* (3), *Champneys v. Peck* (4), and *Pitman v. Maddox* (5), and others of the same nature."

Entries received, although other available testimony may exist.

Judgment of
Chief Justice
Tindal in *Poole
v. Dicus*.

It is not essential to evidence of this description, that no other evidence can be given except that which is offered. In *Poole v. Dicus* (6) Chief Justice Tindal said, "It has been argued that the decision in *Doe v. Turford* (7) can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case farther than the facts warrant, for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous."

(1) 1 Salk. 285. 2 Ld. Raym. 873.

(2) 3 Camp. 305.

(3) Ibid. 379.

(4) 1 Stark. 404.

(5) 2 Salk. 690.

(6) 1 Bing. N. C. 654.

(7) 3 B. & Ad. 890.

The declarations should be contemporaneous, or nearly so, with the transaction to which they relate. (1)

HEARSAY
EVIDENCE.

In *Champneys v. Peck* (2) Lord Ellenborough was of opinion, "that it was not sufficient merely to prove that an indorsement was in the handwriting of a deceased clerk, without at least shewing, that the indorsement had an existence cotemporary with the date."

CONTEMPORANEOUS
ENTRIES.

And where a plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his handwriting, Lord Raymond would not allow the evidence, saying, that it differed from *Lord Torrington's case* (3), because there the witness saw the drayman sign the book every night. (4)

Entries made by a person in the course of his duty or employment, but which are not the declarant's ordinary practice or duty to make, are not receivable in evidence, although the declarant may have peculiar knowledge respecting his entries.

Entries not made in the ordinary course of business or employment.

Thus, in *Chambers v. Bernasconi* (5) it appeared, by the course of the office of the sheriff of Middlesex, the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to W., a sheriff's officer, to arrest A. B., W. arrested him accordingly, and made the following return:—"9th November, 1825, arrested A. B. in South Moulton Street, at the suit of W. B.," which return was signed by the officer and sent by him to the sheriff's office on the execution of the writ, and was then filed with the writ according to the course of the office. The writ and certificate were produced by the under-sheriff at the trial: it was held, that in an action brought by A. B. against a third party, the certificate was not admissible after the death of the officer to prove the place where the arrest was made; Lord Denman observing, "The ground on which the attorney general first rested his argument for the plaintiff in error was not much relied on by him, viz. that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. The discussion of this point involved the general principles of evidence; and a long list of cases determined by judges of the highest authority, from that of *Price v. Torrington* (Lord) before Holt C. J., to *Doe d. Patteshall v. Turford*, recently decided by Lord Tenterden (6), and the court of King's Bench, was cited. After carefully considering, however, all that was argued, we do not find it necessary, and therefore think it would not be proper, to enter upon that

Judgment of Lord Denman in *Chambers v. Bernasconi*.

(1) *Doe d. Patteshall v. Turford*, 3 B. & Ad. 898., vide etiam *Poole v. Dicus*, 1 Bing. N. C. 653.

(2) 1 Stark. 404.

(3) 1 Salk. 285. 2 Ld. Raym. 873. Holt, 300. Bull. N. P. 282.

(4) *Clerk v. Bedford*, Bull. N. P. 282.

(5) 1 C. & J. 451. 1 C. M. & R. 347. (in error).

(6) 3 B. & Ad. 864.

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extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails, the plaintiff in error cannot succeed; and we are all of opinion, that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion, that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done."

Indorsements
on bond ad-
mitted to rebut
the presump-
tion of non
payment.

Seemingly, upon the principle that the declarations of a person having peculiar means of knowledge having no interest to misrepresent, and making a declaration against his interest, are admissible in evidence after his death: a person's own declarations in the course of business have been received in evidence for a party claiming under him, or succeeding to his representative title, though it did not appear by negative evidence, but that the declarations were made at a time when they might have been made, and when, if made, they would have promoted the interest of the representative of the maker.

Thus, in *Searle v. Barrington* (Lord) (1) indorsements on a bond made by the deceased obligee, acknowledging the receipt of interest within twenty years, were admitted to rebut the presumption of non payment. (2)

Indorsements
on a promissory
note.

And in *Bosworth v. Cotchett* (3), where the payee of a promissory note had written indorsements of the half yearly payment of interest, from the time of making the note till his death (which happened within six years of the date of the note), and the like indorsements had been written by his executor, who died before the commencement of the action; it was adjudged, that these indorsements were admissible in evidence in answer to a plea of the Statute of Limitations, though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note, and that of the executor. (4)

So, likewise, in *Gleadow v. Atkin* (5) it was held, that an indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating, that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of

(1) Str. 826., vide etiam *Rose v. Bryant*, 2 Camp. 322. *Gleadow v. Atkin*, 1 C. & M. 421.

(2) The authorities of *Searle v. Barrington* (Lord) and *Bosworth v. Cotchett* were relied on in the decision of the court in *Gleadow v. Atkin*, 1 C. & M. 410., and Bayley B. observed, "I have discovered by my own research that evidence was given in *Searle v. Barrington* (Lord) of the time when the

indorsements were made. It is not stated in the reports. That not being stated, may have been an objection made to the case."

(3) Dom. Proc. May 6. 1824.

(4) Vide etiam *Searle v. Barrington* (Lord), Str. 826. 8 Mod. 279. 2 Ld. Raym. 1370. 3 P. Wms. 397. 12 Vin. Abr. Evidence, 85. [A. b. 5.].

(5) 1 C. M. 410.

twenty years old, but interest having been paid within twenty years by the obligor to the third person.

Where the indorsement of a receipt of part of a bond was proved to have been made after the presumption of payment had taken place, it was held to be inadmissible, Chief Justice Raymond saying, "It differed from the case of *Searle v. Barrington* (Lord), where the indorsement appeared to be made before it could be thought necessary to be made use of to encounter the presumption" (1); in fact, as observed by Lord Hardwicke (2), "a man cannot make evidence for himself."

In consequence of stat. 9 Geo. 4. c. 14., such indorsements are not sufficient to prevent the operation of the Statute of Limitations, but they are still admissible to repel the presumption of payment. An indorsement made within twenty years, of the payment of interest within twenty years, is sufficient to rebut the presumption, though the interest accrued beyond twenty years. (3)

By stat. 7 Jac. 1. c. 12. the shop-book of a tradesman will not be evidence in any action for wares delivered, or work done, above one year after the bringing of the action, except the tradesman or executor shall have obtained a bill of debt, or obligation of the debtor for the said debt, or shall have brought against him some action, within a year next after the delivery of the wares or work done. And the second section provides that nothing in that act shall extend to the mutual trading and merchandise between tradesman and tradesman. "At the time of making stat. 7 Jac. 1. c. 12. there was an opinion growing up, that, after a certain length of time, a man's own shop-books should be evidence for him after the year, to prevent which, that act of parliament was made." (4) But shop-books alone, unless under the circumstances which have been noticed, are not admissible evidence either within or after the year. (5)

In *Rose v. Bryant* (6), which was an action of debt on a bond, dated in the year 1785, and to which payment was pleaded, several indorsements appeared on the bond, acknowledging the receipt of interest down to 1793, and were proved to be in the handwriting of the intestate. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff for the purpose of meeting certain direct evidence of payment in the year 1794, proposed to read other indorsements on the bond down to the year 1795, acknowledging the receipt of interest and part of the principal; but these latter indorsements were not in the defendant's hand, nor did it appear when they were written, or even that they existed during the intestate's lifetime. An objection

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Indorsement of a receipt after presumption of payment.

Stat. 9 Geo. 4. c. 14.

Stat. 7 Jac. 1. c. 12.
Tradesman's books.

Receipts not admissible, unless written at a time, when the effect of them was in contradiction to the writer's interest.

(1) *Turner v. Crisp*, Str. 827.

(2) *Glynn v. England* (Bank of), 2 Ves. sen. 42.

(3) *Sanders v. Meredith*, 3 M. & R. 116. The limitation of actions on bonds is governed by stat. 3 & 4 Will. 4. c. 42., ante, 1262.

(4) Per Lord Hardwicke in *Glynn v. England* (Bank of), 2 Ves. sen. 43.

(5) Bull. N. P. 282. *Pitman v. Maddox*, 2 Salk. 690. *Price v. Torrington* (Lord), 1

ibid. 285. *Axon*, 1 Ld. Raym. 745. In *Sikes v. Marshal*, 2 Esp. N. P. C. 705., Lord Kenyon said, that, "since the statute of James, shop-books are not evidence after the year." *Vide etiam* 12 Vin. Abr. Evidence, 88. [A. b. 15.]. *Smart v. Williams*, Comb. 247. *Blackelore v. Crofts*, ibid. 348. *Lee v. Lee*, cit. 1 Keb. 27. *Crouch v. Drury*, ibid. 27. *Digby v. Stedman*, 1 Esp. N. P. C. 328. *Cooper v. Marsden*, ibid. 1.

(6) 2 Camp. 321.

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Judgment of Lord Ellenborough in *Rose v. Bryant*.

being taken to their being read, Lord Ellenborough observed, "I think you must prove that these indorsements were on the bond at, or recently after, the times when they bear date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby, in many cases, set up the bond for the residue of the sum secured. If such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time, when the effect of them was clearly in contradiction to the writer's interest."

HEARSAY EVIDENCE IN CASES OF PEDIGREE. GENERALLY.

BY WHOM THE DECLARATIONS MUST HAVE BEEN MADE.

God-mother.

Accoucheur.
Clergyman.

Parish registers.

Death of declarant.

Relationship of declarant to be proved *aliunde*.

IX. Hearsay Evidence in Cases of Pedigree.

The principal questions which arise in evidence respecting pedigrees are, first, "who was related to whom; by what links the relationship was made out; whether it was a relationship of consanguinity, or of affinity only; when the parties died, or whether they are actually dead." (1)

Hearsay evidence is received respecting questions of pedigree, legitimacy, or the time of the birth of a child, if such information be derived from relatives of blood, or from the husband with respect to his wife's relationship; but if it emanate from servants and friends, it cannot be received. (2)

In *Annesley v. Anglesea (Earl of)* (3) the declaration of a deceased lady, that she stood godmother to the child of Lord Altham, was rejected; and in the same case, the declaration of a midwife that she had delivered Lady Altham of a child, was also rejected. (4) So, also, a clergyman's declaration as to the fact of marriage, when it was not against his interest, has been held inadmissible (5); and parish registers are not evidence of the time or place of birth. (6)

It is essentially requisite, that the relatives, whose declarations are offered in evidence, should be dead. (7)

To make the testimony of a relative admissible, his relationship must be established *aliunde*, that is, it must be established by extrinsic proof, and

(1) *Per* Lord Chancellor Brougham in *Monkton v. Att. Gen.* 2 Russ. & M. 156.

(2) If *Johnson v. Lawson* (2 Bing. 86.) be applied, the declarations of persons not relations are inadmissible, even though made respecting facts peculiarly within their knowledge, or under the most solemn circumstances. *Crease v. Barrett*, 1 C. M. & R. 928. 9 Moore, 183. *Whitelocke v. Baker*, 13 Ves. 514. *Goodright v. Moss*, Cowp. 594. *Doe d. Sutton v. Ridgway*, 4 B. & A. 53. *Doe d. Northey v. Harvey*, R. & M. 297. *Doe d. Futter v. Randall*, 2 M. & P. 20.

(3) 17 Howell's St. Tr. 1160.

(4) *Ibid.* 1157., *sed vide contra*, *Higham v. Ridgway*, 10 East, 109. *Gleadow v. Atkin*, 1 C. & M. 428.

(5) *Berkeley Peerage case*, Printed Minutes, 1811, 655. *Standen v. Standen*, Peake's N. P. C. 45.

(6) *Phillipps' Ev.* 246., *et vide* *Re v. Clapham*, 4 C. & P. 29. *Re v. North Petherton*, 5 B. & C. 508. *Wihen v. Law*, 3 Stark. 63. *Cope v. Cope*, 1 M. & Rob. 269. *Morris v. Davies*, 3 C. & P. 215. 427. *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 389.

(7) *Pendrell v. Pendrell*, Str. 925.

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not out of the declaration itself (1); but where a person is connected with A. by evidence *dehors*, his declaration touching relationship between A. and B. is admissible, without connecting the declarant with B., otherwise the declaration would be manifestly superfluous, as only proving the very fact already established. (2)

It seems, that the evidence of strangers as to general reputation is admissible, if of a general nature, as that A. was commonly reputed to be the son of B., or the father of C.: thus, in the case of marriage, common reputation is sometimes evidence to prove the fact of marriage. (3)

It is no objection, that the person who made the declaration, stood *in pari casu* with the person tendering it in evidence. (4) In a case of peerage before the House of Lords, "a widow was allowed to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish." (5) So declarations are admissible though they tend to shew the declarant's own title at the time, provided there was then no *lis mota*. (6)

In *Doe d. Bamford v. Barton* (7) it was held, that the declarations of an illegitimate member of a family, respecting his illegitimate brothers, are not admissible as reputation, Mr. Justice Patteson observing, "The courts have not latterly been disposed to enlarge the exception in favour of declarations of this kind. The person whose declarations are now tendered in evidence was not, in point of law, a member of the family of his reputed father; and it would be opening a new and a wide door to such evidence if it were to be received merely because the party was living in habits of intimacy amongst those who were members of the family. I think, therefore, I cannot receive the evidence."

In *Vowles v. Young* (8) Lord Erskine said, "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established, and subjects of property regulated, requiring the facts from the mouth of the witness, who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, the best the nature of the subject will admit, establishing the descent from the only sources, that can be had. Perhaps, while the feudal tenures prevailed, with the ancient inquisitions, as inquisitions *post mortem*, opportunities of establishing descents were afforded, much superior even to the modern means by the register of births and baptisms. The heads of families upon those occasions made solemn declarations, which were matter of record, and threw a great light upon questions of inheritance." His lordship likewise said (9), "The law resorts to hearsay of relations upon the principle of interest in the person, from whom the descent is to

Evidence of strangers respecting general reputation of relationship.

Declarant standing *in pari casu* with the person tendering the declaration in evidence.

Declarations of illegitimate members of a family inadmissible.

Judgment of Mr. Justice Patteson in *Doe d. Bamford v. Barton*.

Judgment of Lord Erskine in *Vowles v. Young*.

Declarations of heads of families upon inquisitions *post mortem*.

Hearsay of re-

(1) *Monkton v. Att. Gen.* 2 Russ. & M. 156. *Leigh Peerage case*, Printed Minutes, 1829, 307. *Davies v. Morgan*, 1 C. & J. 591. Phillipps' Ev. 248.

(2) *Monkton v. Att. Gen.* 2 Russ. & M. 157.

(3) *Evans v. Morgan*, 2 C. & J. 453. *Read v. Passer*, 1 Esp. N. P. C. 213. *Leader v. Barry*, *ibid.* 353. *Birt v. Barlow*, Doug. 174. *Hervey v. Hervey*, 2 W. Black. 877. *Rex v. Bramley*, 6 T. R. 330. *Doe d. Fleming*

v. Fleming, 4 Bing. 266. Phillipps' Ev. 247.

(4) *Monkton v. Att. Gen.* 2 Russ. & M. 156.

(5) *Cit. per Abbott C. J.* in *Doe d. Tilman v. Tarver*, R. & M. 142.

(6) *Ibid.* Roscoe's Ev. 28.

(7) 2 M. & Rob. 28.

(8) 13 Ves. 143.

(9) *Ibid.* 147.

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EVIDENCE.**

lations ad-
mitted to prove
consanguinity.

Judgment of
Lord Eldon in
*Whitelocke v.
Baker*.

Tradition not
evidence of pe-
digree.

General repu-
tation of the
family.

Declarations
by general kin-
dred;

by parents, re-
specting time
of birth;

by an elder
brother respect-
ing his bastardy

Hearsay not
contempora-
neous.

be made out; and it is not necessary, that evidence of consanguinity should have the correctness, required as to other facts. If a person says, another is his relation or next of kin, it is not necessary to state, how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree; which, perhaps, he could not tell, if asked. But it is evidence from the interest of that person in knowing the connections of the family. Therefore, the opinion of the neighbourhood of what passed among acquaintance will not do." (1)

In *Whitelocke v. Baker* (2) Lord Eldon said, "It was not the opinion of Lord Mansfield, or of any judge, that *tradition*, generally, is evidence even of pedigree: the tradition must be from persons, having such a connexion with the party, to whom it relates, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that.

"Declarations in the family, descriptions in wills, inscriptions upon monuments, descriptions in bibles, and registry books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth. (3) But there may be many circumstances, forming part of the tradition, which you would reject, taking the body of the tradition."

The general reputation of the family is sometimes evidence. Thus, proof by one of the family that a person had gone abroad many years before, and was supposed to have died there, and that the witness had not heard in the family of his having married, was considered as good *prima facie* evidence of the person's death without lawful issue. (4)

Declarations relative to general kindred, as that a person was heir to another being his cousin or relation, are, as matters of pedigree, seemingly evidence. (5)

The declarations of a deceased parent are admissible to prove the time of the birth of a child either before or after marriage (6); but declarations from a relative in opposition to those of the parent are likewise evidence. (7) Upon questions whether a testator, at the time of making his will, was of full age, a written memorandum by a deceased parent stating the time of his birth is admissible. (8) And in an issue out of Chancery, to try whether A. B. was the eldest son born out of wedlock, the declarations of his elder brother, that he himself was a bastard, were received. (9)

It is not requisite, that such evidence should be contemporaneous with the facts to which the evidence relates: thus, a person's declaration that

(1) Vide *Whitelocke v. Baker*, 13 Ves. 511. *Walker v. Wingfield*, 18 ibid. 443.

(2) 13 ibid. 514.

(3) *Higham v. Ridgway*, 10 East, 120. Bull. N. P. 233.

(4) Doe d. *Banning v. Griffin*, 15 East, 294. Bull. N. P. 295.

(5) Doe d. *Futter v. Randall*, 2 M. & P. 24. Phillipps' Ev. 228.

(6) *Goodright d. Stevens v. Moss*, Cowp. 593. *Stapylton v. Stapylton*, cit. ibid. Lord *Valentia's case*, Dom. Proc. April 22. 1771. *May v. May*, Trial at Bar, 17 Geo. 2. cit. Bull. N. P. 112. *Rex v. Bramley*, 6 T. R. 330.

(7) 12 Vin. Abr. Evidence, 247. [T. b. 91.]. *Berkeley Peerage case*, 4 Camp. 401.

(8) *Herbert v. Tuckal*, Sir T. Raym. 84. cit. 7 East, 290. *Goodright d. Stevens v. Moss*, Cowp. 593. Inscriptions upon monuments have been considered evidence respecting the ages of parties. *Per Brougham C.*, Little-dale and Park Js., *contra* Tindal C. J. in *Kidney v. Cockburn*, 2 Russ. & M. 167. 170. Roscoe's Ev. 27.

(9) *Cooke v. Lloyd*, Peake's Ev. App. 78. *Rex v. Nottingham*, 13 East, 57. n. *Berkeley Peerage case*, 4 Camp. 401.

his grandmother's name was A. B. is admissible. If it were otherwise, it would preclude evidence from extending beyond the lifetime of the person whose declaration is to be adduced in evidence. (1)

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Evidence is receivable, as declarations, respecting the demeanour of the parties to each other, the disposition of property, the devolution of property title, and similar circumstances. (2) In the case of *Beer v. Ward* (3) a deed was put in evidence, by which certain estates were

Conduct of parties may be equivalent to declarations.

limited in remainder by the owner to his grandson (the person whose legitimacy was in question), and the deed described him, as if he were legitimate; Chief Justice Dallas said he was quite aware that, besides the manner of describing him, there was an argument arising out of the disposition of the property.

Evidence of pedigree is receivable when both degrees are within the family. Thus, the declarations of a deceased lady, that her first husband was accustomed to make certain statements respecting the pedigree of the family, are evidence. (4)

Declaration upon declaration.

Entries in family bibles, as standing on the ground of family acknowledgments, are admissible on account of their publicity, without proof that the entries were made by a member of the family. (5) Memoranda inserted in an almanack (6), missal (7), prayer book (8), correspondence between members of the family addressing each other as relatives, and making statements of pedigree (9), in documents and papers (10), are receivable as evidence.

FORMS OF EVIDENCE.

BIBLES, BOOKS, &c.

A bill in Chancery by an ancestor, was held by Lord Kenyon to be evidence to prove a family pedigree, stated therein in the same manner as an inscription on a tomb-stone or in a bible. (11)

BILLS, &c. IN CHANCERY.

It is the practice of the House of Lords to admit as evidence of the pedigrees of claimants of peerage, bills and answers in Chancery made in suits where the facts of the pedigree are not in dispute, but only incidentally stated. (12)

The judges however held, in the *Banbury Peerage case* (13), that a bill or depositions in Chancery, in a suit to perpetuate testimony, could not be

(1) *Monkton v. Att. Gen.* 2 Russ. & M. 158.

(2) *Phillipps' Ev.* 237. *Goodright v. Saul*, 4 T. R. 356. 4 Camp. 416. *Devon Earldom*, Report by Nicolas, App. 36. *Chandos Peerage case*, Printed Minutes, 1790, 11. *Le Marchant Gardner's Peerage case*, 285. *Lisle Barony*, Report by Nicolas, 50. 120. *Leigh Peerage case*, Printed Minutes, 1829, 298. et seq. *Clinton Peerage case*, 30 Serjeant Hill's Col. Linc. Inn Lib. 331.

(3) *Cit. Phillipps' Ev.* 238.

(4) *Monkton v. Att. Gen.* 2 Russ. & M. 165. *Athol (Duke of) v. Ashburnham (Lord)*, Bull. N. P. 295. *Doe d. Futter v. Randall*, 2 M. & P. 20., sed vide *Johnson v. Lawson*, 2 Bing. 88.

(5) *Monkton v. Att. Gen.* 2 Russ. & M. 162. *Highman v. Ridway*, 10 East, 120. *Berkeley Peerage case*, 4 Camp. 421. *White-locke v. Baker*, 13 Ves. 514. *Goodright d. Stevens v. Moss*, Cowp. 594.

(6) *Herbert v. Tuckal*, Sir T. Raym. 84.

(7) *Slane Peerage case*, Printed Minutes, 1830, ii. 49.

(8) *Leigh Peerage case*, *ibid.* 1829, 310.

(9) *Bell's Huntingdon peerage*, 357. *Berner's Peerage case*, Collins on Baronies, 355, 356. 361.

(10) 12 Vin. Abr. Evidence, 87. [A. b. 13.]. *Berkeley Peerage case*, 4 Camp. 401. Bull. N. P. 233. *Goodright d. Stevens v. Moss*, Cowp. 591. 2 Russ. & M. 164.

(11) *Taylor v. Cole*, 7 T. R. 3. n.

(12) *Howard de Walden (Barony)*, Att. Gen. Rep. 1806, 35. *Claim of Sir John Griffin* in 1781, Minutes reprinted, 1806, 15. *Slane Peerage case*, Printed Minutes, 1830, i. 32. ii. 42. *Netterville Peerage case*, *ibid.* 1827, 43. *Roos' Peerage case*, *ibid.* 1804, 293, 294. *Zouch of Haryngworth Peerage*, *ibid.* 1804, 221.

(13) Reported in App. to the Law of Adulterine Bastardy by Nicolas. *Le Marchant Gardner's Peerage case*, 411., et etiam *Berkeley Peerage case*, 4 Camp. 412.

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received as evidence in the courts below, on the trial of an ejectment against a party not claiming or deriving in any manner under the plaintiff in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree; and added, that it would not make any difference in their opinion, if the bill had been a bill seeking relief.

CHARTS OF PEDIGREE.

Charts of pedigree hung up in family mansions (1), or found among family documents, are evidence. (2) But a pedigree found in the Ashmolean Library at Oxford, unaccompanied by any proof that it was made by a member of the family, or by any person connected with it, was rejected. (3)

COFFIN-PLATES.

Inscriptions on coffin-plates in family vaults and graves are admissible (4), and not affected by the originals not being in a church or churchyard (5); and for public convenience, examined copies of such inscriptions are received. (6)

FUNERAL CERTIFICATES.

Funeral certificates have been considered evidence. (7)

MONUMENTS.

Tracings from effaced monuments are evidence (8); and where monuments have been decayed by time, or surreptitiously destroyed or removed, evidence of the recollection of witnesses respecting them, and the inscriptions they bore, has been admitted by the House of Lords. (9)

MURAL INSCRIPTIONS.

Mural inscriptions (10), coat armour (11), herald's books (12), armorial shields (13), and armorial arms upon a carriage, are evidence. (14)

PICTURES.

Inscriptions on family pictures are admissible. (15)

RECITALS IN DEEDS.

Recitals in deeds are not evidence of pedigree against persons who were strangers to the deeds. (16)

But recitals in family deeds, as marriage settlements, have been admitted on the footing of declarations of relatives. (17)

RINGS.

"Engravings upon rings are admitted, upon the presumption, that a person would not wear a ring with an error upon it." (18)

TOMB-STONES.

In *Vowles v. Young* (19) Lord Erskine said, "Pedigree inscriptions upon tomb-stones are admitted, as it must be supposed the relatives of the family would not permit an inscription without foundation to remain."

(1) *Goodright d. Stevens v. Moss*, 2 Cowp. 594.

(2) *Monkton v. Att. Gen.* 2 Russ. & M. 161. *Berner's Barony*, Collins on Baronies, 333. *Lisle Peerage case*, 1824—1826, Report by Nicolas, 45.

(3) *Chandos Peerage case*, Printed Minutes, 1790, 10, 11.

(4) *Ibid.* 10. *Rakeby Peerage case*, Printed Minutes, 1830, 4. *Lovat Peerage case*, *ibid.* 1826, 77.

(5) *Whittuck v. Waters*, 4 C. & P. 376. 26 Serjeant Hill's Col. Linc. Inn Lib. 173.

(6) Phillipps' Ev. 233.

(7) *Barony of Vaux*, Printed Minutes, 1826, 195. *Le Marchant Gardner's Peerage case*, 415.

(8) *Slaney v. Wade*, 7 Sim. 595.

(9) *Roscommon and Leigh Peerage cases*, Printed Minutes, 1829.

(10) *Slaney v. Wade*, 1 M. & C. 338.

(11) Harl. MSS. 1386, 6141. *Roy v. Parker*, Sid. 354. Co. Litt. 27. (a.)

(12) *Chandos Peerage case*, Printed Minutes, 1790, 6.; 1791, 24. 37.; 1794, 40. 49.

(13) *Bell's Huntingdon Peerage*, 280.

(14) *Hervey v. Hervey*, 2 W. Black. 877.

(15) *Barony of Camoys*, Printed Minutes, 1838, 378.

(16) *Fort v. Clarke*, 1 Russ. 604. *Slaney v. Wade*, 1 M. & C. 338. As to the effect in general of recitals, vide *Doe d. Pritchard v. Dodd*, 2 N. & M. 45. *Bowman v. Taylor*, 2 A. & E. 278.

(17) Bull. N. P. 233. *Neal v. Wilding*, Str. 1151. *Zouch of Haryngworth Peerage*, Printed Minutes, 1804, 275. *Stafford Peerage case*, *ibid.* 1812, 110. *Chandos Peerage case*, *ibid.* 1791, 27. *Eccleston v. Petty*, Carth. 79. *Doe d. Johnson v. Pembroke (Earl)*, 11 East, 505. *Whitelocke v. Baker*, 13 Ves. 514. *Lisle Peerage case*, Printed Minutes, 1824, 116. 127. *Banbury Peerage case*, *ibid.* 1808, 6. 117. *Devon Earldom*, Report by Nicolas. Printed Minutes, 1832, App. 44. 46. Phillipps' Ev. 229, 230.

(18) *Per* Lord Erskine in *Vowles v. Young*, 13 Ves. 144.

(19) *Ibid.*

In *Monkton v. Attorney General* (1) the lord chancellor considered tomb-stones on the same footing as rings, pedigrees hung up, and family bibles, and admissible on account of their publicity, without connecting them with the family (2); and they have been received as evidence to prove deaths. (3)

HEARSAY
EVIDENCE.

In the *Lisle Peerage case* (4) a description in a will of certain individuals being the next heirs in blood, was relied upon as shewing, that a particular person was illegitimate; and an old cancelled will has been allowed to prove the existence and relative ages of certain deceased members of the family, from whom both parties derived title, it appearing to have been treated as a paper relating to the family. (5)

WILLS.

But *probate* of a will is not evidence for the purpose of proving relationship in a question of pedigree (6)—the original will should be produced. (7)

Declarations which are made either where a suit has been commenced, or where there is a controversy (8) preparatory to one, upon the subject-matter; or where they are made by a party who could not have been examined as a witness (9) had he been alive; or upon matters of notoriety (10), and which may therefore be proved by better proof, are not admissible in evidence; and it is not requisite, in order to exclude the evidence, that the controversy was known to the person making the declaration. (11)

INADMISSIBLE
EVIDENCE.
Declarations
post litem mo-
tam.

General declarations, or the answer of a parent in Chancery, are good evidence after the death of such parent to prove that a child was born before marriage; but not to prove that a child born in wedlock is a bastard (12), evidence of *non access* being rejected on the grounds of public policy.

Both the wife's and husband's declarations to establish illegitimacy have been rejected; and the admissibility of declarations of the wife as to incontinence with other persons, and particularly as to that sort of intercourse whereby a child might be produced, and to which she might be examined if living, does not appear to have been decided. (13) But the declarations of deceased persons supposed to have been married, are admissible to disprove the fact of marriage. (14)

Legitimacy o.
children.

The declarations of a deceased parent are not evidence of the place of the birth (15); because a mere question of locality only arises (16): and such is not a fact peculiarly within the knowledge of relations.

Place of birth.

(1) 2 Russ. & M. 163.

(2) *Kidney v. Cockburn*, 2 Russ. & M. 171.
12 Vin. Abr. Evidence, 243. [T. b. 87].
Goodright d. Stevens v. Moss, Cowp. 594.
Bull. N.P. 233. 13 Ves. 144. 514. 7 T.R. 3.
n. *Higham v. Ridgway*, 10 East, 120. 1 Lil.
Pract. Reg. 552. *Lisle Peerage case*, Report
by Nicolas, 50. 173.

(3) *Kidney v. Cockburn*, 2 Russ. & M. 171.
Rider v. Malbone, cit. ibid. Roscoe's
Ev. 27.

(4) *Lisle Peerage case*, Report by Nicolas,
51, 53.

(5) *Doe d. Johnson v. Pembroke (Earl of)*,
11 East, 504., vide *Doe d. Brune v. Rawlings*,
7 ibid. 279.

(6) Bull. N. P. 246.

(7) *Polhill v. Polhill*, 3 Bac. Abr. Evidence,
(F.), 279. *Doe d. Wild v. Ormerod*, 1 M. &
Rob. 466.

(8) *Berkeley Peerage case*, 4 Camp. 401.

(9) *Rex v. Reading*, R. T. H. 79.

(10) *Rex v. Erith (Inhab. of)*, 8 East,
542.

(11) *Berkeley Peerage case*, 4 Camp. 417.

(12) *Goodright d. Stevens v. Moss*, Cowp.
591.

(13) Phillipps' Ev. 227. *Rex v. Reading*,
R. T. H. 79. *Stapleton v. Stapleton*, ibid.
277. *Goodright d. Stevens v. Moss*, Cowp.
593. *Rex v. Luffe*, 8 East, 203. *Rex v.*
Kea, 11 ibid. 133. *Rex v. Rook*, 1 Wils.
340. *Hiliarc v. Phaly*, 8 Mod. 180. *Rex*
v. Bedall, Str. 1076.

(14) *Rex v. Bramley*, 6 T. R. 390.

(15) *Rex v. Erith (Inhab. of)*, 8 East,
542.

(16) Ibid.

**HEARSAY
EVIDENCE.**

Declaration of
attesting wit-
ness.

Judgment of
Mr. Baron
Parke in *Sto-
bart v. Dryden*.

Declarations by an attesting witness to a will or other instrument cannot be given in evidence after his death, to shew that he had forged or fraudulently altered the instrument; because, as observed by Mr. Baron Parke (1), "The rights of parties under wills would be liable to be affected at remote periods, by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting, or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination."

ADMISSIONS.**GENERALLY.**

By whom ad-
missions must
be made.

6. ADMISSIONS.**I. Generally.**

The whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to himself will not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to himself, and that not merely as evidence that he made such a counter claim, but as admissible evidence of the existence of the matter in his discharge, which he asserts. (2)

Admissions must be directly to the party in a suit against whom they are used, or to some person who is identified in interest with him. Thus, in an action of trover brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff's case was, that he had paid rent to another person: and it was held, that the statement of that person respecting the receipt of rent was not evidence without calling him (3); Mr. Justice Littledale observing, "The general rule is, that where a person is living, and can be called as a witness, his declarations made at another time cannot be received in evidence. To this rule there is an exception, viz. where the party making the declaration can be identified with the party against whom they are offered. Here it was not shewn that the action was brought for the benefit of John Brown, and he was not identified with the plaintiff."

The defendant's own admission is always evidence against him, though it refers to the matter of a written agreement. (4) A defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, although such plaintiff appear to be only trustee for a third person (5); and even admissions of particular articles before an arbitrator are good evidence. (6)

It is also a general principle, that where a party can be considered as

(1) *Stobart v. Dryden*, 1 M. & W. 623.

(2) *Randle v. Blackburn*, 5 Taunt. 245.
Smith v. Blandy, R. & M. 257. *Thomson v. Austen*, 2 D. & R. 358. *Fletcher v. Froggatt*, 2 C. & P. 569. *Yates v. Carnsew*, 3 ibid. 99.

(3) *Spargo v. Brown*, 9 B. & C. 935.
Barough v. White, 4 ibid. 325. *Bernasconi v. Farebrother*, 3 B. & Ad. 372.

(4) *Newhall v. Holt*, 6 M. & W. 662.

(5) *Bauerman v. Radenius*, 7 T. R. 663.
2 Esp. N. P. C. 653. 11 East, 584. n. et vide *Lane v. Chandler*, 3 Smith, 77. *Duke v. Aldridge*, cit. 7 T. R. 665.

(6) *Westlake v. Collard*, Bull. N. P. 236.
Gregory v. Howard, 3 Esp. N. P. C. 113.

Judgment of
Mr. Justice
Littledale in
Spargo v. Brown.

identical in interest and authority with another, the admissions or declarations of the former bind the latter.

ADMISSIONS.

Upon the subject of admissions Mr. Starkie (1) justly remarks, "It is a matter of obvious and daily remark, how much of the materials of evidence in ordinary practice is derived from the admissions, direct and indirect, of the parties themselves, and how difficult it would frequently be, if not impossible, to establish the truth by means of any other evidence. Evidence of this kind admits of great variety both in its nature and application. In many instances the admission is *directly and expressly* made with a view to establish the fact, and in order to supersede the necessity of any other proof; as where it arises upon the face of the pleadings, or is made by matter of record, or by specialty, by which the party is estopped from afterwards denying the admitted fact. In other instances, although there be no direct and express admission for such a purpose, yet if a representation be made of any fact, with a view to influence the conduct of another, or to derive an advantage to the party, and which cannot afterwards be denied without a breach of good faith, such an admission will not only be evidence of the fact, but will usually preclude the party who has made it from insisting upon the contrary. In such cases the admission does not operate merely as presumptive evidence of the actual truth of the fact, which must give way to positive proof of the contrary, but precludes, and as it were *estops the party*, on grounds of policy, from repudiating his own representation, and renders the actual truth of the fact immaterial. In other instances, again, such evidence rests simply on the presumption, that the party would not have admitted a fact contrary to his own interest, unless it had been true; such admissions are frequently of the most forcible nature, as in the case of a confession of guilt by a prisoner. It is a most general and extensive rule, that all a man's acts and declarations shall be admitted in evidence whenever they afford any presumption against him; for it is to be presumed, that he acted or spoke consistently with his knowledge of the truth. All presumptions founded upon a man's conduct may be referred to this head, for a man's acts and conduct are indications which frequently afford presumptions as strong as express declarations; the very silence of a party will frequently supply a strong inference, as, for instance, where one makes a claim upon another, before witnesses, the justice of which the latter does not deny."

General principles respecting admissions.

An admission as previously observed, whether written or verbal, must be presented in its entirety, because one part frequently explains and qualifies another. (2)

Admissions must be presented in their entirety.

Thus, if part of a conversation be reported, in order to establish an admission, he against whom it is used, is entitled to have the entire conversation repeated (3); and the assertion of a party in conversation, given in evidence against him, of facts in his favour, is evidence for him of those facts. (4)

(1) 2 Ev. 16.

(2) *The Queen's case*, 2 B. & B. 287. *Thompson v. Austen*, 2 D. & R. 361.

(3) *Fletcher v. Froggat*, 2 C. & P. 569. *Thompson v. Austen*, 2 D. & R. 361. *Rex v. Jones*, 2 C. & P. 690. *Yates v. Carnes*, 3 ibid. 99. *Smith v. Young*, 1 Camp. 439.

Green v. Dunn, 3 ibid. 215. n. *Smith v. Blandy*, R. & M. 257. *Anon.* 12 Vin. Abr. Evidence, 95. [A. b. 23.]. *Remmis v. Hall*, Mann. Ind. 376. *Cray v. Hall*, R. & M. 258. n.

(4) *Smith v. Blandy*, R. & M. 257.

Admissions.	<p>When commissioners in bankruptcy send for a party, and compel him to produce documents and answer questions, secondary evidence cannot be given of the documents, without proof of the examination which accompanied their production (1), because it is in effect a part of the examination: nor can the cross-examination of the defendant be read, without his examination in chief (2): but where an answer in Chancery by a witness is put in, only to prove his incompetency, the adverse party cannot read the whole in order to prove the issue. (3)</p>
Proceedings in bankruptcy.	<p>If a person in making an admission against his own interest refer to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party. (4)</p>
<p>Admissions must be relevant to the suit.</p> <p>Judgment of Lord Tenterden in the <i>Queen's case</i>.</p> <p>Verbal conversation.</p>	<p>The admissions should be relevant to the suit: thus, in the <i>Queen's case</i> (5) Lord Tenterden said, "If a counsel chooses to ask a witness as to any thing that may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it did relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time, the benefit of the entire residue of what he said on the same occasion."</p>
Entries in a book.	<p>A defendant is entitled to have the whole of a particular entry in a book read, if a part be produced against him, but he cannot require to have distinct entries in different parts of the book read. (6)</p>
Testimony given in court.	<p>Testimony given in court, admitting a particular fact, may be used as an admission, though the person examined was prevented from entering into an explanation of the circumstances under which the fact took place, because it was irrelevant to the matter in issue upon the former occasion. (7)</p>
Examination before commissioners of bankruptcy.	<p>The examination of a party signed by him before commissioners of bankruptcy is evidence against him, though part only of his deposition was noted down (8): but evidence is admissible to add to the examination of a party before a magistrate, though taken in writing. (9)</p>
Letters.	<p>Letters written by a party are evidence against him, without producing those to which such letters are answers (10): but the merely having subscribed any paper writing as a witness, is not sufficient to charge the witness with notice, unless it be proved that he knew the contents. (11)</p>
Voluntary admissions.	<p>Voluntary admissions are evidence, if the compulsion under which they are given be legal, and the party be not imposed upon or under any du-</p>

(1) *Holland v. Reeves*, 7 C. & P. 38.(2) *Smith v. Biggs*, 5 Sim. 391.

(3) Bull. N. P. 238.

(4) *Wheeler v. Atkins*, 5 Esp. N. P. C. 246. *Randle v. Blackburn*, 5 Taunt. 245. *Falconer v. Hanson*, 1 Camp. 171. *Smith v. Young*, ibid. 439. *Barrymore (Lord) v. Taylor*, 1 Esp. N. P. C. 326. *Collett v. Keith (Lord)*, 4 ibid. 212. *Jacob v. Lindsay*, 1 East, 462. *Dagleish v. Dodd*, 5 C. & P. 238. *Johnson v. Gilson*, 4 Esp. N. P. C. 21. *Adey v. Bridges*, 2 Stark 189.

(5) 2 B. & B. 298.

(6) *Catt v. Howard*, 3 Stark. 6. *Wharam v. Routledge*, 5 Esp. N. P. C. 235.

(7) *Collett v. Keith (Lord)*, 4 Esp. N. P. C. 212. *Stanley (Bart.) v. Fielden*, 5 B. & A. 425. *Grey v. Smith*, 1 Camp. 387.

(8) *Milward v. Forbes*, 4 Esp. N. P. C. 172.(9) *Venafrá v. Johnson*, 1 M. & Rob. 316.(10) *Barrymore (Lord) v. Taylor*, 1 Esp. N. P. C. 326., *vide etiam post*, 1615.(11) *Harding v. Crethorn*, 1 Esp. N. P. C. 57.

ress (1), notwithstanding, the party might have demurred to the questions as exposing him to penalties. (2)

The jury can believe one part of an admission, and reject the other, if it be not worthy of equal credit.

Thus, in *Smith v. Blandy* (3) Chief Justice Best observed, "The whole of what a party says at the same time, must be given in evidence, and what he says in his favour, must not be taken as true, but must be left, under all the circumstances, for the jury to say, whether they believe it or not." (4)

So likewise in *Rose v. Savory* (5) it was held, that the jury were not bound to believe both sides of the account; therefore, where the plaintiff put in evidence an account rendered by the defendant, in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim, and to recover the amount for which defendant owned himself debtor.

"Where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to wave any objection to the competency of the testimony of the party making the answer, and he does not thereby admit as evidence all the facts, which may happen to have been stated by way of hearsay, only in the course of the answer to a bill filed for a discovery." (6)

Where admissions involve matters of law, as well as matters of fact, they are obviously, in many instances, entitled to very little weight, and in some cases they have been altogether rejected. (7)

The discharge of a defendant by a court of quarter sessions under an insolvent act, cannot be established by proof of an acknowledgment of the discharge by the plaintiff himself; because the discharge might have been irregular and void, or might have been mistaken by the plaintiff. (8)

"The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person, and those claiming under him, and that transaction; but as to third persons he is not bound." (9)

In an action of trespass commenced in order to try the validity of a commission of bankruptcy issued against the plaintiff, when it was proved by the defendants, that the commission issued against the plaintiff then in custody at the suit of the petitioning creditor, who was one of the defendants, and that the plaintiff had afterwards applied to the court of King's Bench under stat. 49 Geo. 3. c. 121. s. 14., on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission:—It

ADMISSIONS.

Parts of an admission may be rejected by the jury.

One party by reading the answer of another, does not admit as evidence all the facts.

Admissions involving matters of law as well as matters of fact.

Acknowledgment of having been discharged as an insolvent.

EFFECT OF ADMISSIONS.

Judgment of Mr. Justice Bayley in *Heane v. Rogers*.

Estoppel.
Fiat in bankruptcy.

(1) *Slack v. Buchanan*, Peake's N. P. C. 7. *Collett v. Keith* (Lord), 4 Esp. N. P. C. 212. *Stockfleth v. De Tastet*, 4 Camp. 10.

(2) *Stockfleth v. De Tastet*, 4 Camp. 10. *Milward v. Forbes*, 4 Esp. N. P. C. 172. *Smith v. Beadnell*, 1 Camp. 30., sed vide *Tucker v. Barrow*, 7 B. & C. 624.

(3) R. & M. 257.

(4) *Cray v. Halls*, cit. ibid. *Rennie v. Hall*, Mann. Ind. 376. *Rundle v. Blackburn*, 5 Taunt. 245.

(5) 2 Bing. N. C. 145., et vide *Rex v. Clewes*, 4 C. & P. 225.

(6) Per Chambre J. in *Pellatt v. Ferrars*, 2 B. & P. 548., vide etiam *Bermon v. Woodbridge*, Doug. 788.

(7) Phillipps' Ev. 377.

(8) *Scott v. Clare*, 3 Camp. 236. *Summersett v. Adamson*, 1 Bing. 73., vide etiam *Rouse v. Redwood*, 1 Esp. N. P. C. 155.

(9) Per Bayley J. in *Heane v. Rogers*, 9 B. & C. 586.

ADMISSIONS.

Judgment of Lord Tenterden in *Watson v. Wace*.

was held, that the plaintiff could not in an action against the assignees dispute the validity of the commission; Chief Justice Abbott observing, "The estoppel arises by matter of evidence; and the question is, whether a party, having availed himself of the commission for one purpose, can afterwards be allowed to assert to the same judges, before whom he took the benefit of the commission, that the commission was invalid. Lord Ellenborough(1) gave his opinion to the contrary; and that has never since been questioned." (2)

Where the doctrine of estoppel will not be applied.

A disinclination exists to extend the doctrine of estoppels in consequence of its tendency to prevent the investigation of truth(3); and where a party has assumed a particular character as belonging to another person, his conduct and language have, in general, not been deemed conclusive against him, though they may be often used as *prima facie* evidence against him. (4)

Entry at the custom-house.

An entry at the custom-house in the names of a firm is not conclusive against the person making the entry, except as between him and the crown(5); a person is not concluded, as to the amount of his property, by an oath taken before commissioners under the property tax acts(6); and an insolvent's omission of a particular debt in his schedule, to which he was sworn, will not preclude him from afterwards recovering the debt. (7)

Omission of a debt by an insolvent in his schedule.

Admission of bankruptcy.

Where an admission, that a person has become bankrupt is made in the course of a transaction with third persons, the bankrupt is not thereby estopped from showing in an action against the assignees, that he has not become bankrupt(8); nor is he precluded from disputing the fiat by surrendering, or by petitioning, to enlarge the time for surrender(9), or by having applied to a commissioner to appoint an official assignee for investigating the petitioning creditor's debt, &c. (10)

INDIRECT ADMISSIONS.

Indirect admissions are those, wherein the existence and truth of the fact to be proved is assumed in the expressions, which are given in evidence. The principle upon which such declarations are evidence is, that, when accompanying the act done, and tending to explain it, they are part of the *res gesta*, and therefore admissible. (11)

If a person be seen felling timber in a wood, it is *prima facie* evidence that he is the owner of it; and, therefore, any thing that he says, at that or any other time, as to any one else being the owner of it is evidence. (12)

Exercising acts of ownership.

If the landlord reserve a right of entry for an assignment or under-letting of the property by his tenant, and a person be found thereon, the declarations of that person are *prima facie* evidence against the lessee of an under-letting. (13)

An admission by a defendant, that a third person has become bankrupt, as where an auctioneer advertised for sale "the property of J. S., a bankrupt," is evidence of the title of the assignees in an action by them against

(1) *Goldie v. Gunston*, 4 Camp. 381.

(2) *Watson v. Wace*, 5 B. & C. 153.
Mercer v. Wise, 3 Esp. N. P. C. 221.

(3) *Rex v. Lubbenham (Inhab. of)*, 4 T. R. 254. *Wightw.* 67. *Like v. Rogers*, 6 Esp. N. P. C. 20. *Peacock v. Harris*, 10 East, 105. *Radford, q. t. v. McIntosh*, 3 T. R. 632.

(4) *Smith v. Taylor*, 1 N. R. 210.

(5) *Ellis v. Watson*, 2 Stark. 453.

(6) *Rex v. Clarke*, 8 T. R. 220.

(7) *Hart v. Newman*, 3 Camp. 13.

(8) *Heane v. Rogers*, 9 B. & C. 577.

(9) *Mercer v. Wise*, 3 Esp. N. P. C. 221.

(10) *Munk v. Clark*, 2 Bing. N. C. 299.

(11) *Aveson v. Kinnaird (Lord)*, 6 East, 188. 2 Smith, 286.

(12) *Doe d. Stansbury v. Arkwright*, 5 C. & P. 575.

(13) *Doe d. Hindly v. Richarby*, 5 Esp. N. P. C. 4.

the auctioneer (1), and such an admission is evidence on a plea denying the title of the assignees. (2)

ADMISSIONS.

An undertaking by an attorney on the record, to appear for two persons described in the undertaking as joint owners of a ship, is evidence of joint ownership. (3)

Joint ownership.

In an action against the acceptor of a bill of exchange, his attorney gave notice to produce "all papers relating to a bill" (described as in the declaration) "accepted by the defendant," this notice to produce, was by Chief Justice Abbott held to furnish *prima facie* evidence of the defendant's acceptance of the bill. (4)

Acceptance of bill of exchange.

"Any recognition of a person standing in a given relation to others, is *prima facie* evidence against the person making such recognition, that that relation exists." (5)

IMPLIED ADMISSIONS.

It is allowable to give evidence of written or verbal statements, or of acts done by others, which a party to be affected by them is proved to have seen or heard, and thus to use the conduct, expressions, or demeanour of the party, as evidence by way of admission against him. (6)

The admission in some cases, though not strictly an estoppel, is conclusive: thus, if B. have dealt with A. as farmer of the post-office duties, it is evidence in an action by A. against B. to prove that he is such farmer. (7)

Recognition of public officers.

In an action by the clerk of the trustees of a turnpike road, brought against one of the trustees, the fact that the plaintiff had acted as clerk, and that the defendant had acknowledged him as such, is evidence of the plaintiff's employment. (8)

"In the case of all peace officers, justices of the peace, constables, &c. it is sufficient to prove, that they acted in those characters, without producing their appointments, and that even in the case of murder." (9)

The suppression of some of a series of documents admitted to be in the possession of the party who produces the others, is evidence, that the documents withheld, afford inferences unfavourable to that party who withholds them. (10)

Suppression of documents.

If a landlord forbear from acts of ownership, and neglect to interpose, while his tenant exercises such acts, or incurs expenses in buildings or alterations inconsistent with a title afterwards claimed, it is evidence for the jury in the nature of an admission (11), that the landlord meant to be bound by such acts.

Forbearing from acts of ownership.

In an action brought to recover back notes delivered to the defendant by the plaintiff, the plaintiff proved, that the defendant, who was the executor of W., had questioned the plaintiff as to her having possession of some property belonging to W., and that the plaintiff handed over the notes

Where admissions of a donee are evidence to prove the gift of property from a donor.

(1) *Maltby v. Christie*, 1 Esp. N. P. C. 340. cit. 16 East, 193.

(2) *Inglis v. Spence*, 1 C. M. & R. 432.

(3) *Marshall v. Cliff*, 4 Camp. 133. *Rex v. Fisher*, Cald. 135.

(4) *Holt v. Squire*, R. & M. 282.

(5) *Per Lord Ellenborough in Dickinson v. Coward*, 1 B. & A. 679. *Inglis v. Spence*, 1 C. M. & R. 432., vide *James v. Birn*, 2 S. & S. 606.

(6) *Phillipps' Ev.* 372.

(7) *Radford, q. t. v. M'Intosh*, 3 T. R. 632. *Peacock v. Harris*, 10 East, 104. *Cross v. Kaye*, 6 T. R. 663., sed vide *Smith v. Taylor*, 1 N. R. 211.

(8) *Pritchard v. Walker*, 3 C. & P. 212.

(9) *Per Buller J. in Berryman v. Wise*, 4 T. R. 366.

(10) *Owen v. Flack*, 2 S. & S. 606.

(11) *Doe d. Winckley v. Pye*, 1 Esp. N. P. C. 364. *Stanley (Bart.) v. White*, 14 East, 332. *Jarrett v. Leonard*, 2 M. & S. 265. *Morris v. Burdett*, 1 Camp. 218. *Doe d. Sheppard v. Allen*, 3 Taunt. 78. *Hollis v. Goldfinch*, 1 B. & C. 222. *Neale d. Leroux v. Parkin*, 1 Esp. N. P. C. 229. *Steel v. Prickett*, 2 Stark. 471. *Jones v. Williams*, 2 M. & W. 327.

ADMISSIONS.

Judgment of
Mr. Justice
Patteson in
Hayslep v.
Gymer. |

to the defendant, stating that the deceased had given them to her;—the defendant did not deny the statement, but had no means of knowing its truth or falsehood :—It was held, that the declaration of the plaintiff was evidence to go to the jury in her favour, Mr. Justice Patteson observing, “As to the question, whether the declaration was evidence, I allow that there is a difference between the cases where a party to the cause, by proving an admission of the opposite party, lets in the latter to shew the whole that took place, and cases where the party attempts to make his own declaration evidence in the first instance. But here Mrs. Hayslep was obliged to shew how the defendant had obtained possession of the money, and she might give evidence of what she herself said at the time as a part of the transaction; and that being before the jury, it cannot be said that they were not entitled to give it consideration. The defendant having asked her how she obtained the money, did not, in terms, deny the truth of her answer; but he retained the money, and thereby, perhaps, shewed that he did not acquiesce in her account. There was however, upon the whole transaction, evidence, though of very trifling weight, to go to the jury; and there were circumstances which supported the plaintiff’s statement. I think the verdict should not be disturbed.” (1)

Effect of pay-
ment of money.

Payment of money is evidence against the payer of the title of the party receiving it, but is not evidence against the receiver that the payer was the party bound to pay it. (2)

AGENT.

“If an agent, employed to receive money, and bound by his duty to his principal from time to time to communicate to him, whether the money is received or not, renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that that statement was made unintentionally, or by mistake.” (3) Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence (4); “because as they are signed by the agent, it is exactly the same, as if they were in his handwriting.”

ASSIGNEE.

Where the defendant (in an action at the suit of the assignee of a bankrupt) had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part payment to the plaintiff on that account :—It was held, in an action for the balance remaining due, that this was *prima facie* evidence as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy. (5)

ATTORNEY.

In an action for slandering the plaintiff, who was an attorney, charging him with being a swindler, and threatening that he would have him struck off the roll of attorneys :—It was held, that such threats amounted to a distinct acknowledgment by the defendant, that the plaintiff was an attorney. (6)

(1) *Hayslep v. Gymer*, 1 A. & E. 165.

(2) *James v. Biou*, 2 S. & S. 606.

(3) *Per* Bayley J. in *Shaw v. Picton*, 4 B. & C. 729., *vide etiam post*, 1622.

(4) *Per* Tindal C. J. in *Doe d. Lichfield (Earl) v. Stacey*, 6 C. & P. 139.

(5) *Dickinson v. Coward*, 1 B. & A. 677. *Inglis v. Spence*, 1 C. M. & R. 432., *vide etiam Clarke v. Clarke*, 6 Esp. N. P. C. 61. *Like v. Howe*, *ibid.* 20. *Mercer v. Wise*, 3

ibid. 221. *Pope v. Monk*, 2 C. & P. 112. *Mott v. Mills*, 3 *ibid.* 197. *Crofton v. Poole*, 1 B. & Ad. 568. *Rex v. Barnes*, 1 Stark. 243. *Walker v. Burnell*, Doug. 317. *Haviland v. Cook*, 5 T. R. 655., *post*, 1626.

(6) *Berryman v. Wise*, 4 T. R. 366. *Pearce v. Whale*, 5 B. & C. 39., *vide etiam Combe v. Pitt*, 3 Burr. 1586. *Rigg v. Currenven*, 2 Wils. 395. *Smith v. Taylor*, 1 N. R.

196.

In *Beauchamp v. Parry* (1) it was held, that, in an action by the indorsee against the maker of a promissory note, declarations of the payee, not uttered at the time of making the note, are not evidence to prove, that the consideration for the note was money lost at play, unless it be previously shewn, that the indorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration; Mr. Justice Parke observing, "The plaintiff does not claim by the title of the indorser of the note. He has a title of his own as indorsee. He ought not, therefore, to be affected by the declaration of the indorser. If the declarations were part of the illegal transaction itself, as in *Kent v. Lowen* (2), where the evidence given was the declaration of one of the parties, made at the time of the contract, the case might be different. There the evidence admitted was proof of the contract."

ADMISSIONS.
BILLS OF EXCHANGE (PARTIES TO).
Judgment of Mr. Justice Parke in *Beauchamp v. Parry*.

It seems that a party accepting a negotiable instrument is precluded from disputing the handwriting of the drawer; and although he may in general dispute the handwriting of the indorser, yet where the drawer is a fictitious person, the acceptor is bound to pay to the signature of the same person that signed for the drawer. (3)

"In actions against clergymen for non residence, it is reasonable, that the acts of the defendant as parson, and his receipt of the emoluments of the church should be evidence against him that he is parson, without calling upon the plaintiff to prove the defendant's title formally." (4)

CLERGYMEN.

In an action for penalties against a collector of taxes, proof of his collecting the taxes is sufficient evidence of his being collector, though his appointment is by warrant under an act of parliament. (5)

COLLECTOR OF TAXES.

If a tradesman make out an account for goods sold in the name of a particular person, it may be assumed, that they were furnished upon the credit of such person, unless it appear that the credit was given to another. (6)

DEBTOR AND CREDITOR.

An admission of a debt not being due, was held to arise, where the plaintiff had taken the benefit of the Insolvent Act, and had not inserted the debt in question in his schedule. (7)

Insolvent omitting to insert a debt in his schedule of goods sold and delivered by him.

Where an account for goods sold is settled, and the party gives a bill for the amount, in an action on it, the party cannot go into evidence to impeach the charges in the account (8); because "the giving of the bill must be taken as conclusive evidence of the sum due at that time."

In an action for tolls, where the defendant had accounted with the plaintiff, and received credit from him as collector of certain turnpike tolls, but who had not been legally appointed:—It was held, that, "as the defendant had recognised the title of the party with whom he had accounted" (9), he could not be permitted to dispute such party's title to recover the balance of the account.

Payment of tolls to an officer illegally appointed.

(1) 1 B. & Ad. 91.

(2) 1 Camp. 177.

(3) *Cooper v. Meyer*, 10 B. & C. 468. *Robinson v. Yarrow*, 7 Taunt. 455.

(4) *Per* Chambre J. in *Smith v. Taylor*, 1 N. R. 210. *Bevan, q. t. v. Williams*, 3 T. R. 635. *n. (a.) Rex v. Topham*, 4 T. R. 126.

(5) *Lister, q. t. v. Priestly*, Wightw. 67.

(6) *Storr v. Scott (Bart.)*, 6 C. & P. 241. *Thomson v. Davenport*, 9 B. & C. 86., *post*, 1627.

(7) *Nicholls v. Downes*, 1 M. & Rob. 13., *vide etiam Nash v. Turner*, 1 Esp. N. P. C. 217. *Soloman v. Turner (Bart.)*, 1 Stark. 51.

(8) *Per* Lord Kenyon in *Knox v. Whalley*, 1 Esp. N. P. C. 159., *et vide Bacon v. Chesney*, 1 Stark. 192.

(9) *Dict.* Lord Ellenborough in *Peacock v. Harris*, 10 East, 106. *Dickinson v. Coward*, 1 B. & A. 679.

ADMISSIONS.

LETTER CARRIER.

Upon an indictment for embezzlement against a letter carrier, proof that he acted as such, was held sufficient, without shewing his appointment. (1)

MILITARY OFFICER.

On an information against a military officer for false musters, he will be bound by the description he gives of himself in such returns, and direct evidence of his appointment (2) is not essentially requisite.

MORTGAGOR AND MORTGAGEE.

Judgment of Mr. Justice Littledale in Doe d. Sweetland v. Webber.

In Doe d. *Sweetland v. Webber* (3) admissions by a mortgagor made after he had parted with his interest by a settlement, were held not to be admissible on behalf of a mortgagee after the death of the mortgagor, to shew that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary; Mr. Justice Littledale observing, "The evidence in question might have been good as against Hill himself, but cannot be admitted to affect the interest of third persons under this settlement. For that purpose, there should have been proofs of an actual advance of money by the mortgagee to Hill. The payment by the brother, and the other facts proved as to him, amount to nothing more, ultimately, than evidence of Hill's declarations. It does not follow from the payment of 100*l.*, that any further sum had ever been advanced; and if the only sum ever advanced was paid off, the mortgagee would no longer stand in the situation of a purchaser for valuable consideration, as against whom a prior voluntary settlement would be void."

PARISHIONER.

Payment of tithes by the defendant, a parishioner, is *prima facie* evidence against him of the rector's title. (4)

PARTNER.

Judgment of Chief Justice Tindal in Fox v. Clifton.

Where a person has held himself out to be a partner to a particular individual, or under such circumstances of publicity, that it may be presumed that the individual acted on the faith of his being a partner, he will be precluded from disputing his liability as a partner. (5) Thus, "where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liabilities as a partner." (6)

PHYSICIAN,

In *Smith v. Taylor* (7), which was for defamation, the plaintiff averred that he was a physician, and exercised the profession, and that the words were spoken concerning him as a physician. The words did not impute want of *qualification* by degree, but only want of *skill* in practice, and that the defendant called the plaintiff "Dr. S." when he spoke the words; and further, the defendant as an apothecary had followed the directions of the plaintiff as a physician, in the business out of which the cause of action arose. These circumstances were considered by two of the judges, against the opinion of the other two, as sufficient *prima facie* evidence of the plaintiff's qualification.

A person who has described himself as a physician cannot afterwards maintain an action for fees. (8) If a man hold out a woman as his wife, he

(1) *Borrett's case*, 6 C. & P. 124.

(2) *Rex v. Gardner*, 2 Camp. 513.

(3) 1 A. & E. 733.

(4) *Chapman v. Beard*, 3 Anstr. 942.

(5) *Dickinson v. Valpy*, 10 B. & C. 140. *Guidon v. Robson*, 2 Camp. 302., *vide etiam post*, 1629.

(6) *Per Tindal C. J.* in *Fox v. Clifton*, 6 Bing. 794. *Newsome v. Coles*, 2 Camp. 617.

(7) 1 N. R. 196.

(8) *Chorley v. Bolcot*, 4 T. R. 317. *Lipcombe v. Holmes*, 2 Camp. 441.

cannot set up as a defence to an action for necessities that she was not his wife. (1)

ADMISSIONS.

A tenant cannot dispute his landlord's title; but the tenant is not precluded from shewing, that his landlord's title is determined either by act of law, or his own act, or efflux of time. (2)

TENANT.

A lessee who executes the counterpart of a lease, cannot dispute its admissibility in evidence, or impeach its validity, upon the ground of the original not being properly stamped. (3)

A notice to quit at a certain time is *prima facie* evidence, that the tenancy commenced at that period, if the notice was served personally upon the tenant, and if he made no objection at the time of quitting mentioned in the notice. (4) But "if the tenant cannot or does not read the notice in the presence of the person who serves it upon him, it must go for nothing." (5)

Admission will not be implied, if the words imply a charge, that the plaintiff was not qualified to act in the particular character which he assumed: the qualification ought to be proved; and it will not be sufficient to shew his acting in that capacity. (6)

ADMISSIONS
NOT IMPLIED.

The deposition of a witness, taken in a criminal proceeding before a magistrate in the presence of the party there charged, is not admissible in another proceeding against that party, on the ground that he was present, because the person charged has not the same facility of "interposing when and how he pleases as he would in a common conversation," and "the same inferences therefore cannot be drawn from his silence or his conduct." (7)

Depositions before magistrates.

Accounts of the receipts of tolls of a market, signed by a person since deceased, styling himself managing clerk of a deceased steward of the claimant's ancestor, are not evidence of title, although such accounts are found among the family muniments. (8)

Receipts of tolls.

Evidence of concessions made for the purpose of settling matters in dispute is not admissible. (9)

ADMISSIONS
DURING TREATY
FOR A COMPROMISE.

The essence of an offer of compromise is, that the party making that offer, is willing to submit to a sacrifice, and to make a concession (10); and a letter sent by a debtor to a creditor, respecting a debt, which contains in the introductory part, these words, "which is not to be used in prejudice of my rights now or in any future arrangement that may be made or instituted," cannot be given in evidence in an action for the debt for the purpose of taking the case out of the Statute of Limitations. (11)

(1) *Robinson v. Nahon*, 1 Camp. 245. *Watson v. Threlkeld*, 2 Esp. N. P. C. 637. *Munro v. De Chemant*, 4 Camp. 215.

(2) *England d. Syburn v. Slade*, 4 T. R. 682. *Hill v. Saunders*, 2 Bing. 112. 4 B. & C. 529.

(3) *Paul v. Meek*, 2 Y. & J. 116.

(4) *Doe d. Clarges (Bart.) v. Forster*, 13 East, 405. *Doe (Lessee of) v. Leicester*, 2 Taunt. 109. *Doe d. Baker v. Woombswell*, 2 Camp. 559. *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473. *Doe d. Whitaker v. Hales*, 7 Bing. 322. *Doe d. Brierly v. Palmer (Bart.)*, 16 East, 53. *Goodright d. Charter v. Cordwent*, 6 T. R. 219.

(5) Per. cur. in *Thomas d. Jones v. Thomas*, 2 Camp. 647. *Doe d. Clarges (Bart.) v. Forster*, 13 East, 405.

(6) *Smith v. Taylor*, 1 N. R. 204. 207.

Moises v. Thornton, 8 T. R. 303. *Pickford v. Gutch*, ibid. 305. n. *Collins v. Carnegie*, 1 A. & E. 703.

(7) Per Parke J. in *Melen v. Andrews*, M. & M. 337. *Child v. Grace*, 2 C. & P. 193. *Finden v. Westlake*, M. & M. 461. *Rex v. Appleby*, 3 Stark. 33.

(8) *De Rutzen v. Farr*, 5 N. & M. 617.

(9) *Gregory v. Howard*, 3 Esp. N. P. C. 113.

(10) *Thompson v. Austen*, 2 D. & R. 358.

(11) *Cory v. Bretton*, 4 C. & P. 462. *Turner v. Railton*, 2 Esp. N. P. C. 474. Bull. N. P. 236. *Harman v. Vanhatton*, 2 Vern. 717. *Gregory v. Howard*, 3 Esp. N. P. C. 113. *Waldridge v. Kennison*, 1 ibid. 143. *Turton v. Benson*, 1 P. Wms. 497. *Hill v. Elliott*, 5 C. & P. 436. *Rouse v. Redwood*, 1 Esp. N. P. C. 155.

Admissions.

Where a debtor, being in prison, wrote to the town agents of his creditors' attorneys, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claims:—It was held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter was receivable in evidence, even though the subject-matter of the communication was an offer of ten shillings in the pound. (1) And in *Turner v. Railton* (2) it was decided, that the plaintiff might call the former attorney for the defendant, to prove an offer by him on the part of his client to settle the account, and to pay a sum of money as due to the plaintiff.

Competency of witness.

Where a communication, without prejudice, had taken place between the attorneys of the plaintiff and defendant, and the plaintiff's attorney three months afterwards called on the defendant to explain, why an earlier answer was not given to a proposition made in the course of the prior communication, it was adjudged, that the evidence which passed on the second occasion was inadmissible. (3)

In *Gainsford v. Grammar* (4) where it appeared, that A., having a demand upon B., B., before A. commenced his action, employed C. his attorney to make certain propositions to A. upon the matters in difference between them:—It was held, that C. could not be examined as to what B. said upon the occasion, for this was to be considered as a privileged communication between attorney and client; but what C. said, when he made the propositions to A. was good evidence against B., without further proof of C. being authorised by him, than the fact of C. being his attorney.

An attorney is bound to give evidence of a statement made by himself to the adverse party by the direction of his client. (5)

Unconditional offers of compromise.

An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution, that the offer is confidential. (6)

The fact of a person having made an offer to compromise a suit, is sometimes evidence, although an inquiry into the terms offered may be improper. (7)

Where an agreement has been finally concluded.

Where an agreement, though purporting to be a compromise, has been finally concluded, as where it has been signed by the parties and executed (8), it is evidence, and cannot under any circumstances be considered as an inchoate attempt to compromise.

Admission of handwriting.

An admission of handwriting made by the defendant, pending a treaty for compromising the suit, is evidence against him (9); and admissions before an arbitrator are likewise evidence. (10)

(1) *Hill v. Elliott*, 5 C. & P. 436.

(2) 2 Esp. N. P. C. 474.

(3) *Per Lord Abinger in Collins v. Wright*, Midland Spr. Cir. 1837, cit. Phillipps' Ev. 366. n.

(4) 2 Camp. 9.

(5) *Ripon v. Davies*, 2 N. & M. 310.

(6) *Wallace v. Small*, M. & M. 446.

(7) *Harding v. Jones*, Phillipps' Ev. 367. cit. 1 Tyrw. & G. 135

(8) *Froysell v. Lewelyn*, 9 Price, 122. 128.

(9) *Waldridge v. Kennison*, 1 Esp. N. P. C. 143.

(10) *Doe v. Evans*, 3 C. & P. 220. *Westlake v. Collard*, Bull. N. P. 236. *Slack v. Buchannan*, Peake's N. P. C. 8. *Harman v. Vanhatton*, 2 Vern. 717. *Turton v. Benson*, 1 P. Wms. 497. *Gregory v. Howard*, 3 Esp. N. P. C. 113.

ADMISSIONS.

II. *Written Admissions.*

By Reg. Gen. H. T. 4 Will. 4., a judge at chambers has power, with consent, to order the admission of documents.

Where a judge ordered a party to admit a deed, called in the order a "counterpart;" and on production at the trial it proved to be an original lease stamped as a counterpart, the party was nevertheless held bound by the order. (1)

Conflicting decisions have been made as to the necessity of giving notice to produce instruments, the contents of which have been admitted.

In *Earle v. Picken* (2), where a witness was asked, whether he had not heard the defendant say, that an individual named had agreed to give a certain sum of money for the estate in question, Mr. Justice Parke observed, upon an objection being taken to the question, "that what a party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to any thing else."

So, likewise, where the defendant put in evidence the answer of a plaintiff to a bill in equity, in which answer the plaintiff stated, that he had conveyed certain property by deeds of lease and release:—It was held, that the answer was evidence of the conveyance, without notice being required to produce the deeds. (3)

In *Sewell v. Stubbs* (4) it was held, that if in conversation one party state the contents of a written paper to another, the latter may give such declaration in evidence, without producing the paper.

But, in *Bloxam v. Elsee* (5), where, in order to prove a partnership between Didot and Foudrinier, whose assignees were plaintiffs in the suit, a witness was asked by the defendant, whether he had not heard Foudrinier say, that by a deed between him and Didot an interest belonged to Didot, Chief Justice Abbott held, that a witness could not be asked, "what a plaintiff has said as to the contents of deeds executed by such plaintiff, without giving such plaintiff notice to produce the deeds, or accounting for their non production."

The possession of documents, or the circumstance that a party has access to them, has been considered as a ground for affecting persons with the admission of the facts stated in them.

Thus, an entry in the books of the South Sea Company of the minutes of a license granted by them, is admissible in evidence, as being a declaration adverse to their interest, without calling as a witness the officer who made the entry. (6)

In an action against a tavern keeper, it appeared that the defendant belonged to a club which was held at the plaintiff's house, and that in a

WRITTEN AD-
MISSIONS.

GENERALLY.

Reg. Gen. H.
T. 4 Will. 4.

Necessity of
giving notice
to produce in-
struments, the
contents of
which have
been admitted.

Admission by
possession of
documents.

South Sea Com-
pany.

Club books.

(1) *Doe d. Wright v. Smith*, 2 M. & Rob. 7.
(2) 5 C. & P. 542.

(3) *Ashmore v. Hardy*, 7 C. & P. 504.,
vide etiam *Call (Bart.) v. Dunning*, 4 East,
53. *Cunliffe v. Sefton*, 2 East, 183. *Bowles*
v. Langworthy, 5 T. R. 366. *Sewell v. Stubbs*,
1 C. & P. 73. *Alderson v. Clay*, 2 Stark.
405. *Harvey v. Kay (Bart.)*, 9 B. & C. 356.
Newman v. Stretch, M. & M. 338. *Doe d.*
Waithman v. Miles, 1 Stark. 181. *Doe d.*

Lowden v. Watson, 2 ibid. 230. *Doe d. Digby*
v. Steel, 3 Camp. 115. *Pasmore v. Boussfield*,
1 Stark. 296. *Greenway v. Hindley*, 4 Camp.
52. *Gibson v. Coggon*, 2 ibid. 188. *Pat-*
erson v. Becher, 6 B. Moore, 319.

(4) 1 C. & P. 73., vide etiam *Fox v.*
Waters, 4 Jur. 555.

(5) 1 C. & P. 558. R. & M. 187.

(6) *Hodgson v. Fullarton*, 4 Taunt. 787.

- Admissions.** room where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had hereby an opportunity of inspecting and correcting the account. Lord Kenyon admitted the book as evidence of the delivery, though it was not proved, that the servants who made the entry were dead, nor was their absence accounted for, and only their handwriting was proved: — because the daily account in the book was considered as tantamount to a bill delivered and admitted by the defendant. (1)
- Depositions of deceased persons under a fiat.** In an action by a bankrupt against his assignees to try the validity of his fiat, depositions of deceased persons taken under the fiat and enrolled by the assignees, are not evidence against them as admissions by reason of the enrolment. (2)
- Partnership books.** Although partnership books are evidence against partners as being the acts and declarations of such partners, being kept under their superintendence, yet the books of a corporate company are not evidence against a member of the company, as entering into a contract with the company; in such respect he is to be regarded as a stranger; and "can be affected by no entry made under orders from the entire body." (3)
- Corporate books.**
- Parol admission not receivable to contradict documentary evidence.** A parol admission appears not to be receivable for the purpose of contradicting documentary evidence. Thus, where a person was proved to be seised of certain lands by documents produced in the cause, his declarations to the effect that he had a less estate than a fee simple were rejected: but as observed by Mr. Justice Littledale, "in the cases where such declarations had been received, the declarant's title had rested merely on the fact of possession." (4)
- Where an admission of record, will not dispense with its proof.** An admission in an answer in Chancery of the execution of a deed is only secondary evidence, and does not supersede the necessity of proving it in the regular way. (5) So also with regard to matters of record and judicial proceedings. (6) Thus, in order to prove the incompetency of a witness on the ground of infamy, his own admission of having been convicted is not sufficient, and an examined copy of the record of his conviction must be produced. (7)
- ADJUSTMENT ON A POLICY.** An adjustment on a policy, though *prima facie* evidence against a person signing it, does not bind him, unless there was a full disclosure of the circumstances of the case. (8) An adjustment and the striking out the name from a policy does not prove payment. (9) In cases of fraud, or where the underwriter is mistaken in the law, or in a material fact, the adjustment has been held not to be conclusive. (10)

(1) *Wiltzie v. Adamson*, K. B. Sitt. after M. T. 1789, cit. *Phillipps' Ev.* 375., vide etiam *Alderson v. Clay*, 1 Stark. 405. *Raggett v. Musgrave (Bart.)*, 2 C. & P. 556.

(2) *Chambers v. Bernasconi*, 1 C. M. & R. 347. *Doe d. Wilkins v. Cleveland (Marquess of)*, 9 B. & C. 870.

(3) *Hill v. Manchester Water Works Comp.* 5 B. & Ad. 875., post, 1629. *Dunston v. Imp. Gas Comp.* 3 ibid. 125. As to the possession of survey, vide *Roe d. Brune v. Rawlings*, 7 East, 290. Possession of letters, *Hewitt v. Piggott*, 5 C. & P. 77. Manorial rolls, *Ely (Dean and Chapter of) v. Caldecott*, 7 Bing. 433. Letters or writings in possession

of prisoners, *Watson's case*, 2 Stark. 140. *Horne Tooke's case*, 25 Howell's St. Tr. 120.

(4) *Harrison v. Moore*, Nott. Spr. Ass. 1837, cit. *Phillipps' Ev.* 365.

(5) *Call (Bart.) v. Dunning*, 4 East, 53. *Cunliffe v. Sefton*, 2 East, 187., sed vide *Bowles v. Langworthy*, 5 T. R. 366.

(6) *Scott v. Clare*, 3 Camp. 236.

(7) *Phillipps' Ev.* 365.

(8) *Shepherd v. Chewter*, 1 Camp. 274.

(9) *Adams v. Sanders*, M. & M. 373., vide *Reyner v. Hall*, 4 Taunt. 725.

(10) *Christian v. Coombe*, 2 Esp. N. P. C. 489.

Admissions which a defendant would be obliged to make in his answer to a bill in equity are evidence. (1)

And also by way of admission, in favour of a person who was no party to the Chancery suit (2), for the statements being upon oath, cannot be considered as conventional merely. A mere voluntary affidavit is evidence as an admission against the party who makes use of it. (3) But the admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone. (4)

It is no objection to the proof of a mere admission, that it was made under compulsive process: thus, an answer to a bill in Chancery, filed against the defendant by a stranger, may be read against him to show the admission of a particular fact. (5)

An answer in Chancery is admissible in evidence against a privy in estate, and the answer can be read against persons in occupation of property, in proof, that it was the reputation of the county, that the lands had belonged to the person making the answer. (6)

On a trial touching the right to lands, decrees in Chancery between other parties concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands. (7)

If part of an answer in Chancery be read in evidence, the other party is entitled to have the whole read. (8)

And if on exceptions taken, a second answer be put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. (9)

Where an answer or depositions in Chancery are offered in evidence, as to the admissions of a party upon oath, or for the purpose of contradicting a witness, it appears not to be necessary to produce any of the other proceedings, as the bill, answer, or decree, for the purpose of elucidating the admission (10); although, in general, an answer to a question cannot be read, without shewing the question to which it relates. (11)

But where a bill of discovery had been filed, upon which there had been a decree and order for bringing into court certain letters: — It was held, these letters could not be read in an action at law between the parties to the

ADMISSIONS.

ANSWERS IN
CHANCERY.Voluntary affi-
davit.Husband and
wife.Compulsive
process.Against a privy
in estate.Entire answer
must be read.Production of
answers, for the
purpose of con-
tradicting a
witness.

(1) *Slack v. Buchanan*, Peake's N. P. C. 7. Bull. N. P. 237. *Doe d. Digby v. Steel*, 3 Camp. 115. *Sussex (Earl of) v. Temple*, 1 Ld. Raym. 310. *Gully v. Exeter (Bishop of)*, 5 Bing. 171. *Grant v. Jackson (Bart.)*, Peake's N. P. C. 268. *Salter v. Turner (Clerk)*, 2 Camp. 87. *Hodgkinson v. Willis*, 3 ibid. 401. *Dartmouth (Countess of) v. Roberts*, 16 East, 334. *Studdy v. Sanders*, 2 D. & R. 347. 12 Vin. Abr. Evidence, 93. [A. b. 17.], post, 1640.

(2) *Ashmore v. Hardy*, 7 C. & P. 505. *Grant v. Jackson (Bart.)*, Peake's N. P. C. 268.

(3) *Vicary's case*, 3 Bac. Abr. Evidence, (F.) 267. *Sacheverel v. Sacheverel*, ibid. 272. *Cameron v. Lightfoot*, 2 W. Black. 1191. *Johanson v. Ward*, 6 Esp. N. P. C. 47. Bull. N. P. 238. *Rex v. James*, 1 Show. 397.

(4) *Elston v. Wood*, 2 Myl. & K. 678.

(5) *Grant v. Jackson (Bart.)*, Peake's N. P. C. 268.

(6) *Sussex (Earl of) v. Temple*, 1 Ld. Raym. 310.

(7) *Davies d. Lowndes*, 2 Scott, 71. 1 Bing. N. C. 606.

(8) *Bath (Earl of) v. Bathersea*, 5 Mod. 9. *Lynch v. Clark*, 3 Salk. 153. Gilb. Ev. 44., sed vide *Sparin v. Drax*, cit. Bull. N. P. 238.

(9) *Rex v. Carr*, 1 Sid. 418. Bull. N. P. 237. Gilb. Ev. 40. Phillipps' Ev. 357.

(10) *Dartmouth (Countess of) v. Roberts*, 16 East, 334. *Ewer v. Ambrose*, 4 B. & C. 25. *Salter v. Turner (Clerk)*, 2 Camp. 87. *Hodgkinson v. Willis*, 3 ibid. 401.

(11) *Rex v. Picton*, 30 Howell's St. Tr. 466. Phillipps' Ev. 360.

ADMISSIONS.

Chancery suit, without first putting in the bill and answer (1); because the answer might contain such a contradiction or explanation of parts of the letters, as might wholly neutralise their effect. (2)

ATTORNEYS' BILLS.

A bill delivered by an attorney to his client, for business done during a certain period, is presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of having transacted other business for the defendant. (3)

Where a defendant signed an admission of a debt, to enable an attorney to prove it under a commission of bankruptcy then subsisting against him:—It was held to be no admission of the delivery of a signed bill, and did not dispense with the necessity of proof of the delivery of such a bill in an action subsequently brought for the same claim (4), but the bill might have been proved under the fiat without proof of delivery.

BILL IN CHANCERY.

“A bill in Chancery is not evidence of any fact therein contained, but is to be taken merely as the suggestion of counsel.” (5) It does not, however, distinctly appear, whether a bill in Chancery is not evidence when produced by way of an admission; and there are authorities in favour of such evidence being received. (6)

CERTIFICATE.

A parish *certificate* is conclusive upon the parish granting it, with respect to that parish to which it is granted, and *prima facie* evidence with respect to other parishes. (7)

DEEDS (PARTIES TO).

Parties to a deed cannot at law dispute the accuracy of the facts contained in such deed. (8)

Facts stated in a deed cannot be disputed where there is no mutuality.

But a party to a deed may contradict it in an action between himself and a stranger to it, if not pleaded by way of estoppel; because, as there is no mutuality, there can be no estoppel. (9) It seems where issue is found on a demurrable plea, evidence may be admitted in support of it, though inconsistent with an admission on the record (10), and that the recital in a deed ought not to be treated as conclusive upon the trial of an issue, the recital not having been pleaded by way of estoppel.

In trespass against a sheriff, a bill of sale executed by the sheriff to a purchaser of the property, reciting the writ and the seizure and sale of the property under it, is *prima facie* evidence of the facts recited in it. (11)

From *Baker v. Dewey* (12) it seems to have been laid down, apparently without sufficiently advertng to the circumstance of the deed being used by a party to it, or to the fact of its being pleaded by way of estoppel or not, that a party who executes a deed is precluded from saying,

(1) *Hewitt v. Piggott*, 5 C. & P. 77., vide *Temperley v. Scott*, *ibid.* 341. *Roe (Bart.) v. Day*, 7 *ibid.* 705.

(2) Vide etiam *Long v. Champion*, 2 B. & Ad. 284.

(3) *Loveridge v. Botham*, 1 B. & P. 49.

(4) *Eicke v. Nokes*, M. & M. 303.

(5) Per Lord Kenyon in *Doe d. Bowerman v. Sybourn*, 1 T. R. 3. *Le Marchant Gardner's Peerage*, 413., et vide *Ferrers v. Shirley*, Fitz. 197. *Wollet v. Roberts*, 1 Ch. Ca. 64.

(6) Bull. N. P. 235. *Snow v. Phillips*, 1 Sid. 221. *Taylor v. Cole*, 7 T. R. 3. n.,

where a bill in Chancery was received as evidence of reputation in a case of pedigree, which perhaps is an authority *à fortiori*. Gilb. Ev. 49.

(7) *Rex v. Lubbenham*, 4 T. R. 251.

(8) *Baker v. Dewey*, 1 B. & C. 707. *Lampon v. Corke*, 5 B. & A. 606. *Rowntree v. Jacob*, 2 Taunt. 141., *post*, 1618.

(9) Phillipps' Ev. 387., vide etiam *ante*, 1606., *post*, 1626.

(10) *Bowman v. Rostron*, 2 A. & E. 295.

(11) *Woodward v. Larking*, 3 Esp. N. P. C.

286.

(12) 1 B. & C. 707.

that the facts stated in the deed are not truly stated. (1) But that case recognises the principle, that a party to a deed may contradict it in an action between himself and a stranger to it, if not pleaded by way of estoppel; for as there is no mutuality, there can be no estoppel.

ADMISSIONS.

Where a deed is used as an admission against a party to it by a person who is not a party, it seems material to consider, that an admission of a fact, not made upon oath, may have been entered into between persons from various causes, besides that of a conviction of the truth of the facts contained in it. The evidence may have been of a conventional nature merely; and the only question seems to be, whether it is admissible at all as between a party to a deed and stranger to it. (2)

The inscription on a stage-coach, of the name of the party licensed to use it, is evidence against him of ownership, as well in an action, as on summary proceedings (3); in fact, whatever is written by a party may be used as an admission against him, though signed by a third person. (4)

INSCRIPTIONS.

In *Bacon v. Chesney* (5) it was held, that it was competent to shew a mistake in an invoice, though it was in the same case considered, that if it had been delivered with the goods, or under a judge's order, the party would have been bound by it.

INVOICE.

A statement in a lease by a landlord has been held admissible against a person, who claims under a subsequent lease of the same land. (6)

LEASE.

The recitals in a lease or charter are *prima facie* evidence of the facts embodied in it. Thus, the recital of a lease in a release is evidence of the release (7); the recital of an ancient charter in a modern charter is evidence of its having existed (8); and the recitals in a deed may confine the effect of other admissions in the same document, as of the receipt of the purchase money. (9)

Recitals.

The date of a lease is also evidence of its execution on the same day. (10)

Date.

A letter is to be presumed to be written on the day on which it is dated, until the contrary is shewn to be the fact. (11)

LETTERS.

"What is said to a man before his face, he is in some degree called upon to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man by omitting to answer a letter at all events, admits the truth of the statements that letter contains." (12) A line of a letter may be read which contains a demand of a certain amount, but not any other part which states any supposed fact or facts. (13)

Judgment of Lord Tenterden in *Fairlie v. Denton*.

But in *Child v. Grace* (14) it was held, that what is said by a party to a suit to the opposite party may sometimes be evidence, but not what is said by a stranger, unless it draws forth an answer.

(1) *Rowntree v. Jacob*, 2 Taunt. 128. *Lampon v. Corke*, 5 B. & A. 606.

(2) *Slaney v. Wade*, 1 M. & C. 338. *Fort v. Clarke*, 1 Russ. 604. *Rex v. Scamonden*, 8 T. R. 179. *Phillipps' Ev.* 388.

(3) *Barford v. Nelson*, 1 B. & Ad 571.

(4) *Alexander v. Brown*, 1 C. & P. 288.

(5) 1 Stark. 193. The mistake was in the time of credit allowed for payment.

(6) *Crease v. Barrett*, 1 C. M. & R. 932.

(7) *Ford v. Grey (Lord)*, 1 Salk. 286.

(8) *Gervis v. Grand Western Canal Comp.* 5 M. & S. 78.

(9) *Lampon v. Corke*, 5 B. & A. 607.

Ford v. Grey (Lord), 6 Mod. 44. 1 Salk. 285. *Cragg v. Norfolk*, 2 Lev. 108. *Fitzgerald v. Eustace*, Hardr. 123.

(10) *Phillipps' Ev.* 387. cit. 1 Salk. 485. *Ingleby v. Swift*, 10 Bing. 84. Bull. N.P. 298.

(11) *Hunt v. Massey*, 3 N. & M. 109.

(12) *Dict.* Lord Tenterden in *Fairlie v. Denton*, 3 C. & P. 103., vide *Rex v. Plumer*, R. & R. 264., where a letter found in the possession of a prisoner was held, not to be evidence of its contents.

(13) *Fairlie v. Denton*, 3 C. & P. 103.

(14) 2 *ibid.* 193.

ADMISSIONS.

Letters written to the assured by his agent or correspondent on the Continent, are not admissible as evidence against him (1); and where letters between parties shewed that an insurance broker had considered himself as dealing with one of the owners of a ship only, and as having insured for him alone; they were held to be conclusive against the broker, as fixing him with an agency for his correspondent solely. (2)

A letter written by an agent (though not known to be such by the party to whom the letter was written), speaking of a ship as his own ship, is not conclusive against him in an action on a policy of insurance, in which the question of ownership is raised: he may still prove that he is only an agent, and that others are in fact the owners of the vessel. (3)

A letter written by a party is not admissible in evidence in his own favour, except as a notice or a demand. (4)

A letter written by a party is not evidence against him, without producing that to which it purports to be an answer. (5)

MODUS.

An ancient statement, concerning the payment of tithes of a parish by a *modus* signed by the rector for the time being, is evidence against a succeeding rector. (6)

Judgment of
Lord Ellen-
borough in
Dartmouth
(*Countess of*)
v. Roberts.

In *Dartmouth (Countess of) v. Roberts* (7) it was held, that an answer to a bill filed in the court of Exchequer, in a suit instituted for tithe-hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, was evidence in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted; Lord Ellenborough observing, "This appears to me, not to be *res inter alios acta*, but *inter eosdem acta*; and was not only evidence, but strong evidence, against the defendant, who stood in the same place, by derivation of title and by legal obligation, as the former occupier of the same land; and who [the previous occupier], upon his oath, in a suit against him by the vicar, has declared that the tithe is due to the rector, and not to the vicar; and now that same person [the defendant] *in effect* is deraigning the title of the rector in favour of the vicar." (8)

The receipts for a *modus* given by a vicar's lessee are evidence against the vicar by reason of the privity of estate. (9)

PRESENTATION.

A case stated for the opinion of counsel, touching the right of presentation to a living by a bishop, was held to be evidence against a subsequent bishop of the same see on a question touching the right of presentation to the same living. (10)

RECEIPTS.

Judgment of
Lord Ellen-
borough in
Alner v. George.

In *Alner v. George* (11) Lord Ellenborough, in observing upon the effect which receipts should have upon the minds of juries, said, "There can be no doubt that a receipt in full, when the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon

(1) *Reyner v. Pearson*, 4 Taunt. 662.

(2) *Roberts v. Ogilby*, 9 Price, 269.

(3) *Tulloch v. Boyd*, Holt's N. P. C. 487.

(4) *Richards v. Frankum*, 9 C. & P. 221.

(5) *Mortimer v. Wright*, 4 Jur. 465.

(6) *Maddison v. Nuttall*, 6 Bing. 226.

(7) 16 East, 338.

(8) Vide etiam *Travis v. Chaloner*, 3

Gwilll, 1237. *Askby v. Power*, *ibid.* 1239.

Benson v. Olive, 2 *ibid.* 701. *Sussex (Earl of) v. Temple*, 1 Ld. Raym. 310.

(9) *Jones v. Carrington (Clerk)*, 1 C. & P. 329.

(10) *Meath (Bishop of) v. Winchester (Marquess of)*, 3 Bing. N. C. 183., *post*, 1634.

(11) 1 Camp. 393., *post*, 1630.

him; "but," as observed by Lord Kenyon in *Bristow v. Eastman* (1), "in order to make such receipt conclusive, it must be given by one having full authority to do so." (2)

ADMISSIONS.

If the language of a receipt be ambiguous, evidence is admissible to explain such ambiguity: thus, in *Bowman v. Horsey* (3) Lord Abinger said, "There is an ambiguity in the language of the instrument; the defendant is to hold them [goods] for one person, and yet on account of another. I think this falls within the general rule, that upon a mercantile instrument you may give evidence of usage in explanation of an ambiguous expression."

Judgment of Lord Abinger in *Bowman v. Horsey*.

In *Lampon v. Corke* (4) the deed recited an *agreement* to pay, and afterwards stated, that, "in consideration of the purchase money being now so paid as hereinbefore is mentioned," &c.; upon which it was observed, that estoppels were *odious in the law*, and ought to be clearly made out, and that as the deed did not state an absolute payment, the payment might be disputed: and it was said by Mr. Justice Holroyd, with reference to the receipt indorsed on the deed, that "not being under seal, it cannot amount to an estoppel, but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case." (5)

Estoppels odious in law.

But it is otherwise, if the deed itself, or any other deed, state such receipt, for then the doctrine of estoppels may apply. (6)

A receipt upon a negotiable instrument may be explained or contradicted in the same manner as any other receipt. (7) Lord Kenyon in *Scholey v. Walsby* (8) was of opinion, that a receipt on the back of a bill might be explained by parol evidence to be a receipt from the drawer, and not the acceptor. In *Fairmaner v. Budd* (9) a receipt, "received 10*l.* for a colt warranted sound," signed by an illiterate man, was held not conclusive of the contract.

Receipt for money not conclusive.

As a receipt for money is not conclusive, there is no legal objection to the party who signed it shewing, if he can, that the money was not received, or that he gave the receipt under a mis-representation or fraud (10), unless there has been a fraud practised by the assured to induce the broker to give credit to him. (11) If a man give a receipt for the last rent, the former is presumed to be paid. (12) A receipt on the back of a bill of exchange is *prima facie* evidence of payment by the acceptor (13); but the giving a receipt does not exclude parol evidence of payment. (14)

In debt for work and labour, to which there was a plea of *nunquam indebtedatus*, a receipt for a certain amount of labour, acknowledging that it is

(1) 1 Esp. N. P. C. 174.

(2) Respecting the liability of agents for their receipts, *antè*, 1606. *Shaw v. Picton*, 4 B. & C. 729. *Skyring v. Greenwood*, *ibid.* 281.

(3) 2 M. & Rob. 86.

(4) 5 B. & A. 609.

(5) *Skaipe v. Jackson*, 3 B. & C. 421. *Lampon v. Corke*, 5 B. & A. 611. *Graves v. Key*, 3 B. & Ad. 318.

(6) *Rowntree v. Jacob*, 2 Taunt. 144., vide *Lampon v. Corke*, 5 B. & A. 609. *Baker v. Dewey*, 1 B. & C. 704. Co. Litt. 512.

(7) Per cur. in *Graves v. Key*, 3 B. & Ad. 318. *Stratton v. Rastall*, 2 T. R. 366. *Wyatt*

v. Hertford (Marquess of), 3 East, 147. *Heane v. Rogers*, 9 B. & C. 586.

(8) Peake's N. P. C. 34.

(9) 7 Bing. 574., *antè*, 1291.

(10) *Stratton v. Rastall*, 2 T. R. 366. *Benson v. Bennett*, 1 Camp. 394. n. *Att. Gen. v. Randall*, 2 Eq. Ca. Ab. 742. recog. in 2 T. R. 369. *Bristow v. Eastman*, 1 Esp. N. P. C. 172. *Dalzell v. Mair*, 1 Camp. 532. *De Gaminde v. Pigou*, 4 Taunt. 246.

(11) *Foy v. Bell*, 3 Taunt. 493.

(12) Gilb. Ev. 142.

(13) *Scholey v. Walsby*, Peake's N. P. C. 35.

(14) *Rambert v. Cohen*, 4 Esp. N. P. C. 214.

ADMISSIONS. the plaintiff's entire claim for labour up to a certain day, is admissible in evidence if tendered to shew that nothing else was due. (1)

But in ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of the defendant. (2) A receipt for damages in an action is evidence of the event of an action, where the issue was collateral, and there was no dispute between the parties as to the reality of the judgment. (3)

RECITALS IN A DEED.

When a party has solemnly admitted a fact, under his hand and seal, he is estopped, not only from disputing the deed itself, but every fact which it recites. (4)

Against whom recitals are evidence.

A recital in a deed is evidence against the grantor, or those claiming under him (5), and likewise operates as an estoppel (6); but a party claiming under a certain title, does not necessarily admit statements in previous deeds, which make up his title. (7) But a recital will not operate as an estoppel, or as evidence against one who was neither a party to the deed, nor claims under the party.

The whole of a recital must be taken.

The whole of a recital is to be taken, and therefore, if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender. (8)

Evidence of an ancient charter may be given, from a recital of such instrument in a modern charter. (9)

The recital in a bond, that the parties had agreed to execute a bond in the sum of 500*l.*, will not confine the bond to that sum, if actually executed in the penal sum of 1000*l.* (10): but the recitals in a deed may confirm the effect of other admissions in the same instrument (11)

When attesting witness should be called.

If the recital of a deed be used as an admission, the attesting witness should be produced, though the deed be cancelled. (12)

Where a party is under the necessity of producing and proving a writing in order to connect a defendant with the act of an agent, the recital of the authority under which the principal assumes to act, will not relieve the latter from the necessity of proving that authority in his own justification by the proper evidence. (13)

RECORD (ADMISSION ON THE.)
Judgment of Mr. Baron Alderson in *Edmunds v. Groves*.

In *Edmunds v. Groves* (14) Mr. Baron Alderson said, "An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn proved like any other facts."

Immaterial averments.

A record will not be conclusive as to the truth of allegations which were not material nor traversable. (15) Thus, a party will not be estopped from

(1) *Lawler v. Clements*, 4 Jur. 768.

(2) *Doe d. Haden v. Burton*, 9 C. & P. 254.

(3) *Anon.* Lofft, 303.

(4) Bull. N. P. 298. (b.), *antè*, 1614.

(5) Com. Dig. Evidence (B. 5.), *et vide* *Rees v. Lloyd*, Wightw. 123.

(6) *Bowman v. Taylor*, 4 N. & M. 264.

(7) *Doe d. Lane v. Shelton*, 3 A. & E. 265. Roscoe's Ev. 47.

(8) Com. Dig. Evidence (B. 5.).

(9) *Gervis v. Great Western Canal Comp.*

5 M. & S. 78.

(10) *Ingleby v. Swift*, 10 Bing. 84.

(11) *Lampon v. Corke*, 5 B. & A. 607.

(12) *Breton v. Cope*, Peake's N. P. C. 44., *vide antè*, 1615. LEASE (RECITALS IN).

(13) *Grey v. Smith*, 1 Camp. 387.

(14) 2 M. & W. 645., *post*, 1629. tit. RECORD (PARTIES TO).

(15) Co. Litt. 352. (b.)

averring in an action of debt on a bond, that the bond was made at A., though in a former action on the same bond he averred it to have been made at B. (1)

ADMISSIONS.

No evidence need be given to prove any facts which are admitted by the pleadings on the record, nor can any be received to dispute such admissions; for the jury are only sworn to try the matters in issue between the parties, so that nothing else is properly before them (2); and in fact, whatever is pleaded and not denied, will be taken to be admitted (3), so that the jury cannot find to the contrary. (4)

PLEAS.

Facts admitted by the pleadings.

But an averment in one count of a declaration, or in one distinct plea, cannot be insisted on as an admission of any fact in another count or plea. (5) Therefore, a plaintiff cannot use one plea as evidence of a fact which the defendant denies in another (6); nor can he use a notice of set-off, as evidence of the debt, on an issue of *non assumpsit*, because the statute gives the notice in the nature and place of a plea (7); nor can he use a particular of set-off for that purpose, because it is incorporated with the notice. (8)

An admission in one count is not an admission of a fact in another count.

An admission on the face of one plea cannot be made use of to prove or disprove another plea. (9)

But where it appears, from the whole conduct of a cause, that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to that fact, as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record; and the court refused to grant a new trial, on the ground, that the judge had stated to the jury a fact so admitted between the parties, as being admitted on the record, and applied such supposed admission in support of another issue. (10)

When facts are admitted.

The statements in a special plea, which has been held bad on demurrer, are not evidence for the plaintiff on the general issue, although the jury are to assess damages, as well as to try the case on the general issue. (11) But the case must be tried on the general issue, without any reference to the special plea. (12)

Statements in a special plea held bad on demurrer.

A plea in an action which was discontinued, and wherein no judgment was entered, is not admissible evidence against the party pleading it, of a fact therein averred. (13) And where, in covenant on a charter-party, a plea took an issue on an immaterial part of a breach: — It was held, that by so doing, the defendant admitted the material part as stated in the declaration. (14)

Plea in a discontinued action, wherein no judgment was entered.

The plea of the general issue admits only the title stated in the declaration; and therefore, where *profert* is made of letters of administration which are void on the face of them, the plea of the general issue does not admit the title of the plaintiff, so far as to enable him to recover. (15) In

Plea of general issue.

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|--------------------------------------------------------------|-----------------------------------------------------------------------|
| (1) Com. Dig. Estoppel (E. 6.). | (9) <i>Stracy v. Blake</i> , 1 M. & W. 168. |
| (2) <i>Anon.</i> Bull. N. P. 298. (a.) | (10) <i>Ibid.</i> |
| (3) <i>Wimbish v. Tailbois</i> , Plowd. 48. | (11) <i>Montgomery v. Richardson</i> , 5 C. & P. 247. |
| (4) 2 Lutw. 1215. Bull. N. P. 298. (a.) | (12) <i>Firmin v. Crucifix</i> , <i>ibid.</i> 98. |
| (5) <i>Harington v. M^r Morris</i> , 5 Taunt. 228. | (13) <i>Allen v. Hartley</i> , 4 Doug. 20. |
| 1 Marsh. 33. | (14) <i>Deffail v. Brocklebank</i> (<i>in error</i>), 3 Bligh, 561. |
| (6) <i>Ibid.</i> | (15) <i>Adams v. Savage</i> , 6 Mod. 134. |
| (7) <i>Ibid.</i> | |
| (8) <i>Miller v. Johnson</i> , 2 Esp. N. P. C. 602. | |

ADMISSIONS.

an action by husband and wife the plea of the general issue admits the marriage. (1) And where in trespass the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, the nuisance is admitted, and the plaintiff cannot go into evidence to negative it. (2)

Effect of a fact being admitted on the pleadings.

It seems, that a fact admitted by the pleadings is not to be considered on the same footing, as if it had been proved to the jury. Thus, if a defendant plead, that a note originated in a gaming debt, and that plaintiff took it with knowledge and without consideration, and plaintiff denies any knowledge of the illegality, yet he need not prove the consideration unless the defendant proves the illegality (3); and *non assumpsit* admits no immaterial allegation in the inducement. (4)

DEMURRER.

Neither a plea nor demurrer to a bill in equity admit the facts, so as to be evidence against the defendant in another transaction between the same parties; for if the demurrer be overruled, the party is still allowed to answer over, and a plea only *supposes* the facts charged to be true. (5)

A demurrer admits all facts in controversy between the parties on the point of demurrer. (6) And therefore, upon a writ of inquiry after a judgment on demurrer, the defendant cannot control any thing but the amount of the sum in demand. (7)

Demurring to a bad plea of justification in slander, is no admission of the truth of all the slanders contained therein, as it confesses nothing but what is well pleaded. (8)

But it is doubtful whether a defendant, by demurring to a declaration for a libel, stated to have been published with intent to cause certain matters to be believed, does not admit particular words in the libel to have been published with that intent. (9)

The setting out a judge's order in pleading is not, upon demurrer, to be taken as an admission of the facts stated in the order. (10)

Where a plea has been demurred to, the defendant, on the trial of issues joined on other pleas, has no right to advert to the matters alleged in the plea demurred to, as matters admitted by the plaintiff, though the *venire* be to assess the damages on the demurrer as well as to try the issues. (11)

REPLICATION.

In *Holt v. Miers* (12), where in a former action between the same parties, in which no judgment had been taken out, certain statements were made in the defendant's plea, which were not denied by the replication:—It was held, that neither the issue which was delivered by the plaintiff himself, nor the *Nisi Prius* record in the former action, were admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, and not denied by the replication.

(1) Bull. N. P. 20. (a.)

(2) *Pickering v. Rudd*, 1 Stark. 58. 4 Camp. 219.

(3) *Edmunds v. Groves*, 2 M. & W. 642.

(4) Roscoe's Ev. 48. *Bennion v. Davison*, 3 M. & W. 179., et vide *Blewett v. Tregonning*, 3 A. & E. 554. 579. 583.

(5) *Tomkins v. Ashby*, M. & M. 32. Roscoe's Ev. 49.

(6) *Anon.* Lofft, 461.

(7) *De Gaillon v. L'Aigle*, 1 B. & P. 368.

(8) *Jones v. Stevens*, 11 Price, 278.

(9) *Digby v. Thompson*, 1 N. & M. 485. 4 B. & Ad. 821.

(10) *Mc Cormick v. Melton*, 1 C. M. & R. 525. 5 Tyrw. 147. *Quare*, Whether circumstances not denied on the record can be assumed to be true in point of fact, or whether they are admitted only so far as to exclude them from the issue? *Noel v. Boyd*, 1 Gale, 293.

(11) *Ingram v. Lawson*, 2 M. & Rob. 253., vide *Edmunds v. Groves*, 2 M. & W. 642. *Bennion v. Davison*, 3 ibid. 179.

(12) 9 C. & P. 191.

Upon a judgment by default or on demurrer, the contract or contracts are admitted as stated in the declaration, and evidence to contradict them, which would be good under the general issue, ought not to be admitted. (1) Thus, in an action on a contract, the defendant cannot after judgment by default rely upon the fraud of the plaintiff. (2)

ADMISSIONS.
Judgment by default.

But where a defendant suffers judgment by default in an inferior court, and removes the proceedings into a superior court, in which he pleads to issue, the judgment by default is not even *prima facie* evidence of the right of action. (3)

A paper written by a party is evidence against him by way of admission, although it is signed by another person. (4)

SIGNATURE.

Ancient books of surveys and maps are frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used, and the person directing it to be made (5): thus, if A. be seised of the manors of B. and C., and during his seisin of both, he cause a survey to be taken of the manor of B., and that the manor of B. is then conveyed to E., and that subsequent disputes arise between the lords of the manors of B. and C. about their boundaries, this old survey is evidence (6) as between them, but not against strangers. (7)

SURVEYS AND MAPS.

An ancient survey of a manor, made before commissioners appointed by the lord of the manor, and a jury of the tenants of the manor, is admissible as evidence to show the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck. (8)

Manors.

Ancient grants cannot be received in evidence, unless they can be accounted for, as coming from the hands of some one connected with the estate to which they relate (9); and, as previously stated, in order to use a survey, a privity of estate must be shown between the parties who originally directed the making of the survey; consequently a terrier or map of the parish, not signed by any of the parishioners or parish officers, is not admissible evidence of the boundary of the parish. (10)

Parochial boundaries.

Nor a copper-plate map, taken by the direction of the overseers of a parish, on an issue whether a particular spot of ground is a highway or not. (11)

Where the manors of R. and of S., the parishes of C. and of Y., and the counties of B. and of G. were co-terminate:—It was held, in an action for disturbance of common, in which the boundaries of the two manors came in question, that a county history of the county of B., which stated the boundaries of the counties at this spot, was not receivable in evidence. (12)

Inadmissibility of a county history.

- (1) *Stephens v. Pell*, 2 Dowl. P. C. 629. 1 Ld. Raym. 734. *Davies v. Pierce*, 2 T. R. 53. Bull. N. P. 283.
(2) *E. I. Comp. v. Glover*, Str. 612., vide *etiam Green v. Hearne*, 3 T. R. 301. (7) Ibid. *Anon.* Str. 95. 12 Vin. Abr. Evidence, 89. [A. b. 15.]
(3) *Bottings v. Firby*, 4 M. & R. 567. 9 B. & C. 762. (8) *Talbot v. Lewis*, 6 C. & P. 603.
(4) *Alexander v. Brown*, 1 C. & P. 288., vide *etiam Harding v. Crethorn*, 1 Esp. N. 3 Taunt. 91. (9) *Swinerton v. Stafford (Marquess of)*,
P. C. 57. (10) *Earl (Clerk), v. Lewis*, 4 Esp. N. P. C. 3.
(5) *Doe d. Strode v. Seaton*, 2 A. & E. 171. (11) *Pollard v. Scott*, Peake's N. P. C. 26.
(6) *Allott v. Wilkinson*, 4 Gwill. 1585. 2 E. & Y. 293. *Bridgman (Sir John) v. Jennings*, (12) *Evans v. Getting*, 6 C. & P. 586.

ADMISSIONS.

VERBAL AD- MISSIONS.

GENERALLY.

Statements inimical to the interest of the utterer entitled to credit.

AGENTS.

Proof of agency.

Judgment of Chief Justice Tindal in *Garth v. Howard*.

III. Verbal Admissions.

Statements directly inimical to the interest of the utterer are entitled to credit, without the tests of the party being sworn or cross-examined; but it should be borne in mind, that the repetition of oral statements is subject to inaccuracies, sometimes arising from the utterer not having correctly expressed his meaning, or if correctly expressed, having been misunderstood; in fact, a trivial change of the language, without any intentional misrepresentation, may entirely alter the meaning of the statement. (1)

A parol admission by a party to a suit is always receivable as primary evidence against him, although it relate to the contents of a deed or other written instrument, and its contents be directly in issue in the cause. (2)

The evidence which a person has given before a committee of the House of Commons is afterwards admissible against him on a criminal charge. (3)

The fact of agency must be proven, before the admissions of an agent can be received; but it will be evidence of general authority to shew, that the party has acted as agent in other instances, in which his acts have been recognised by the principal. (4)

If A. have received money from B. to pay to C., and the question be, whether A. were the agent of C. for that purpose, A. may be called as a witness to prove the agency. (5)

Respecting admissions by agents, Chief Justice Tindal in *Garth v. Howard* (6) observed, "It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath; it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent, and it is brought before the court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer, and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits, to which the cases have confined it."

There is less necessity for resorting to such evidence in the case of living agents, than where proof is given of the admission of parties who may refuse to be examined; and perhaps the admissions of agents may be considered not so likely, as those of the parties, to contain an accurate and complete statement of circumstances. (7)

From the legal relation between principal and agent, the statements of an agent at the time of a transaction, if within the scope of his authority, are evidence against the principal. It is in the nature of original evidence

(1) Phillipps' Ev. 392. *Earle v. Picken*, 5 C. & P. 542. *Rex v. Simons*, 6 C. & P. 540. *Morris v. Miller*, 2 Burr. 2057. *Rigg v. Curgenven*, 2 Wils. 399. *Rex v. Whitley (Lower) (Inhab. of)*, 1 M. & S. 636. 1 Stephens's English Constitution, 165.

(2) *Slatterie v. Pooley*, 6 M. & W. 664. *Earle v. Picken*, 5 C. & P. 542.

(3) *Rex v. Mercer*, 2 Stark. 366.

(4) *Neal v. Erving*, 1 Esp. N. P. C. 61. *Watkins v. Vince*, 2 Stark. 368., *vide etiam ante*, 1606.

(5) *Iderton v. Atkinson*, 7 T. R. 480.

(6) 8 Bing. 453.

(7) Phillipps' Ev. 401.

and not of hearsay, the representation or statement of the agent in such cases being the ultimate fact to be proved, and not an admission of some other fact.

Admissions.

If bills be paid in at a banker's as short bills (*i. e.* bills which the bankers are to present when due, and carry the proceeds to account), and after a commission of bankruptcy has issued against the bankers, but before the choice of assignees, a person, on behalf of the customer by whom they were paid in, calls at the banking-house to demand a return of these bills, the answer he receives is evidence in an action of trover, brought against the assignees for the recovery of such bills. (1)

Bankers.

If an alteration have been made in the plaintiff's pass-book with his bankers by some person at his bankers, and if he inquire there, why it was done, the answer he receives from a person acting in the banking-house as a clerk, is evidence in an action against the bankers. (2)

But where an agent has said or written any thing relative to a past or completed transaction, the question of the admissibility of the agent's declaration, without calling the agent, is dependent on the fact, whether the making of such a statement was within the scope of the agent's authority: it being a principle, that an agent or servant can only act within the scope of his authority; therefore, declarations made by him as to a particular fact are not admissible in evidence, unless they fall within the nature of his employment as such agent or servant. (3)

Authority of agents, how restricted.

Can only act within the scope of their authority.

The declarations of an agent are only admissible in evidence against the principal, when they form part of the contract which he has entered into, and is employed to negotiate on behalf of the principal; therefore, where the principal, through the medium of his agent, chartered his ship to J. S., and engaged by the charter-party that she was seaworthy, a letter written by the agent to a third person previously to the charter-party being effected, tendering the ship for hire, is not admissible in evidence, as it did not form a part of the contract on which the action was founded; but the agent himself must be called. (4)

Declarations only admissible, when they form part of the contract, for which they are employed to negotiate on behalf of their principals.

Although what is said by an agent respecting a contract or other matter in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal, it is otherwise as to what is said by him on another occasion. (5)

Where payments were made by A. purporting to be on account of the defendant, who took credit in account for them: and a letter was written by the plaintiff to the defendant, which was answered by A. in a letter stating, that the defendant had handed the plaintiff's letter to him: — It was held, that as A.'s letter contained an admission of the debt, there was evidence of A.'s authority to make the admission. (6)

But where statements were made by the shopman of a pawnbroker, who was left in the shop to answer in his master's absence: — It was decided, they

(1) *Tennant v. Strachan*, 4 C. & P. 31. M. & M. 378., *antè*, 754. tit. BILLS OF EXCHANGE AND PROMISSORY NOTES.

(2) *Price v. Marsh*, 1 C. & P. 60.

(3) *Schumack v. Lock*, 10 Moore, 39. *Fairlie v. Hastings*, 10 Ves. 123.

(4) *Betham v. Benson*, Gow, N.P.C. 45.

(5) *Peto v. Hague*, 5 Esp. N. P. C. 134.

(6) *Morel v. Harborough* (Lord), 1 Gale, 146.

Admissions.

Judgment of
Chief Justice
Tindal in *Garth*
v. Howard.

could only be received in evidence in an action against the master, when they related to transactions which were strictly within the business of a pawnbroker; and were not receivable if they related to an advance of money not within the terms of the Pawnbrokers' Act(1); Chief Justice Tindal observing, that, "If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent, that his master had received goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry, made by any person interested in the goods deposited with the pawnbroker." "But the transaction appears not a transaction in his business as a pawnbroker;" "and there is no evidence to shew the agency of the shopman in private transactions unconnected with the business of the shop." (2)

In *Lawrence v. Thatcher* (3) it appeared, that A. having assigned his stock in trade and business to two trustees, one of them directed the plaintiff to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, and it was arranged that Mr. L. should remit the plaintiff money while there; the plaintiff went there, and Mr. L. sent a letter to him announcing that he had done so:—Upon which it was held, in an action by the plaintiff against the trustees for a compensation for going that journey, that the statements in Mr. L.'s letters were not evidence; and also, that the declarations of a person whom the trustees had placed at the house of business to manage the shop, were also not evidence to shew, that the plaintiff was entitled to be paid for taking an account of the stock.

When agent
must be called
as a witness.

A letter written by an agent or broker, by whom a contract has been made, is not evidence, where such agent or broker can be called as a witness. (4)

"If the agreement," said the Master of the Rolls in *Fairlie v. Hastings* (5), advertng to *Maesters v. Abraham* (6), "was contained in the letter, I should have thought it sufficient to have proved that letter was written by the agent; but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." In *Kohl v. Jansen* (7) and *Langhorn v. Allnutt* it was holden (8), that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal as the mere representation of the agent, Mr. Justice Gibbs observing, "When it is proved that A. is agent to B., whatever A. does or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B., but it is not admissible as his account of what he does."

But a letter from an agent abroad, stating the receipt of money coupled

(1) *Garth v. Howard*, 8 Bing. 451. 5 C. & P. 346.

(2) Vide etiam *Maesters v. Abraham*, 1 Esp. N. P. C. 375. *Fairlie v. Hastings*, 10 Ves. 128. *Helyear v. Hawke*, 5 Esp. N. P. C. 73. *Schumack v. Lock*, 10 Moore, 39.

(3) 6 C. & P. 669.

(4) *Maesters v. Abraham*, 1 Esp. N. P. C. 375.

(5) 10 Ves. 127.

(6) 1 Esp. N. P. C. 375.

(7) 4 Taunt. 565.

(8) Ibid. 519. *Reynar v. Pearson*, *ibid.* 663.

Judgment of
Mr. Justice
Gibbs in *Lang-*

with the answer of the employer, directing the disposition of the money, will be evidence of the receipt by the principal. (1)

ADMISSIONS.

So also if the attorney of a creditor write to A., asking payment of a debt due from B., and A. answer the letter, and pay 200*l.* of the debt, and afterwards the attorney again write to A., asking payment of the residue of the debt, and B. send a letter promising payment, this last letter is evidence in an action against B. (2)

When letters of agent bind the principal.

In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured, a letter written to the plaintiff respecting the pulling down of the house by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them. (3)

An affidavit of an agent cannot be used to prove a fact against his principal, where he can himself be called; but where the principal has used an affidavit of the agent in an application to the court, in which a particular fact is stated, the affidavit of the agent may be used as evidence of that fact. (4)

Affidavit of agent.

When the declarations of an agent are admitted in evidence, they are received, not for the purpose of establishing the truth of the fact stated, but as representations, by which the principal is as much bound, as if he had made them himself, and which are equally binding, whether the fact stated be true or false. (5)

EXPRESS AND IMPLIED AUTHORITY.

But an agent's admission will be binding on his principal, when the making of the admission is within the scope of the agent's authority; and the authority of an agent to make admissions may be either express, or implied from circumstances; and a person once proved to be an agent, is presumed to continue in that capacity. (6)

"Wherever a party refers to the evidence of another, he is bound by it;" and what such third party said is evidence. (7)

Wherever a party refers to the evidence of another, he is bound by it.

If a person says, "I'll pay you money if A. B. says it is due," and A. B. being applied to says it is due, but is dead at the time of the action brought, what he said respecting the debt is evidence. (8)

If A. refer B. for information upon any particular subject to C., what C. says concerning it, when applied to by B. or his agent, is evidence for B. in an action against A. (9)

So when a party being applied to for payment says, "A. will pay you," is an admission by A. sufficient to bind the principal, and A. need not be called (10); and it is also sufficient to take the case out of the Statute of Limitations. (11)

A. received a forged note from B., and the inspector of notes proved, that he carried back the note to B., who said if she paid it away, she had it from C., and desired him to inquire of C. about it; the inspector was allowed to

(1) *Coates v. Bainbridge*, 5 Bing. 58.

(6) *Roberts v. Gresley (Lady)*, 3 C. & P.

(2) *Roberts v. Gresley (Lady)*, 3 C. & P.

381.

(3) *Peyton v. St. Thomas's Hospital*, 3 C. & P. 363. S. C. nom. *Peyton v. London, (Mayor, &c. of)*, 9 B. & C. 725. 4 M. & R. 625.

(7) *Per Lord Ellenborough in Daniel v. Pit*, 1 Camp. 366. *n. Peake's Add. Cas.* 238. 6 Esp. N. P. C. 74.

(8) *Ibid.*

(4) *Johnson v. Ward*, 6 Esp. N. P. C. 47.

(9) *Williams v. Innes*, 1 Camp. 364.

(5) *Phillipps' Ev.* 404.

(10) *Burt v. Palmer*, 5 Esp. N. P. C. 145.

(11) *Ibid.*

ADMISSIONS.

state what C. told him, as B. had referred to C. for information on the subject (1)

If a person, on being applied to on a particular subject, state, mentioning another person, "he is in possession of my sentiments, and will attend;" "I have written to him, and I refer you to him thereon;" such reference and letter are sufficient to constitute the party referred to an agent in the business; and what he said at a meeting on the subject, may be given in evidence against the principal. (2)

Where through the defendant's negligence in not fencing a shaft, the loss of a horse accrued, and the defendant consented to indemnify the owner of the horse for his loss, if a miner's jury should say the shaft was his:—It was held, that the finding of the jury, that the shaft was the defendant's, coupled with the declaration, was evidence against the defendant upon the principle of the authorities, which make the declarations of persons referred to equivalent to their own admissions, for the jury were to be considered in the nature of accredited agents. (3)

ASSIGNOR AND ASSIGNEE.

An admission against a person's own interest being conclusive, it has been held upon an issue, whether a third person died possessed of certain property, that evidence can be given of a declaration made by that third person, of his having assigned the property, the party against whom the declarations were adduced, claiming under that person.

Declarations of an assignee of a bankrupt suing as such, made before he was chosen assignee, are not admissible against him. (4)

ATTORNEYS.

Judgment of Lord Ellenborough in *Young v. Wright*.

Respecting admissions by attorneys, Lord Ellenborough in *Young v. Wright* (5) said, "If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission; but it is clear, that whatever the attorney says in the course of conversation, is not evidence in the cause." (6)

Undertaking to appear.

An undertaking to appear "for Messrs. T. and M. joint owners of the sloop A." given by the attorney on the record, is evidence of the joint ownership. (7)

To admit execution of deeds.

An admission, "It is agreed to admit on the trial of this cause the execution of," &c. "applies to every trial which may take place by direction of the court" (8), notwithstanding the defendant's attorney retract it before the new trial. (9)

Proof of being the attorney in the cause.

In order to shew, that the person making the admission is the attorney in the cause, it is in general enough to prove, that the person making the admission is the attorney upon the record (10); but it has been held, that a letter written to a plaintiff's attorney before action brought, by the attorney

(1) *Brock v. Kent*, 1 Camp. 366. n.

(2) *Hood v. Reeve*, 3 C. & P. 532., vide etiam *Garnet v. Ball*, 3 Stark. N. P. C. 160. *Bretton v. Prettiman*, Sir T. Raym. 153. *Price v. Hollis*, 1 M. & S. 105. *Brock v. Kent*, 1 Camp. 366. n. *Beayne v. Beal*, 3 Lev. 241., *sed quare*, Whether evidence of the answer is not sufficient without calling the servant, though alive? *Williams v. Innes*, 1 Camp. 364. Roscoe's Ev. 41.

(3) *Sybray v. White*, 1 M. & W. 441., vide etiam *Lloyd v. Willan*, 1 Esp. N. P. C. 178. *Whitehead v. Tattersall*, 1 A. & E. 491. *Doe d. Morris v. Rosser*, 3 East, 15. *Hunter v.*

Rice, 15 *ibid.* 100. *Stevens v. Thacker*, Peake's N. P. C. 249.

(4) *Fenwick v. Thornton*, M. & M. 51., vide *antè*, 1606.

(5) 1 Camp. 141., *antè*, 403. tit. ATTORNEY.

(6) Vide etiam *Griffith v. Williams*, 1 T. R. 710. *Truslove v. Burton*, 9 Moore, 64. *Goldie v. Shuttleworth*, 1 Camp. 70., *antè*, 1606. 1614.

(7) *Marshall v. Cliff*, 4 Camp. 133.

(8) *Per Tindal C. J.* in *Elton v. Larkins*, 1 M. & Rob. 196.

(9) *Doe d. Wetherell v. Bird*, 7 C. & P. 6.

(10) *Marshall v. Cliff*, 4 Camp. 133.

who afterwards appeared in the cause for the defendant, was not evidence of a fact admitted therein without further proof, that the defendant authorised the communication. (1)

Admissions.

An offer by the attorney of the defendant's father, is no evidence against the defendant, though the same attorney may be afterwards employed by him. (2)

If the counsel on both sides in the conduct of a cause admit a certain state of facts, the jury can draw the same conclusion respecting such facts, as if they were formally proved before them. (3)

COUNSEL.

If a *special case* be signed by the counsel on both sides for the opinion of the court above, and stating facts proved at the trial of the cause, such case is admissible, as evidence of those facts on a new trial (4); but, whether an admission by the plaintiff's counsel in his address to the jury on a former trial, that part of his client's demand had been satisfied, be receivable in evidence, if his client were in court and heard it, and made no objection at the time (5), is questionable; but such evidence was once rejected at *Nisi Prius*.

SPECIAL CASE.

Upon an issue to ascertain, whether a commission was concerted between the petitioning creditor, bankrupt, and attorney, the declarations of a deceased petitioning creditor, made after the commission, were held not to be evidence against the assignees (6): and it was said, that the petitioning creditor could not be taken to be the real party interested in the cause, and the result of the trial, if the verdict were for the plaintiff, would not necessarily be the superseding of the commission, the issue being merely a proceeding to satisfy the chancellor's conscience.

DEBTOR AND CREDITOR.
Petitioning creditor.

To prove the defendant's admission of a debt due, the plaintiff produced a book containing a written entry signed by the defendant, but which being couched in the terms of a promise to pay, was rejected for want of a stamp:—It was held, that a verbal admission by the defendant of the amount of the debt due from him to the plaintiff, and made before or contemporaneously with his signing the entry, was properly admitted in evidence. (7)

WRITTEN ENTRIES.

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it may appear that there was a written agreement relating to the goods. (8)

PAROL ADMISSION.

Where, in order to prove that a certain debt had been entered in a schedule annexed to a composition deed, the plaintiff offered in evidence an admission of that fact by the defendant, but neither produced the deed or schedule, or accounted for their non production:—It was held, that evidence of the admission by the defendant was improperly rejected. (9)

(1) *Wagstaff v. Wilson*, 4 B. & Ad. 339.

(2) *Burghart v. Angerstein*, 6 C. & P. 690.

(3) *Stracy v. Blake*, 1 M. & W. 173.

(4) *Van Wart v. Wolley*, R. & M. 4.

(5) *Colledge v. Horn*, 10 Moore, 431. 3 Bing. 119. *Phillipps' Ev.* 410. That a statement prepared by an attorney for the opinion of counsel is evidence against a party, or those identified in interest with him, vide *Meath (Bishop of) v. Winchester (Marquess of)*, 3 Bing. N. C. 211., *post*, 1634.

(6) *Harwood v. Keys*, 1 M. & Rob. 204. It was suggested by Mr. Justice Patteson, that

in *Young v. Smith* (6 Esp. N. P. C. 121.), which was loosely reported, the declarations must have been made before the commission; and that in *Dowden v. Fowle* (4 Camp. 38.), the fact of the petitioning creditor having indemnified the sheriff, was the principle of the decision. The assignees gave the instructions for the defence; *post*, 1630.

(7) *Singleton v. Ballot*, 2 Tyrw. 409.

(8) *Newhall v. Holt*, 6 M. & W. 662., *ante*, 1607.

(9) *Slatterie v. Pooley*, *ibid.* 664.

ADMISSIONS.

GUARANTOR.
Indemnifica-
tion of sheriff.

In an action against the sheriff, the declarations of a party, who has indemnified the sheriff, are evidence against the sheriff, because such a declarant is considered as substantially the defendant. (1)

Upon the same principle it was held in *Harrison v. Vallance* (2), which was an action of trover for a deed, where the defendant admitted he retained it at the request of W. R., and in the detainer of which, W. R. was substantially interested, the declarations of W. R. in favour of the plaintiff's claim were admitted.

GUARDIAN

If a minor sue by his guardian, the declarations of the guardian are not admissible in evidence against the minor (3); nor the admissions of a *prochein amy* (4); nor those of a trustee against a *cestuique trust*. (5)

And the infant's answer in Chancery by his guardian cannot be read in evidence against the infant, for the guardian is sworn, and not the infant, and the guardian has not authority to prejudice the infant by his admissions. (6)

HOLDER OF
NEGOTIABLE
SECURITIES.

Where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims. Thus, if a person bring an action upon a bill of exchange, the declaration of a person, who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one, according to whose title his own must stand or fall. (7)

INSURERS.

Judgment of
Lord Ellen-
borough in *Bell*
v. Ansley.

"An action upon a policy may be brought in the name of the person who effected it, though he be not the person actually interested; yet the persons interested are so far looked upon as parties to the suit, that the declaration of any of them are received as admissible in evidence against the plaintiff." (8)

INTERPRETER.

Where a witness had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer; the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff, or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff, nor the answer made by him? But Mr. Justice Gould held, that the evidence of the witness was clearly admissible, and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency. (9)

OBLIGORS.

In *Whitcomb v. Whiting* (10), which was an action on a joint and several promissory note, given by defendant and others, to which action

(1) *Dyke v. Aldridge*, 7 T. R. 665., vide *Young v. Smith*, 6 Esp. N. P. C. 121. *Dowden v. Fowle*, 4 Camp. 38.

(2) 1 Bing. 45., et vide *Robson v. Andrade*, 1 Stark. 372.

(3) *Webb v. Smith*, R. & M. 106. *Cowling v. Ely*, 2 Stark. 366., vide etiam *Eggleston v. Speke*, 3 Mod. 258., sed vide *James v. Hatfield*, Str. 548.

(4) *Webb v. Smith*, R. & M. 106.

(5) Bull. N. P. 237.

(6) Gilb. Ev. 44. *Eccleston v. Petty*, Carth. 79. 3 P. Wms. 237. n. (e.), vide *Beasley v. Magrath*, 2 Sch. & Lef. (Irish), 34.

(7) *Benson v. Marshall*, cit. in *Shaw v. Broom*, 4 D. & R. 731.

(8) Per Lord Ellenborough in *Bell v. Ansley*, 16 East, 143., vide etiam *Dyke v. Aldridge*, cit. in *Bauermann v. Radenius*, 7 T. R. 665., ante, 1615. tit. LETTERS.

(9) *Fabrigas v. Mostyn*, Phillipps' Ev. 405. cit. 11 Howell's St. Tr. 171.

(10) Doug. 652. recog. in *Perham v. Raynal*, 2 Bing. 306. *Burleigh v. Stott*, 8 B. & C. 41., et vide *Chippendale v. Thurston*, M. & M. 411.

the general issue and the Statute of Limitations was pleaded, it was decided, that proof of payment of interest and part of the principal within six years by one of the others who was not sued, would take the case out of the statute, Lord Mansfield observing, "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one, is an admission by all."

ADMISSIONS.

Upon appeal against an order of removal, the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant, and shewing that he refused to be examined. (1)

PARISHIONERS.

An admission by one partner is evidence against his co-partners, if there be *prima facie* evidence of partnership. (2)

PARTNERS.

An admission by one defendant of his partnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received against him of a joint promise by all. (3)

BY PARTNER
PARTY TO A
SUIT.

A declaration by one of several partners, joint plaintiffs, that the goods, the subject-matter of the suit, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract. (4)

But entries in a book kept by the clerk of incorporated company are not evidence against a member suing them on a contract with him, although the act of incorporation directs the clerk to keep such a book, and gives liberty of inspection to all its members. (5)

In an action against two partners on a deed, purporting to be executed by one defendant for "self and partner," an admission by the other defendant, that he had given due authority to execute on his behalf, is not evidence for the plaintiff, without producing his authority. (6)

The rule with regard to the admissions of partners is not confined to cases, where they are parties to the same suit.

BY PARTNER
NOT A PARTY.

The admission of a partner, though not a party to a suit, is evidence against another partner, who is sued as to joint contracts during the partnership; and whether the admission be made before the determination of the partnership or afterwards is unimportant. (7)

But the statement of one who has been admitted into partnership subsequently to the transaction in question, is not admissible in evidence as to such antecedent transaction. (8)

An admission by a part owner of a ship, upon a subject not of co-partnership but of co-part ownership, is not evidence against another part owner. (9)

Admissions are clearly evidence against a party to the record who has made them; but some questions have arisen, as to what persons are to be deemed parties; the circumstance giving rise to these questions being,

RECORD (PARTIES TO).

(1) *Rex v. Whitley (Lower) (Inhab. of)*, 1 M. & S. 636. *Rex v. Hardwick (Inhab. of)*, 11 East, 578. *Rex v. Woburn (Inhab. of)*, 10 ibid. 395. 402., *antè*, 1608.

(2) *Nicholls v. Dowding*, 1 Stark. 81. *Grant v. Jackson (Bart.)*, Peake's N. P. C. 268., *antè*, 1608.

(3) *Sangster v. Mazarredo*, 1 Stark. 161.

(4) *Lucas v. De La Cour*, 1 M. & S. 249., *antè*, 1608.

(5) *Hill v. Manchester Water Works*, 5 B. & Ad. 866., *antè*, 1612.

(6) *Steiglitz v. Egginton*, Holt's N. P. C. 141.

(7) *Wood v. Braddick*, 1 Taunt. 104., *sed vide Rooth v. Janney*, 7 Price, 198.

(8) *Catt v. Howard*, 3 Stark. 5. *Pritchard v. Draper*, 1 Russ. & M. 191.

(9) *Jaggers v. Binnings*, 1 Stark. 64.

ADMISSIONS.**ADMISSIONS BY PARTY.**

By party suing for the benefit of another.

Trustee.

Attorney.

when one person is named a party on the record, who is only nominally a party, while another is the person really interested. (1)

Admissions are evidence in favour of the other side, whether made by a nominal party on the record, who sues as a trustee for the benefit of another (2), or whether made by the party who is really interested in the suit, though not named on the record (3); and an attorney conducting a cause in court may be called as witness by the opposite side, and be asked who employs him, in order to shew the real party, and so let in his declarations. (4)

In *Alner v. George* (5) it was held, that a receipt in full given by the plaintiff on the record could not be invalidated by showing, that the plaintiff had assigned all his interest, and was a mere trustee, and that the receipt was fraudulently given. (6)

BY PERSON INTERESTED, THOUGH NOT PARTY TO THE RECORD.

In an action on a bond, conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence; because the case was to be considered as if L. D. was the plaintiff, the action being for L. D.'s benefit. (7)

STRANGERS.
Issue on liability of stranger.

Where the question in the suit is, whether a particular claim might have been enforced as against strangers to the suit, admissions made by such strangers are sometimes evidence.

Thus, it has been held, that in a plea of abatement for the non joinder of A. B. as a defendant, his declarations before action brought, were evidence in support of the plea (8); because, whatever would be evidence in an action brought against him to prove him liable, might be received to prove his liability on this issue.

Apparently, on the same principle, the admissions of bankrupts, or entries in their books, made before the act of bankruptcy, are receivable in evidence to prove the petitioning creditor's debt. (9) And the admission of a petitioning creditor made before the fiat, as to the amount of his debt, is, on a similar ground, receivable in evidence against the assignees of a bankrupt. (10)

"In cases of this description the issue appears to be, what were the mutual rights of two persons (one or both being strangers to the suit) at a particular period; which inquiry would seem to let in such evidence, as would have been receivable between those persons. In the last example, however, it is not clear, that the decision did not turn on the point, that the assignees were liable to be affected by admissions of the petitioning creditor, because he was a privy in estate.

Admission by party in a different capacity.

"An admission may have been made by a party to a record, when in a different capacity from that in which he is concerned as regards the suit;

(1) *Phillipps' Ev.* 392., *antè*, 1618—1621.

(2) *Bauermann v. Radenius*, 7 T. R. 664. *Craig v. D'Aeth*, *ibid.* 670. n.

(3) *Rex v. Hardwick (Inhab. of)*, 11 East, 578. 589.

(4) *Levy v. Pope*, M. & M. 410.

(5) 1 Camp. 392., *antè*, 1616.

(6) *Vide etiam Gibson v. Winter*, 5 B. & Ad. 96. *Payne v. Rogers*, Doug. 407. *Legh v. Legh*, 1 B. & P. 447. *Smith v. Bromley*, Doug. 696. *Cockshott v. Bennett*, 2 T. R. 763.

(7) *Hanson v. Parker*, 1 Wils. 257. *Kemble v. Furren*, 3 C. & P. 623., *vide etiam Davis v. Dinwoody*, 4 T. R. 678.

(8) *Clay v. Langslow*, M. & M. 45.

(9) *Watts v. Thorpe*, 1 Camp. 376. *Ever v. Preston*, R. T. H. 378. *Hoare v. Coryton*, 4 Taunt. 560. *Taylor v. Kinloch*, 1 Stark. 176. *Phillipps' Ev.* 397.

(10) *Young v. Smith*, 6 Esp. N. P. C. 121., *sed vide Harwood v. Keys*, 1 M. & Rob. 205., in which Mr. Justice Patteson conceives this case to be loosely reported; *antè*, 1627.

and it seems to have been considered, in such a case, that his former admission ought not to be evidence against him. For the change which has taken place in his interest, his means of knowledge, and his powers of acting, shew that his former admission is not a safe criterion of the truth of the claim, or defence, which he is at present setting up. And the injustice of allowing his former admission to be used against him may appear to be the greater, where by the change of his situation he has become the representative of the interest of others, with whom in his former situation he had no privity." (1)

ADMISSIONS.

Thus, it has been held, that the declarations of a person, made before he became assignee of a bankrupt, are not evidence against him, when suing as such assignee (2); and the declarations of a *prochein amy*, made before action brought, are not admissible for the defendant. (3)

Prochein amy.

In a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of these persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the suit: thus, in *Rex v. Hardwick (Inhab. of)* (4) Mr. Justice Bayley said, "I consider that every rated inhabitant of a parish is a party to the suit upon an appeal against an order of removal between his parish and another, and that every such rated inhabitant may refuse to give evidence in such suit, when called upon by the opposite parish. I also think it follows from thence, that the declaration of every such rated inhabitant as to the matters in question, made at the time he was a rated inhabitant, is evidence."

By a party having a joint interest in the suit.

Judgment of Mr. Justice Bayley in *Rex v. Hardwick (Inhab. of)*.

In an action of covenant against two defendants, the affidavit of one of them was held to be evidence against both; because, "it was to be looked upon as a truth relating to them both." (5)

But unless there be a joint interest in the decision, the admission of one defendant will not be receivable against a co-defendant (6): thus, in actions of *tort*, the admission of one co-defendant will not affect another co-defendant. (7)

The admissions of an under-sheriff are evidence against the sheriff (8); but not unless they accompany an official act of the under-sheriffs, or tend to charge himself, he being the real party in the cause. (9)

SHERIFF, UNDER-SHERIFF, AND BAILIFF.

Where the declarations of the under-sheriff accompany official acts, they are in the nature of original evidence (10); though the admissions of a bailiff or sheriff's officer, when the authority is limited to the particular duties specified in his warrant, are not evidence against the sheriff. (11)

What a bailiff says while he has a party in custody (12), concerning the circumstances of the arrest, may be admissible against the sheriff as part of the act for which he is responsible (13); and it has been held, that the relation of sheriff and officer continues whilst the writ is in course of execution, and therefore that the sheriff may be affected by the officer's declar-

(1) *Phillipps' Ev.* 398.

(2) *Fenwick v. Thornton*, M. & M. 51.

(3) *Webb v. Smith*, R. & M. 106.

(4) 11 East, 589.

(5) *Vicary's case*, Gilb. Ev. 51.

(6) *Wyck v. Meale*, 3 P. Wms. 311. 12 Vea. 361.

(7) *Daniels v. Potter*, M. & M. 502.

(8) *Drake v. Sykes (Bart.)*, 7 T. R. 117.

(9) *Snowball v. Goodricke*, 4 B. & Ad. 541.

(10) *Yabsley v. Doble*, 1 Ld. Raym. 190.

Drake v. Sykes, 7 T. R. 117. *Kempland v. Macaulay*, Peake's N. P. C. 95.

(11) *Drake v. Sykes*, 7 T. R. 117.

(12) *Bowsher v. Calley*, 1 Camp. 391. n.

(13) *North v. Miles*, *ibid.* 389.

ADMISSIONS.

ations after the return of a *fieri facias*, and before a warrant is made for sale, so long as the goods are in the hands of the officer. (1) In such cases the declarations of the officer are properly original evidence, and not in the nature of hearsay or admission.

SHIPOWNERS.
Interested in freight.

In an action by the master of a ship for freight, the declarations of the owner of the ship are admissible against the plaintiff because the action is brought for the owner's benefit. (2)

SURETY.

A surety cannot in general be affected by evidence of an admission made by his principal: thus, where a party became surety by a bond for the faithful conduct of a clerk, it was held in an action upon such bond, that an admission by the clerk, made after he was discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. (3)

WIFE.

Generally, a husband will not be responsible for admissions made by his wife, even when he is suing *in jure uxoris*. (4)

Responsibility
and irresponsi-
bility of hus-
band, for the
declarations of
his wife.

Where the conduct of the wife is in question, her declarations have been held admissible for her husband in an action brought against him. Thus, in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, which statement was made previously to her expulsion, are admissible. (5) And in an action for seduction, declarations of defendant's wife tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, are evidence in aggravation. (6)

Palethorp v. Furnish (7) recognises the power of a wife to bind her husband by her admissions, when she can be considered as the agent of her husband: as in that case when it appeared, that the wife managed her husband's business, and generally gave orders and paid for goods (8), it was holden, that an admission which she made took a case out of the Statute of Limitations, Mr. Justice Buller conceiving, that "her promise was binding on the defendant, and took the case out of the Statute of Limitations, and ruled that the promise of any servant or agent intrusted by the defendant to transact his business for him would have the same effect."

The declarations of a married woman, during coverture, of the non payment of money lent to her before marriage, are admissible in evidence for the plaintiff, in an action brought against her husband as her administrator. (9)

A jury can infer the wife's agency, from the circumstance of her having

(1) *Jacobs v. Humphrey*, 2 C. & M. 413. 4 Tyrw. 272.

(2) *Smith v. Lyon*, 3 Camp. 465., et vide *Harrison v. Vallance*, 1 Bing. 45. *Robson v. Andrade*, 1 Stark. 372. *Spargo v. Brown*, 9 B. & C. 938.

(3) *Smith v. Whittingham*, 6 C. & P. 78., vide *Middleton v. Melton*, 10 B. & C. 317. *Goss v. Watlington*, 3 B. & B. 132. *McGahey v. Alston*, 2 M. & W. 213.

(4) *Alban v. Pritchett*, 6 T. R. 680. *Anon. Str.* 527. *Hall v. Hill*, *ibid.* 1094. *Wrottesley v. Bendish*, 3 P. Wms. 238., *antè*, 709. tit. **BARON AND FEME.**

(5) *Walton v. Green*, 1 C. & P. 621.

(6) *Knowles v. Compigne*, Winton Sum. Ass. 1835, *cit.* Roscoe's Ev. 44.

(7) 2 Esp. N. P. C. 511. n.

(8) Vide etiam *Gregory v. Parker*, 1 Camp. 395. *Clifford v. Burton*, 1 Bing. 199. *Emerson v. Blonden*, 1 Esp. N. P. C. 141. *Pulmer v. Sells*, 2 N. & M. 422. *Petty v. Anderson*, 5 Bing. 170. *Cotes v. Davis*, 1 Camp. 485. *Barker v. Wray*, 2 Russ. 70. Bull. N. P. 28. *Barlow v. Bishop*, 1 East, 432. *Anderson v. Sanderson*, Holt's N. P. C. 591. 2 Stark. 204. *Clifford v. Burton*, 1 Bing. 199.

(9) *Humphreys v. Boyce*, 1 M. & Rob. 140., *sed vide Kelly v. Small*, 2 Esp. N. P. C. 716., where in an action by husband and wife for a loan by the wife *dum sola*, her admissions after coverture were refused as against the plaintiff by Lord Kenyon.

ADMISSIONS.

been seen twice in his counting-house appearing to conduct his business with reference to the transaction in question, and on one of those occasions giving directions to the foreman. (1) And when a wife admitted, that she had agreed to pay 4s. per week for nursing a child, it was held to be sufficient to charge the husband, it being a matter usually transacted by women. (2)

A party indebted to another for goods supplied, called on his agent, and, after being informed verbally of the amount of the claim against him, said, that he would either return again, or send some person next day either to settle it, or give some further security. The defendant's wife having come next day with an offer of further security, which was afterwards rejected, it was held, that admissions by her in the course of that conversation relative to the amount of the debt, were receivable in evidence against the husband. (3)

7. EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

I. Generally.

In cases of conflicting testimony, and particularly where the subject of litigation is remote in point of time, or the question depends upon the terms of oral communications, the evidence of written documents connected with the transaction are, on account of their permanency, of the most obvious and essential importance. Every day furnishes instances of the weakness of human memory in such cases, and great opportunity is afforded for misrepresentation or mistake, whilst writings are permanent, and, as observed by Montesquieu, are witnesses difficult to be corrupted.

The depositions of dead or absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses subjected to the ordeal of a cross-examination; so are they inferior and weaker in point of force and effect; because a witness will frequently depose that in private, which he would be ashamed to confirm before a public tribunal; — *nam minus obstitisse videtur pudor inter paucos signatores.* (4)

Books kept in public offices (5) which are authorised by competent authority (6), are in general admissible, although in most cases as secondary evidence only (7); and the general rule respecting them is, that such persons only (8) who have an interest (9) in their contents, have a right to inspect and take copies of such parts as relate to their interest, and that when the books themselves are admissible in evidence, examined (10) copies are equally admissible: but, if an original document be not admissible in evidence, and a copy of it be made so by act of parliament, the copy only will be evidence, for the original is not made so by implication. (11)

EFFECT AND PROOF OF DOCUMENTARY EVIDENCE. GENERALLY. Importance of documentary evidence.

Depositions of dead or absent witnesses.

Public books.

(1) *Palmer v. Sells*, 3 N. & M. 422.
(2) *Anon.* Str. 527. *Antè*, 709., tit. BARON AND FEME.
(3) *Barker v. Vaughan*, 4 Jur. 222.
(4) *Quintil. l. v. c. 6.*
(5) *Johnson v. Ward*, 6 Esp. N. P. C. 47.
(6) *Humble v. Hunt*, Holt's N. P. C. 601.

(7) *Henry v. Leigh*, 3 Camp. 499.
(8) *Murray v. Thornhill*, Str. 717.
(9) *Geery v. Hopkins*, 2 Ld. Raym. 851.
(10) *Hoe v. Nathorp*, 1 *ibid.* 154.
(11) *Burdon v. Rickets*, 2 Camp. 121.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

Sometimes entries, although made in books of public offices, are not admissible in evidence without shewing, that the party charged had assented to, or authorised such entries: thus, an entry in the books of the receiver of the duties on carts, &c. is not evidence of property, without shewing by whom the entry was made. (1)

And the entry in the office at Somerset House for licensing stage-coaches, was held to be no evidence to prove, that the persons named in the license were owners of the coach. (2)

**DOCUMENTS
MUST COME
FROM PROPER
CUSTODY.**

II. Documents must come from proper Custody.

Judgment of
Chief Justice
Tindal in
*Meath (Bishop
of) v. Winchester
(Marquess
of)*.

To render documents evidence, their place of custody must be established. Thus, in *Meath (Bishop of) v. Winchester (Marquess of)* (3) a case, touching the right of presentation to a living by the bishop of Meath, was stated for the opinion of counsel by a bishop of Meath in 1695, and found in the family mansion of the Dopping's, descendants of that bishop, was held evidence against a subsequent bishop of the same see on a question touching the right of presentation to the same living; Chief Justice Tindal stating, "The result of the evidence, upon the bill of exceptions, we think is this,—that these documents were found in a place in which, and under the care of persons with whom papers of Bishop Dopping might naturally and reasonably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary, that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural under circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of *Tutbury* (4), a manuscript found in the *Bodleian Library*, Oxford (5), an old grant to a priory brought from the *Cottonian MSS.* in the British

(1) *Weaver v. Prentice*, 1 Esp. N.P.C. §69.

(2) *Strother v. Willan*, 4 Camp. 24.

(3) 3 Bing. N. C. 201.

(4) *Lygon v. Strutt*, 2 Anst. 601.

(5) *Michell v. Rabbetts*, cit. in 3 Taunt 91.

Museum (1), were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of Glastonbury was held to be admissible, because found in the possession of the owner of part of the abbey lands, *though not of the principal proprietor*. This was not the proper custody, which, as Lord Redesdale observed, would have been the Augmentation Office (2); and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the court argued, a place of custody where it might be reasonably expected to be found. (3) So also in the case of *Jones v. Waller* (4), the collector's book would have been as well authenticated if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. (5)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

"Upon this principle we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop Dopping, and found in the place and in the custody before described, was admissible in evidence."

When an ancient document purporting to be an exemplification is produced from the proper place of deposit, but has not, at the time of its production, the great seal affixed, it is still to be presumed "an exemplification," and may be read in evidence as such. (6)

Exemplification without the great seal.

Where an ancient manor book is offered in evidence, the custody must be proved by a sworn witness. It is not enough, that the book is produced in court by counsel or steward of the lord of the manor; nor, as it seems, by the lord of the manor in person: thus, in *Evans v. Rees* (7) Mr. Justice Coleridge said, "If it be necessary to prove the custody of ancient documents, some one must be sworn for that purpose. The person producing them may have had them from a grocer's shop."

Where ancient manor book is produced, the custody must be proved by a sworn witness.

III. *Admissible and inadmissible Documents.* (8)

Judgments of courts of exclusive jurisdiction are, in general, conclusive in the superior courts of common law; and, in the absence of fraud and collusion, are constituted as the sole criterion of those rights which are subjected to their jurisdiction.

ADMISSIBLE
AND INADMISSIBLE
DOCUMENTS.

With respect to courts of admiralty it was observed by Lord Mansfield (9), that the nature of the question of *prize* excludes the jurisdiction of the common law courts; that the views of a prize court could "not be answered in any court of Westminster Hall; and, therefore, the courts of Westminster Hall never have attempted to take cognisance of the question, 'prize or no prize,' not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject."

ADMIRALTY
(COURTS OF).

(1) *Swinnerton v. Stafford (Marquess of)*,
ibid.

(2) 4 Dow, 321.

(3) *Bullen v. Michel*, 2 Price, 413.

(4) 2 Gwill, 346.

(5) Vide *Bertie v. Beaumont*, 2 Price,
307.

(6) *Beverley (Mayor, &c. of) v. Craven*, 2
M. & Rob. 140.

(7) 10 A. & E. 151.

(8) Observations have been made respecting
"Acts of State," under tit. GAZETTE,
post, 1657, 1658.

(9) *Le Caux v. Eden*, Doug. 614. n.
Phillipps' Ev. 551.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

Where sentence of condemnation conclusive that the property belongs to enemies.

Sentences of foreign courts when received as conclusive.

Want of jurisdiction.

Between whom the sentence of condemnation is binding.

When sentence conclusive upon the points on which it professes to decide.

Foreign ordinance.

In *Kindersley v. Chace* the Master of the Rolls said (1), "It has been clearly settled, from the time of Lord Hale down to the present period, that a sentence of condemnation in a court of admiralty, when it proceeds on the ground of enemy's property, is conclusive, that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding in all courts and against all persons. The sentence of a court of admiralty, proceeding *in rem*, must bind all parties, must bind all the world;"—and this doctrine "has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover." (2)

Sentences of foreign courts of competent jurisdiction to decide questions of prize, are received in the courts of England, as conclusive evidence in actions upon policies of insurance on every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially. (3)

But sentences of condemnation in foreign courts of prize are admissible only, where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent or ally in the war (4); therefore, a sentence pronounced by the authority of the capturing power within the dominions of a neutral country, to which the prize may have been taken, is illegal (5), and consequently would not be admissible evidence to falsify the warrant of neutrality.

A sentence of condemnation concludes the rights of third persons, as well as the parties to the original suit; it is also conclusive between the assured and the underwriter. (6)

But the sentence is only conclusive evidence of the points upon which it professes to decide. (7)

If the sentence profess to be made on particular grounds, which are set forth in the sentence, but which apparently do not authorise the condemnation, the sentence will not be conclusive as to such facts. (8) Or if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize, solely on the ground, that the ship had violated an *exparte* ordinance to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or

(1) *Cookpit*, July, 1801. *Park*, Ins. 490., vide etiam as to effect of sentences, *Hughes v. Cornelius*, 2 Show. 242. *Sir T. Raym.* 473. *Graham v. Maxwell*, 2 Dow, 314. *Bernardi v. Motteux*, Doug. 575. *Le Caux v. Eden*, Doug. 605., commented on in *Obicini v. Bligh*, 8 Bing. 347. *Smart v. Wolff*, 3 T. R. 323. *Faith v. Pearson*, 2 Marsh. 133.

(2) *Per* Chambre J. in *Lothian v. Henderson*, 3 B. & P. 513. *Hughes v. Cornelius*, 2 Show. 242.

(3) *Christie v. Secretan*, 8 T. R. 196. *Kindersley v. Chace*, Park, Ins. 486. *Bolton v. Gladstone*, 5 East, 160. *Lothian v. Henderson*, 3 B. & P. 524. *Baring v. Clagett*, *ibid.* 214.

(4) *Oddy v. Bovill*, 2 East, 473.

(5) *Donaldson v. Thompson*, 1 Camp. 429. *Havelock v. Rockwood*, 8 T. R. 268. *Case of Flad Oyen*, 8 T. R. 270. n.

(6) *Kindersley v. Chace*, Park, Ins. 490. *Bolton v. Gladstone*, 5 East, 155. 2 Taunt. 85. *Baring v. Roy. Ex. Ass. Comp.* 5 East, 99.

(7) *Christie v. Secretan*, 8 T. R. 196. *Fisher v. Ogle*, 1 Camp. 418. *Everth v. Hannam*, 2 Marsh. 72. *Marshall v. Parker*, 2 Camp. 70. *Barzillay v. Lewis*, Park, Ins. 469. *Baring v. Clagett*, 3 B. & P. 201. *Salloucci v. Woodmas*, Park, Ins. 471. *Pollard v. Bell*, 8 T. R. 444.

(8) *Calvert v. Bovill*, 7 T. R. 523. *Pollard v. Bell*, 8 *ibid.* 444.

no prize, would not be conclusive of the fact, whether or not the ship were neutral. (1)

It is assumed, that the statements embodied in the sentence, are those on which the confiscation proceeded (2); and if any essential ambiguity appear in such statement, the judgment will be inoperative: thus, in *Dagleish v. Hodgson* (3) Chief Justice Tindal observed, "The general law upon this subject is well known, that the sentence of a foreign court of admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity.

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Equivocal
grounds.

Judgment of
Chief Justice
Tindal in
Dagleish v.
Hodgson.

"But it is at the same time as well established, that in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher v. Ogle* (4) and *Calvert v. Bovill* (5) are express authorities to this point, and the sentence of condemnation in the latter case bears a strong resemblance to that in the present."

The sentence of an admiralty court is evidence of a condemnation without producing the libel and answer; at least "if it be not found in the office, nor usually filed there." (6)

Evidence that an advertisement was inserted in a country newspaper, circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it be shewn that he took the newspaper in. (7)

ADVERTISE-
MENTS.

An affidavit filed in court on a motion, may be read in evidence at the sittings without proof of its being sworn. (8)

AFFIDAVITS.

An affidavit, purporting to be sworn before a public commissioner, is admissible without proof of the commission; and proof of the commissioner acting as such is sufficient. (9)

In the Exchequer, the office copy of an affidavit made in another cause, is good evidence in that, which is before the court. (10)

But a copy of an affidavit made in Chancery by the defendant in ejectment, in support of a former application for an injunction, which alleged title in one of the lessors of the plaintiff, was held to be, even if admissible, not sufficient evidence of that title. (11)

The courts take judicial notice of the ordinary computation of time by ALMANACKS.

(1) *Pollard v. Bell*, 8 T. R. 444. *Bird v. Appleton*, ibid. 562. *Baring v. Clagett*, 3 B. & P. 215. *Bolton v. Gludstone*, 2 Taunt. 85. 95., vide *Von Tungeln v. Dubois*, 2 Camp. 154. *Phillipps' Ev.* 535.

(2) *Horney v. Lushington*, 3 Camp. 89. *Bernardi v. Motteux*, Doug. 581.

(3) 7 Bing. 504.

(4) 1 Camp. 418.

(5) 7 T. R. 523.

(6) *Per Trevor J.* in *Wheeler v. Lowth*, Com. Dig. Evidence (C. 1.).

(7) *Norwich and Lowestoft Navigation v. Theobald*, M. & M. 153. *Boydell v. Drummond*, 2 Camp. 157. S. C. not S. P. 11 East, 142. *Leeson v. Holt*, 1 Stark. 186. *Rowley v. Horne*, 3 Bing. 2.

(8) *Cameron v. Lightfoot*, 2 W. Black. 1190.

(9) *Rex v. Howard*, 1 M. & Rob. 187.

(10) *Wightwick v. Banks*, Forrest, 153.

(11) *Rees d. Howell v. Bowen*, M'Clcl. & Y. 383., et vide *Highfield v. Peake*, M. & M. 109.

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the calendar, and of the fasts and festivals, whether moveable or fixed, which are thereby appointed. (1)

The almanacks and tables framed by stat. 22. Geo. 2. c. 48. for altering the style, and prefixed to the book of Common Prayer, prove the coincidence of any particular day of the week with that of the year, or the time at which any given fast or festival happened. (2)

**ARTICLES OF
WAR.**

It seems, that the existence of a war between this country and another requires no proof. (3)

Articles of war being public acts of government, a copy of them printed by the king's printer is good evidence (4), of which it seems the court will take judicial notice. (5) But the courts cannot take judicial notice of the articles of war without their being proved. (6)

To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad, transmitted by him to the secretary of state's office, is evidence. (7)

But it seems, that, to prove the acts of state of a foreign government, copies should be produced, examined with the public archives abroad (8); and a copy printed by the foreign king's printer will not suffice.

BANK BOOKS.

Bank books are admissible to prove the transfer of stock (9); and examined copies of entries in bank books are evidence (10); but, upon a question, whether the signature to a transfer is in a genuine handwriting, the book must be produced. (11)

BANKRUPTCY.

Office of secretary of bankrupts.

A book kept in the office of the secretary of bankrupts, containing entries of the allowance of certificates, is good secondary evidence of the allowance of a certificate, if the book has been kept by order of the lord chancellor. (12)

CANAL COMPANY.

By act 51 Geo. 3. c. lx. (local act), the register book of the Bristol Canal Company is evidence, in an action brought by them for calls, of the defendant's being proprietor of the number of shares affixed to his name. (13)

**CERTIFICATES,
&c.**

Certificate of a mere matter of fact not coupled with matter of law is not evidence,

A certificate of a mere matter of fact, not coupled with matter of law, cannot be admitted as evidence (14); but certificates upon matters of law mixed with fact have sometimes been made the appropriate medium of proof, and conclusive evidence upon certain questions. (15) The certificate of the king under his sign manual, of a matter of fact, has been always refused except in one old case in Chancery. (16) A certificate under the seal of a

(1) 1 Rol. Abr. Court (C.), 524. *Hanson v. Shackelton*, 4 Dowl. P. C. 48.

(2) *Brough v. Perins*, 6 Mod. 81. *Harrison's Ev.* 83.

(3) Fost. C. L. 219. *Rex v. De Berenger*, 3 M. & S. 67., *vide post*, 1657. tit. GAZETTE.

(4) *Rex v. Withers*, cit. 5 T. R. 442. 1 East, P. C. 360.

(5) *Bradley v. Arthur*, 4 B. & C. 304.

(6) *Rex v. Withers*, cit. 5 T. R. 442. 1 East, P. C. 360.

(7) *Thelluson v. Cosling*, 4 Esp. N. P. C. 266.

(8) *Richardson v. Anderson*, 1 Camp. 65. n.

(9) *Breton v. Cope*, Peake's N. P. C. 43.

(10) *Marsh v. Collnett*, 2 Esp. N. P. C. 665. *Mann v. Carey*, 3 Salk. 155.

(11) *Auriol v. Smith*, 18 Ves. 198.

(12) *Henry v. Leigh*, 3 Camp. 499., *ant.* 699.

(13) *Bristol and Taunton Canal Comp. v. Amos*, 1 M. & S. 570.

(14) *Dict. Willes C. J.*, Willes, 550.

(15) *Exp. Church*, 1 D. & R. 324. *Waldron v. Coombe*, 3 Taunt. 162. *Roberts v. Eddington*, 4 Esp. N. P. C. 88. *Rex v. Fyne et Rex v. Spearpoint*, Forrest, 35. *Allred v. Halliwell*, 1 Stark. 117. *Sewell v. Corp.*, 1 C. & P. 392. *Drake v. Marryat*, 1 B. & C. 473. *Omichund v. Barker*, Willes, 549. *Duchess of Kingston's case*, 20 Howell's St. Tr. 339. *Com. Dig. Certificate (A. 1.)*.

(16) *Abignye v. Clifton*, Hob. 213. 3 Wood. Lect. 275. 2 Rol. Abr. Trial (H.), 686. *Omichund v. Barker*, Willes, 550. *Phillips' Ev.* 608.

minister abroad as to the fact of a marriage having been solemnised before, seems to be admissible although not admitted in one case. (1) A certificate from the secretary at war as to the nature of the station of a serjeant in the army, is said to have been admitted, though opposed, in *Lloyd v. Wooddall*. (2)

Certificates are sometimes made evidence by statute; as to prove a previous conviction for felony, or for uttering counterfeit money. (3)

A certificate of ordination under the seal of the bishop is evidence of holy orders (4), if it have come from the proper custody.

A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. (5)

A protest as to the acceptance and non acceptance in a foreign country of a foreign bill of exchange, attested by a notary public, is evidence of those facts in an action upon the bill: these two instances are a relaxation of the strict rule, from a principle of general convenience. (6) But a notarial protest under seal is no evidence, that a foreign bill of exchange has been presented for payment in England. (7)

A consular certificate is not evidence (8), because he is not a judicial officer.

A ship's protest is of itself evidence only to contradict the captain's evidence, and not to shew a variance between it and the condemnation. (9)

Returns of sales of corn made under stat. 1 & 2 Geo. 4. c. 87. are not conclusive evidence to shew the parties to whom the corn was delivered. (10)

A copy of a charter-party made by a foreign notary, and delivered to the parties, is not admissible proof of the contract, though such copies are received in the foreign courts. (11)

The mere production in court of a diploma of a doctor of physic under the seal of one of the universities, is not in itself evidence to shew, that the party named in the diploma is entitled to that degree. (12)

Although the court of Chancery is not strictly a court of record, yet a decree in Chancery may be given in evidence between the same parties, on the same footing, and under the same limitations, as the verdict or judgment of a court of common law. (13)

In *Davies v. Lowndes* (14), which was a trial touching the right to lands, decrees in Chancery between other parties, concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands, Chief Justice Tindal observing, "I see no objection to the decrees being admitted as evidence of the character in which he held the premises; they are not conclusive as to the right. With respect to the

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sed aliter, of certificates upon matters of law mixed with fact.

Sign manual.

Certificate of ordination.

Certificate of justices.

Protest of bill of exchange.

Consular certificate.

Ship's protest.

Returns of sales of corn under stat. 1 & 2 Geo. 4. c. 87.

Charter-party.

Diploma of a doctor of medicine.

CHANCERY (PROCEEDINGS IN).

Decrees of the court of Chancery.

Judgment of Chief Justice Tindal in *Davies v. Lowndes*.

(1) *Alsop v. Bowtrell*, Cro. Jac. 541. *Omichund v. Barker*, Willes, 549. Phillips' Ev. 608.

(2) 1 W. Black. 29.

(3) *Rex v. Watson*, R. & R. 468.

(4) *Rex v. Bathwick (Inhab. of)*, 2 B. & Ad. 639.

(5) *Rex v. Mawbey, (Bart.)* 6 T. R. 630. 635.

(6) *Omichund v. Barker*, Willes, 550. *Anon.* 12 Mod. 345. *Brown v. Thornton*, 6 A. & E. 185., ante, 754. tit. BILLS OF EXCHANGE AND PROMISSORY NOTES.

(7) *Chesmer v. Noyes*, 4 Camp. 122.

(8) *Exp. Church*, 1 D. & R. 324. *Walldron v. Coombe*, 3 Taunt. 162.

(9) *Christian v. Coombe*, 2 Esp. N. P. C. 490. n. *Evans' Pothier*, 288.

(10) *Woodley v. Brown*, 2 Bing. 527. 10 Moore, 281. 1 C. & P. 593.

(11) *Brown v. Thornton*, 6 A. & E. 185.

(12) *Moises v. Thornton*, 8 T. R. 303. 3 Esp. N. P. C. 4.

(13) Co. Litt. 260. Bull. N. P. 243. *Perry v. Phelps*, 10 Ves. 34.

(14) 1 Bing. N. C. 607.

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**Proof of decree
in Chancery.**

objection, that they are *res inter alios gestæ*, that is not conclusive against their admissibility; for, in actions against the sheriff for an escape, and on other occasions, it is usual to give in evidence, judgments against third persons, in order to shew the character in which the plaintiff claims, and the amount of damage he has sustained."

The decree of an authorised court of equity is inadmissible, either as an award without submission, or as reputation. (1)

A decree in Chancery may be proved by an exemplification, or by an examined copy, or by a decretal order on paper, with proof of the bill and answer. (2); but the bill and answer need not be proved, if they are recited in the decretal order. (3)

It seems, that a decree in equity is admissible in evidence, without reciting the previous proceedings therein, or proving them, where the object of its production is to prove the existence of the decree, and not any facts previously in issue in the suit. (4)

**Order for an
attachment.**

An order for an attachment for not paying the costs of a suit in equity, is in itself *prima facie* evidence, that a suit had been pending. (5)

Office copies.

Office copies are not evidence on the trial of an issue out of Chancery, though they were used in the court of equity. (6)

**Bill in Chan-
cery.**

A bill in Chancery is evidence respecting the existence of a judicial proceeding, and that certain facts were in issue between the parties, in order to introduce the answer, depositions, or decree: but it seems, that a bill in Chancery cannot be used against the complainant, because the facts stated in a bill are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer upon oath by the defendant. (7)

**Judgment of
Chief Justice
Tindal in *Pennell v. Meyer*.**

When the plaintiff gave in evidence the answer of a defendant to a bill in equity, filed by a third party, it was held, that the defendant was entitled to have the bill also read, as explanatory of the answer, and as part of the plaintiff's case; Chief Justice Tindal observing, "that he should tell the jury, that the statements in the bill were not to be considered as admissions of the facts so stated, it being notorious that allegations, not corresponding with the facts, were frequently introduced into bills for the purpose merely of eliciting the truth from the other party." (8)

**Pleadings in
Chancery.**

A demurrer in Chancery does not admit the facts charged in the bill; for if the demurrer be overruled, the defendant may still go on and answer. So also if the defendant plead; for the plea only amounts to a statement, that, supposing the facts charged to be true, the defendant is not bound to answer. Demurrers therefore, and pleas in Chancery, are not evidence against the party demurring, or pleading the facts charged in the bill, in a future action between the parties to the Chancery suit. (9)

**Answers in
Chancery.**

Answers in Chancery are evidence against the defendant, as admissions upon oath. (10)

(1) *Rogers v. Wood*, 2 B. & Ad. 245.

(2) *Trowel v. Custle*, 1 Keb. 21. Bull. N. P. 244.

(3) *Ibid.* Com. Dig. Evidence (C. 1.). *Hewitt v. Piggott*, 5 C. & P. 75.

(4) *Blower v. Hollis*, 3 Tyrw. 356. 1 C. & M. 393.

(5) *Ibid.*

(6) *Burnand v. Nerot*, 1 C. & P. 578., sed vide *Highfield v. Peake*, M. & M. 111.

(7) Bull. N. P. 235. *Snow v. Phillips*, 1 Sid. 221. Gilb. Ev. 56, 57. *Wollet v. Roberts*, 1 Ch. Ca. 64.

(8) *Pennell v. Meyer*, 2 M. & Rob. 98.

(9) *Tomkins v. Ashby*, M. & M. 32. Phillips' Ev. 557.

(10) Bull. N. P. 237., *antè*, 1613. tit. ADMISSIONS.

An answer in Chancery is proved by the production of the bill and answer, or of examined copies of them; but on proof by the proper officer, that the bill has been searched for in the office, and not found, the answer may be read without the bill. (1)

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On the trial of a civil cause, an examined copy of an answer in Chancery is admissible in evidence to contradict a witness, who swore in opposition to what was stated in the answer to which he was a party. (2)

Proof of answer
in Chancery.

A copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in Chancery, and the original of which letter, instead of being filed in the master's office, had, by consent of parties, been deposited for inspection with the plaintiff's clerk in court in the Chancery suit, is admissible in evidence on the part of the defendant at law, without reading the answer in Chancery. (3) An answer is proved by an examined copy without proof of a decree, or of the party's handwriting (4), if it be only tendered as an admission of the party on oath.

The identity of the parties should be established; but it may be inferred from intrinsic evidence, or if the name, description, and character of the defendant at law agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. (5)

Identity of
parties.

An examined copy of an answer in Chancery may be identified by a witness, who has seen the handwriting of the defendant to the original, although the original document is not produced at the time that he speaks to his belief of the defendant's signature. (6)

Entries in the books of the clerk of the peace, of deputations granted to gamekeepers by the owners of manors, are evidence to show, that manorial rights were publicly exercised by such owners, and that an individual, whose title was set up by a gamekeeper, in an action brought against him for killing game without being qualified, knew that he had not any title. (7) But it seems, that a deputation from a lord of a manor is not evidence of qualification, without proof of registration with the clerk of the peace (8); nor of the existence of a manor, without a foundation being first laid in fact. (9)

CLERK OF THE
PEACE.
Entries of de-
putations.

A *cognovit* which is filed, may be proved by putting in an examined copy, without producing the original; and the subscribing witness may prove, that he saw the party sign a *cognovit*, of which the paper produced is a copy. (10)

COGNOVIT.

Collectors' tax-books are public books, and entries therein are evidence. (11)

COLLECTORS'
TAX BOOKS.

A commission under the Exchequer seal (though a commission of instruction only, and not of entitling) is admissible in evidence, though not conclusive. (12)

COMMISSIONS
UNDER EXCHE-
QUER SEAL.

By the act 57 Geo. 3. c. xxix. s. 114., the commissioners of paving of

COMMISSIONERS
OF PAVING.

(1) Gilb. Ev. 55. 57. 58. *Hodgkinson v. Willis*, 3 Camp. 401.

(2) *Ewer v. Ambrose*, 6 D. & R. 127. 4 B. & C. 25. 5 D. & R. 629. 3 B. & C. 746.

(3) *Long v. Champion*, 2 B. & Ad. 284.

(4) *Dartmouth (Countess of) v. Roberts*, 16 East, 334.

(5) *Hennell v. Lyon*, 1 B. & A. 182.

(6) *Dartnall v. Howard*, R. & M. 169.

(7) *Hunt v. Andrews*, 3 B. & A. 341.

(8) *Rushworth v. Craven*, M'Clel. & Y. 417.

(9) Ibid.

(10) *Scott v. Lewis*, 7 C. & P. 347.

(11) *Goss v. Watlington*, 3 B. & B. 132.

6 Moore, 355.

(12) *Tooker v. Beaufort (Duke of)*, 1

Burr. 146.

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the metropolis are to enter their proceedings in a book, and such entries are made evidence. (1)

Where a local paving act authorises commissioners, at a meeting to be called for that purpose, to order footpaths to be raised, &c. and directed, that the entries in the commissioners' books might be read in evidence:— It was held, that an entry in the books, stating that such an order was made at a meeting held by public notice, did not prove that the meeting was duly holden, so as to legalise the order; but that it should appear by the entry, or be shewn *aliunde*, that notice was given of the purpose for which the meeting was called. (2)

CONVOY.

The official letter of the commander of a convoy to the admiralty at the end of the voyage, seems good evidence of the facts therein stated respecting the ships under convoy (3); such as, that the fleet encountered a storm, or a particular ship parted company.

**CORNWALL
(DUCHY OF).**

The enrolment of a lease granted by the duke of Cornwall is evidence, in the same manner, as if it had been granted by the crown, when there is no duke of Cornwall. (4)

On account of the interest which the crown has in the duchy of Cornwall, all acts which affect the possessions or revenues of the duchy are to be considered as public acts; and on this ground, a document, purporting to be a caption of seisin, taken to the use of the first duke of Cornwall by certain persons assigned by his letters patent to do so, was received in evidence to shew the right of the duke. (5)

**CORONER'S IN-
QUISITIONS.**

Although an inquisition taken before the coroner *super visum corporis*, was formerly considered conclusive evidence of the fact found by it, against the executors or administrators of the deceased (6), yet it is now held, that every thing done under it is traversable. (7)

**CORPORATION
BOOKS.**

The corporation books are the proper records of the transactions of the body, for the purpose of proving the election, swearing-in, admission, disfranchisement, and restoration of particular members of the body. (8)

Generally.

The books of the corporation, containing a register of their public acts, are evidence as between the members of the body, or against the body, for they contain the rules and regulations to which they are all subject, and to which all are privy. But they are not evidence for the corporation against a stranger.

**When not evi-
dence of a pe-
cuniary trans-
action.**

Where plaintiff sued the corporation (of which he was an alderman) on a bond, and defendants pleaded, 1. fraud; 2. that the bond was irregularly executed contrary to a bye-law; Mr. Baron Parke admitted the books of a corporation to prove the bye-law, but rejected them as evidence of a pecuniary transaction between the plaintiff and the corporation in proof of the fraud. (9)

In the case of *Marriage v. Lawrence* (10), where in action for trespass

(1) *British Museum v. Finnis*, 5 C. & P. 460.

(2) *Heysham v. Forster*, 5 M. & R. 277.

(3) *Watson v. King*, 4 Camp. 275. S. C. not S. P. 1 Stark. 121.

(4) *Rowe v. Brenton*, 8 B. & C. 755. 3 M. & R. 164.

(5) *Ibid.*

(6) 3 Inst. 55.

(7) Per cur. in *Garnett v. Ferrand*, 6 B. & C. 611. 1 Saund. 362. n.

(8) *Symmers v. Regem*, Cowp. 489. 1 Stephens's Corporation Acts, 2d ed. 525—533.

(9) Roscoe's Ev. 150. cit. *Heldsworth v. Dartmouth (Mayor of)*, Exeter, S. A. 1838, MSS.

(10) 3 B. & A. 142., vide *Kingston-upon-Hull (Mayor of) v. Horner*, Cowp. 103. *Brett v. Beales*, M. & M. 417.

the issue was upon the right of the corporation of Malden to take certain tolls, it was held, that an entry from the books of the corporation, dated 18th year of Hen. 8., purporting to contain the proceedings of the corporation against the masters of two ships who had refused to pay tolls, the seizure of the ships, and the submission of the masters to the payment of a fine, and to have been signed by the corporation clerk, was inadmissible, because the entry was not of a public nature; being, as observed by Chief Justice Abbott, "no more than a minute made by a party in his own memorandum book." "But if this entry had been of a public nature, it would have been different."

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Although a customary, found in a book amongst the records of a corporation, has been held to be evidence against the corporation. But in general, unless papers relate to proceedings of the corporation as a corporate body, they are not evidence; and therefore a letter found in a corporation chest, in which A. B. was described to be of another place, was held to be inadmissible on a question, whether A. B. at the time he did a corporate act was an out-burgess or not. (1)

Unless papers relate to the corporation as a body, they are not, in general, evidence.

The books of a corporation are not evidence to prove a usage by entries of acts of submission by particular persons, to the exercise of rights insisted on, without proof, *aliunde*, of the situation of those persons, and their relative position with reference to the corporation. (2)

To establish the book of a corporation in evidence, it should be shewn to have been publicly kept as such (3), and that the entries were made by the proper officer. (4) But an entry made by one who acts for the officer *pro tempore*, as during the illness of the town clerk, is evidence if the fact be proved. (5) On this ground it was held, upon a *quo warranto*, that minutes of the proceedings of a corporation, taken several years before by the prosecutor's clerk, and not kept as a public book, had been properly rejected at the trial. (6)

Corporate books must have been publicly kept,

Where a water company was sued on a bond, their books were rejected as proof for them, that the bond was executed at an irregular meeting, although the plaintiff was a proprietor, and the private act required such books to be kept and to be open for inspection to proprietors. (7)

The documents must be proved to have come from the proper place of deposit. (8) But, in an action for a false return to a *mandamus* (9) it was held, that a corporator was "as a depositary of the muniments, of being brought forward for the purpose of producing them," subject to cross-examination by the adversary, as to the custody of such documents; and it seems, that if the party objecting wish to inquire as to the custody, the corporator may be examined on the subject. (10) Lapse of time dispenses

and preserved in the proper place of deposit.

(1) *Rex v. Gwyn*, Str. 401.

(2) *Davies v. Morgan*, 1 Price's P. C. 77. 1 Tyrw. 457. 1 C. & J. 587.

(3) *Shrewsbury (Mercers of) v. Hart*, 1 C. & P. 114.

(4) *Rex v. Mothersell*, Str. 92. 12 Vin. Abr. Evidence, 90. [A. b. 15.]. The usual mode of procuring an inspection of corporation books is by rule, where an action is pending; by *mandamus* in other cases. A rule can only be granted where a cause is pending, and only then of a *limited* inspection; for an unlimited inspection the course is by *mandamus*. *Rex v. Babb*, 3 T. R. 579.

Lynn (Corporation of) v. Denton, 1 ibid. 689. *Barnstaple (Corporation of) v. Lathey*, 3 ibid. 303.

(5) *Rex v. Mothersell*, Str. 92. 12 Vin. Abr. Evidence, 90. [A. b. 15.].

(6) Ibid.

(7) *Hill v. Manchester Water Works*, 5 B. & Ad. 866.

(8) *Shrewsbury (Mercers of) v. Hart*, 1 C. & P. 114., *antè*, 1634.

(9) *Rex v. Netherthong*, 2 M. & S. 337.

(10) *Per Lord Ellenborough in Rex v. Netherthong*, 2 M. & S. 337.

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EVIDENCE.

Where examined copies of entries in corporation books are evidence.

with proof of the handwriting of the individual making entries in corporation books, where the document is admissible *per se*. (1) And it seems, that the declarations of deceased corporators and burgesses are admissible in evidence. (2)

If the entries in corporation books be admissible, as being of a public nature, examined copies are evidence. (3) And where, in order to prove the defendant a freeman, a copy upon stamped paper was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the corporation papers; and it appeared, that there was also a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, made when he was originally admitted, but there was no stamp in the book:—It was held, that the loose paper being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of which was good evidence. (4)

Corporate seal proves itself.

The seal of a public corporate body need not be proved as the seal of an individual, by means of a witness who saw the seal affixed, &c. to the instrument; it is sufficient to show, that the seal is the official seal of the corporate body (5): thus, the seal of the city of London proves itself (6); but it seems, that the seal of the bank of England must be proved (7): though the seal need not be shewn to be fixed by the proper officer, yet the deed may be invalidated by proof of its being fixed by a stranger, or without proper authority. (8)

CUSTOM-HOUSE.

A copy from the custom-house of the searcher's report of the cargo, kept there, is evidence of the actual shipment of the goods therein specified (9); and for the recovery of penalties, a copy of the entries in the custom-house book was held to be evidence in an information for a breach of the revenue laws, against the master of an American vessel. (10)

CROWN CONVEYANCES.

All public acts done by the crown, affecting its revenues and possessions, are receivable as public evidence. (11) Thus, an enrolment of a lease of lands belonging to the crown in right of the duchy of Lancaster (12), or a document from the office of the duchy of Cornwall, are receivable in evidence as public instruments. (13)

DEPOSITIONS.
Effect of depositions.

A deposition in evidence is a complete substitution for the evidence of the witness, whose deposition is had recourse to; but, generally, if the witness can be produced, his deposition cannot be read, because it is not the best evidence. It must be likewise proven, that such a cause existed, and between the same parties, in order to shew the inadmissibility of the oath of the witness; for if no legal cause existed, the oath was nothing

(1) *Davies v. Morgan*, 1 Price's P. C. 77.
1 Tyrw. 457. 1 C. & J. 587.

(2) *Ibid*.

(3) *Brocas v. London (Mayor of)*, Str. 308.

(4) *Per Noel J. in Rex v. Head*, Peake's Ev. 92. n. Roscoe's Ev. 84.

(5) *Moises v. Thornton*, 8 T. R. 307.

(6) *Woodmass v. Mason*, 1 Esp. N. P. C. 53.

(7) *Doe d. England (Bank of) v. Chambers*, 4 A. & E. 410.

(8) *Capham v. Wray*, 12 Mod. 423. *Clarke v. Imperial Gas Comp.* 4 B. & Ad. 315. *Rex v. Haughley (Inhab. of)*, *ibid*. 650.

(9) *Johnson v. Ward*, 6 Esp. N. P. C. 48.

(10) *Tomkins v. Att. Gen.* 1 Dow, 404.

(11) *Phillipps' Ev.* 593.

(12) *Kinnersley v. Orpe*, Doug. 50.

(13) *Rowe v. Brenton*, *antè*, 1642., 3 M. & R. 156. 8 B. & C. 765., *vide etiam Kinnersley v. Orpe*, Doug. 50.

more than a voluntary affidavit. (1) It has however been holden, on issue joined upon the plea of not possessed, in trespass *quare clausum fregit*, that a defendant can use as evidence, the deposition of a witness, formerly called by the plaintiff to prove his possession in a proceeding before justices for an alleged trespass on the same close, and that it made no difference that the witness was still alive. (2)

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EVIDENCE.

An authority to take depositions has been conferred by a variety of statutes, in order that justice shall not be thwarted in civil suits from the witnesses being abroad (3), leaving the kingdom, or suffering from infirmity or illness. (4) Depositions can likewise be taken by consent in civil suits, and occasionally upon prosecutions for misdemeanors (5), but does not apply to indictments. (6)

By some statutes depositions are made conclusive: thus, under stats. 6 Geo. 4. c. 16. ss. 90. 92. and 2 & 3 Will. 4. c. 114. s. 7., depositions in bankruptcy are made conclusive in certain cases. By the mutiny acts, the *ex parte* examination of a soldier as to his parochial settlement is made evidence in case of his death or absence from the kingdom; and by stat. 59 Geo. 3. c. 12., analogous provisions exist respecting the examination of prisoners as to their settlements.

Stat. 6 Geo. 4.
c. 16. ss. 90.
92., 2 & 3 Will.
4. c. 114. s. 7.,
and 59 Geo. 3.
c. 12.

The rule that a written deposition, taken before a magistrate, under stat. 7 Geo. 4. c. 64. s. 3. is the best evidence of the statement of the witness, is not confined to the proceeding in which the deposition is taken, but extends to all proceedings, civil as well as criminal, in which it is sought to adduce the statement of the witness in evidence. (7)

Depositions
under stat. 7
Geo. 4. c. 64.
s. 3.

Depositions made by a witness sent by the petitioning creditor to prove an act of bankruptcy before the commissioners, are admissible in evidence against the petitioning creditor in a subsequent action against him by the assignees, although the witness is still living. (8)

Depositions to
prove an act of
bankruptcy
evidence, al-
though depo-
nent be alive.

By stat. 13 Geo. 3. c. 63. ss. 40. 44., powers are confined to take depositions in India, and such authority has been extended by stat. 1 Will. 4. c. 22. to all colonies and places under his majesty's dominion, and to all actions pending in the courts of law at Westminster; and these courts, and the several judges of them, have power to order the examination of witnesses by certain officers or other persons named in the order, or to issue commissions to examine them in places out of their jurisdiction: but by sect. 10. it is provided, that "no examination or deposition to be taken by virtue of this act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and

Stat. 13 Geo. 3
c. 63. and 1
Will. 4. c. 22.
Depositions in
India.

(1) Bull. N. P. 242. *Pyke v. Crouch*, 1 Ld. Raym. 790.

(2) *Cole v. Hadley*, 11 A. & E. 807.

(3) *Vide* stat. 1 Will. 4. c. 22. *Duckett (Bart.) v. Williams*, 1 C. & J. 510. *Pond v. Dimes*, 3 M. & Sc. 161.

(4) *Abraham v. Newton*, 8 Bing. 274., *vide etiam* stats. 13 Geo. 3. c. 63. and 42 Geo. 3. c. 85.

(5) *Rex v. Morpew*, 2 M. & S. 602. *Anon.* 2 Chitt. 199.

(6) *Rex v. Briscoe (Lady)*, 1 Dowl. P. C. 520.

(7) *Leach v. Simpson*, 5 M. & W. 309. 7 Dowl. P. C. 13.

(8) *Gardner v. Moul*, 10 A. & E. 464.

**EFFECT AND
PROOF OF
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EVIDENCE.**

Depositions are not evidence without the production of the depositions.

Depositions in ecclesiastical courts.

Depositions in courts of equity.

may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

Depositions taken on interrogatories under a commission are not evidence without production of the commission, unless the depositions are of long standing. (1)

Affidavits taken by a commissioner of the court of King's Bench are admissible, without proving the commission; acting as such is enough (2); and it seems, that depositions taken before a judge by consent in a cause may be proved at the trial by production of a copy signed by the judge, and delivered by his clerk, without verifying the copy. (3)

If depositions in the ecclesiastical courts be taken in a cause over which such courts have authority, they appear to be evidence, as being depositions taken in the course of a judicial proceeding:—thus, Chief Baron Gilbert says, that "Depositions taken in the spiritual courts may be read when taken in a cause in which those courts have authority, as far as relates to that cause, inasmuch as these are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a court of record" (4): but that "depositions taken in the spiritual courts, in a cause relating to lands, cannot be read, because they are no oaths at all; inasmuch as the spiritual courts have no authority to take depositions relating to lands." There are, however, some authorities against the depositions in ecclesiastical courts being admissible evidence in trials before courts of common law. (5) But they appear, for the most part, to be founded on the doctrine, that depositions are only admissible in evidence when taken in courts of record; a doctrine which does not seem to be supported by satisfactory reasons, and which, it must be admitted, does not by any means universally hold (6): thus, depositions in Chancery are not of record; and depositions before commissioners of excise can be read before commissioners of appeals. (7)

In order to make depositions in courts of equity, they must have been obtained in a suit which was regularly before the court, and within its jurisdiction; and if a bill in equity be dismissed, merely because the court considered the matter unfit for equity to decree, the depositions are notwithstanding evidence. (8) But where, upon a bill to perpetuate testimony, the cause is set down for hearing, and the bill is dismissed, because it ought not to have been so set down, the plaintiff will, at law, have the benefit of the depositions which have been obtained. (9)

On the trial of an action, when it is proposed on one side to read an answer to a bill in Chancery, if the other side insist upon it, the whole of the bill, and not the interrogatory part merely, must be read in evidence. (10)

(1) *Bayley v. Wylie*, 6 Esp. N. P. C. 85. *Rowe v. Brenton*, 8 B. & C. 765.

(2) *Rex v. Howard*, 1 M. & Rob. 187.

(3) *Duncan v. Scott*, 1 Camp. 103.

(4) Ev. p. 60.

(5) *Sarum (Earl of) v. Spencer (Sir B.)*, 2 Rol. Abr. Triall (B.), 679. Litt. Rep. 167. Bull. N. P. 242. 3 Bac. Abr. Evidence (F.), 272. Gilb. Ev. 60. Hawk. c. 42. 12 Vin. Abr. Evidence, 110. [A. b. 31.], *vide* 2 Hale, 285.

(6) Phillipps' Ev. 563.

(7) *Post*, 1647.

(8) *Backhouse v. Middleton*, 1 Ch. Ca. 175. Gilb. Ev. 56.

(9) *Hall v. Hoddesdon*, 2 P. Wms. 162. *Vaughan v. Fitzgerald*, 1 Sch. & Lef. (Irish), 316. *Moyfer v. Peacock*, 12 Vin. Abr. Evidence, 108. [A. b. 31.]. *Smith v. Feak*, *ibid.* 1 Ld. Raym. 735. *Copeland v. Stanton*, 1 P. Wms. 414. *Jones v. Dunthorpe*, 1 Dick. 50. *Mulvany v. Dillon*, 1 Ball & Be. (Irish), 411. *Cholmondeley v. Clinton (Lord)*, 2 Meriv. 81.

(10) *Pennell v. Meyer*, 8 C. & P. 470.

On the trial of a writ of right, decrees in Chancery in causes between the tenant's father and other persons not connected with the demandant, and to which proceedings the latter was neither party nor privy, were admitted for the purpose of shewing the character in which the tenant's father assumed and retained possession of the premises. (1)

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EVIDENCE.

Depositions made before commissioners of excise (who, by stat. 12 Car. 2. c. 24. have power to administer oaths on inquiry into forfeiture), taken in the presence of the other party, and signed by the witness, would be admissible on an appeal from the sentence of the commissioners, "if the witnesses were dead, or could not be found." (2)

Commissioners
of excise.

Depositions to be evidence, must have been made in a judicial inquiry (3); for a person is not bound to take notice of extra-judicial proceedings. Thus, a voluntary affidavit is not evidence, "because it is not part of any cause in a court of justice" (4), unless by way of admission; nor are depositions, made before magistrates, receivable in cases where they are not required to take them (5), as in cases of high-treason.

Depositions to
be evidence
must have been
made in a ju-
dicial proceed-
ing.

Depositions of deceased witnesses, taken before commissioners, on the opening of a fiat, and subsequently enrolled by the assignees afterwards appointed, are not evidence in an action brought by the bankrupt against the assignees acting under the fiat. (6)

When depositions are tendered in evidence in lieu of the parol testimony of the deponent, they are admissible on the same footing as the parol declarations of witnesses on a former trial. But a deposition is not admissible, unless the parties be the same; for a stranger to the former suit had no opportunity to cross-examine (7), and he cannot use them against one who was a party, because he could not have been prejudiced by them; and therefore, for want of mutuality, ought not to take advantage of them. (8)

Identity of
parties.

The depositions or evidence of a witness in one cause cannot be evidence in another, where the verdict would be inadmissible; for the oath cannot be given in evidence, without first giving the verdict in evidence (9); for otherwise it would not appear, that the oath was more than a voluntary affidavit. But it is not requisite, that the depositions should have been made, or the evidence given in the same proceeding, provided the parties be the same. "In the court of Chancery, depositions in one cause are frequently read in another;" and "in courts of law the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim." (10) But although the parties are the same, yet if the same matters were not in issue in the former cause, the depositions are not evidence. (11)

Identity of
matter.

(1) *Davies v. Lowndes*, 7 Scott, 22. 5 Bing. N. C. 161.

(2) *Per Lord Holt in Bredon v. Gill*, 1 Ld. Raym. 219.

(3) Bull. N. P. 241. *Stork v. Denew*, 12 Vin. Abr. Evidence, 110. [A. b. 31.].

(4) 3 Bac. Abr. Evidence (F.), 267. Sty. 446. Bull. N. P. 242.

(5) *Rex v. Payne*, 1 Ld. Raym. 730. 1 Salk. 281.

(6) *Chambers v. Bernasconi*, 1 C. M. & R. 352.

(7) Bull. N. P. 242. *Coke v. Fountain*, 1 Vern. 413.

(8) 3 Bac. Abr. Evidence (F.), 270. *Rushworth v. Pembroke*, (Countess of), Hardr. 472. Gilb. Ev. 55.

(9) Bull. N. P. 242. *Sampson v. Tot-hill*, 1 Sid. 325.

(10) *Per Lord Kenyon in Rex v. Jolliffe*, 4 T. R. 290. *Pyke v. Crouch*, 1 Ld. Raym. 730. *Pitton v. Walter*, Str. 162. *Green v. Gate-wicke*, Bull. N. P. 243. *Richardson v. Wil-liams*, 12 Mod. 319.

(11) *Alkibone v. Att. Gen.*, 12 Vin. Abr. Evidence, 110. [A. b. 31.].

EFFECT AND
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DOCUMENTARY
EVIDENCE.

Opportunity
for cross-ex-
amination.

Where party
has had an op-
portunity of
cross-examin-
ing a witness
and has ne-
glected to do
so.

Depositions af-
fecting particu-
lar individuals.

This rule, however, at all events, does not apply to cases where depositions are offered against those, who were not parties to the former suit, as matter of reputation, for there, the very circumstance that the same matter was litigated, has been urged as an objection to the evidence.

The parties and cause of action must not only be essentially the same, but there must be an opportunity for cross-examination (1): thus, in Chancery depositions, if a witness, after being examined *de bene esse*, die before the defendant puts in his answer, the deposition is not evidence, because the adversary had no opportunity to cross-examine. (2) And although an answer be put in, yet if the witness, examined *de bene esse*, die before he can be examined again, having been dangerously ill from the time of putting in his answer until his death, his deposition will not be admissible. (3) But where upon a bill to perpetuate testimony, the defendant stood in contempt, and would not answer, and thereupon the plaintiff had a commission and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and before the answer came in, the witnesses died, their depositions were held receivable upon the trial of an ejectment. (4)

If a party have had an opportunity of cross-examining a witness, and has refrained from doing so, it is in effect the same as if he had cross-examined: thus, in *Cazenove v. Vaughan* (5) Lord Ellenborough observed, "Otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not, which would be a most uncertain and unjust rule." The abstaining from cross-examining affords also a presumption of the acquiescence in the statement of the witness. And bills to perpetuate testimony would be altogether frustrated, if the adverse party refused to answer till all the witnesses were dead. (6) It has been said by Chief Baron Gilbert, that if the adverse party be in contempt, "then the depositions of the witnesses shall be admitted, for then it is the fault of the objector, that he did not cross-examine the witnesses, since he would not join the examination of the witnesses." (7)

"The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete." (8)

(1) *Att. Gen. v. Davison*, M'Clel. & Y. 160.

(2) *Dutton v. Colt*, Sir T. Raym. 335. n. *Ford v. Gay*, cit. in *Howard v. Tremaine*, 1 Show. 363. *Piercy v. —*, Sir T. Jones, 164. Bull. N. P. 240. 12 Vin. Abr. Evidence, 108, 109. [A. b. 31.]. "The rule is, that depositions are not allowed to be read before answer put in, or before the party is in contempt, unless he has had an opportunity for cross-examining." *Per Le Blanc J. in Cazenove v. Vaughan*, 1 M. & S. 8. Gilb. Ev. 57, 58. 2 Jones, 164. It is said that an order in Chancery requiring such evidence to be admitted, does not bind the common law courts. 2 Jones, 164. Bull. N. P. 240. Gilb. Ev. 57. n.

(3) *Brown's case*, Hardr. 315. The case of *Arundell v. Arundell*, cit. 12 Vin. Abr.

Evidence, 107. [A. b. 31.], which is contrary, does not appear to be tenable.

(4) *Howard v. Tremaine*, 1 Show. 363. Carth. 265. 1 Salk. 278. Gilb. Ev. 57. n.

(5) 1 M. & S. 6.

(6) *Howard v. Tremaine*, Carth. 265. *Mulvany v. Dillon*, 1 Ball & Be. (Irish), 413.

(7) Gilb. Ev. 56. 62. 64. Com. Dig. Evidence (C. 4.). *Per Le Blanc J. in Cazenove v. Vaughan*, 1 M. & S. 8. *Brown's case*, Hardr. 315. 12 Vin. Abr. Evidence, 109. [A. b. 31.]. Bull. N. P. 240. *Howard v. Tremaine*, 2 Show. 363, 364. Carth. 265. 4 Mod. 147. 1 Salk. 278.

(8) *Per Lord Ellenborough in Cazenove v. Vaughan*, 1 M. & S. 6. *Per De Grey C. J. in Duchess of Kingston's case*, 20 Howell's St. Tr. 538.

The principle that "the evidence which a witness gave on a former trial may be used on a subsequent one if he die in the interim," (1) must be taken with this qualification, that the party to be affected by such evidence, or some person in privity with him, had an opportunity of cross-examining the witnesses with reference to the same subject-matter.

EFFECT AND
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EVIDENCE.

Where the plaintiff claimed to hold land under A. B., and on a previous charge of malicious trespass on the land, before the petty sessions had called A. B. as a witness, who, however, disproved the tenure, it was held, that the deposition of A. B. was admissible in evidence against the plaintiff, although A. B. was alive. (2)

Depositions cannot be used if there be a want of privity. (3)

Depositions
cannot be used
if there be a
want of privity.

On an issue to try the *bona fides* of a conveyance, the plaintiff cannot give in evidence a deposition against the defendant, merely because it has been used by him in a Chancery suit brought by another person against him to try the same question; because in *Atkins v. Humphreys* (4) Chief Justice Tindal said, that "he was inclined to think that he could not receive [such] evidence, on the ground of want of reciprocity," and rejected it. Mr. Phillipps (5) has however observed, "The question appeared to be the same in the two suits; and it may be questioned, whether the doctrine of reciprocity was applicable to this case, which related to the admissibility of a deposition, and not of a verdict. The party had not only a power of cross-examining, but actually used the deposition."

Where hearsay evidence is admissible, it is obvious, that there can be no reason why depositions regarding matters of general reputation should have been taken in suits in which the party to be affected by them, or any one whom he represents, were concerned. (6) The principal questions as to the admissibility of depositions in such matters are, whether they have been made *post litem motam*, and whether the characters of the parties, whose depositions are tendered, is proved to have been such as is purported, on the face of the depositions. (7)

Depositions re-
specting general
reputation.

A deposition taken in a cause between other parties will be admitted to contradict what the same witness swears at a trial. (8) But depositions are not used for the purpose of secondary evidence, where they are produced in order to contradict a witness examined upon a trial.

Depositions to
contradict wit-
ness.

On an issue out of Chancery, an examined copy of the depositions of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. (9)

So an examined copy of an affidavit of a third person filed at chambers, and used by the defendant on a motion, is evidence against him on a subsequent trial. (10)

An examined copy of an affidavit filed in the court of Chancery is evi-

(1) *Per* Lord Kenyon in *Rex v. Jolliffe*, 4 T. R. 290. *Strutt v. Bovingdon*, 5 Esp. N. P. C. 56. *Doncaster (Mayor of) v. Day*, 3 Taunt. 262. *Pyke v. Crouch*, 1 Ld. Raym. 730. (5th resolution).

(2) *Cole v. Hadley*, 3 P. & D. 458. 4 Jur. 483.

(3) *Doe d. Foster v. Derby (Earl of)*, 1 A. & E. 790.

(4) 1 M. & Rob. 523.

(5) Ev. 571.

(6) Bull. N. P. 240.

(7) Phillipps' Ev. 575.

(8) *Sparis v. Drax*, Bull. N. P. 240.

(9) *Highfield v. Peake*, M. & M. 109., vide etiam *Denn d. Lucas v. Fulford*, 2 Burr. 1179.

(10) *Per* Abbott J. in *Doe v. Wood*, Manning's N. P. Dig. 122.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

Depositions in
Chancery must
be proved in
their entirety.

When deposi-
tions are and
are not evidence
in the absence
of the witness.

Mode of prov-
ing what a
witness, since
dead, had sworn
upon a trial.

dence without proof of the handwriting of the party making it, provided it be shewn, that it has been used or acted upon by him. (1)

In order that the proper effect of depositions may be collected, the party reading them, must read the answers to the cross interrogatories as part of his case (2), even though the answers refer to or state the contents of writings not in themselves evidence; in fact, the court "cannot form any distinction between the examination *vidē voce*, and the examination on paper." (3) A party cannot abandon part of a series of interrogatories; he must abandon the whole, if any. (4) An objection cannot be taken to a deposition from the interest of a witness after cross-examination (5); or to leading questions after publication. (6) And where depositions have been taken to perpetuate testimony, and the witness becomes a party to the suit, his deposition cannot be read. (7)

Although the deposition of a witness may be read, not only where it appears that the witness is actually dead, but in all cases where he is dead for the purposes of evidence; yet, depositions will not be received as evidence, while there remains any reasonable probability of the witness being forthcoming on a future occasion, in which case the proper course is to move the court for a postponement of the trial, previous to the jury being charged. (8) In *Rex v. Hogg* (9) the deposition of an old woman bedridden was allowed to be read, on the ground of there being no likelihood of her being able to attend at another assizes (10); so also if the witness be insane (11); or if he cannot be found after diligent inquiry. (12) But the deposition of a female near her confinement was, by Mr. Justice Patteson, rejected. (13)

In Chancery, when the deponent is unable to attend through sickness, his depositions cannot, seemingly, be read without a special order. (14)

If depositions be taken on the ground of a witness going abroad, they cannot be read if the witness be in this country at the time of the trial. Some evidence of the witness having actually gone abroad should be given. (15)

"What a witness, since dead, has sworn upon a trial between the same parties, may, without any order of the court, be given in evidence, either from the judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given." (16)

(1) *Rex v. James*, 1 Show. 397. *Crook v. Dowling*, 3 Doug. 75. n. *Rees d. Howell v. Bowen*, M'Clel. & Y. 383. Roscoe's Ev. 79. But in case of an indictment for perjury, the handwriting must be proved. *Ibid.* Rosc. Dig. Crim. Ev. 157.

(2) *Temperley v. Scott*, 5 C. & P. 341.

(3) *Per Tindal C. J.* *ibid.* *M'Intyre v. Layard*, R. & M. 203. *Falconer v. Hanson*, 1 Camp. 171.

(4) *Wheeler v. Atkins*, 5 Esp. N. P. C. 246.

(5) *Ogle v. Paleski*, Holt's N. P. C. 485.

(6) *Williams v. Williams*, 4 M. & S. 497.

(7) *Tilly's case*, 2 Ld. Raym. 1009.

(8) *Rex v. Savage*, 5 C. & P. 143.

(9) 6 *ibid.* 176.

(10) *Doe v. Evans*, 3 *ibid.* 221.

(11) 1 Hale's P. C. 305.

(12) Bull. N. P. 239. Hawk. P. C. 1. ii. c. 46. s. 18.

(13) *Rex v. Savage*, 5 *ibid.* 143., sed

vide *Rex v. Eriswell (Inhab. of)*, 3 T. R. 721.

(14) *Doe v. Evans*, 3 C. & P. 221. There are however authorities of a contrary tendency. *Lutterell v. Reynell*, 1 Mod. 293. *Kinsman v. Crooke*, 2 Ld. Raym. 1166. Gilb. Ev. 54. Bull. N. P. 239. *Andrews v. Palmer* 1 Ves. & B. 22. *Jones v. Jones*, 1 Cox, 184. As to reading Chancery depositions when the witness is kept away by contrivance, Bull. N. P. 243.; when he cannot be found, *Benson v. Olive*, Str. 920.; when he is not amenable to process, *Fry v. Wood*, 1 Atk. 445. *Altham (Lord) v. Anglesea (Lord)*, Holt, 736.

(15) *Proctor v. Lainson*, 7 C. & P. 629., vide *Patterson v. Evans*, 1 Chitt. 89. *Ward v. Wells*, 1 Taunt. 461. *Fonsick v. Agar*, 6 Esp. N. P. C. 92. *Falconer v. Hanson*, 1 Camp. 171.

(16) *Per Mansfield C. J.* in *Doncaster (Mayor of) v. Day*, 3 Taunt. 262. *Strutt v. Bovingdon*, 5 Esp. N. P. C. 57.

The witness must be prepared to prove the very words of the former witness. (1)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

In general, depositions taken *in perpetuum rei memoriam* are not evidence at law, unless an answer be put in and proved (2), in case of a bill filed for a commission to examine witnesses. (3)

Depositions offered in evidence under an order of the court of Chancery, directing a trial at law, may be read without proof of the bill and answer, it being proved, that at the time of trial, the witnesses are unable to attend in person. (4)

Depositions
under an order
of the court of
Chancery.

But this order will not have the effect of making any thing admissible in evidence at common law, which would not be so, irrespective of such order. (5)

At common law a deposition must be proved by an examined copy: but office copies are evidence in Chancery. (6)

Depositions
how proved.

Domesday contains a general survey of all the counties in England excepting the four northern, and was compiled towards the termination of the reign of William I., for the purpose of ascertaining the ancient demesne lands, which were the socage tenures, first in the hands of Edward the Confessor, and afterwards possessed by William I. (7)

DOMESDAY.

Domesday (8) being a record compiled by the authority of government, and founded on official returns, is admissible evidence of the tenure of lands, &c.; and when a question arises, whether a manor is ancient demesne, the trial is by inspection of Domesday. (9)

An order entered in a book, and signed by the governor of Queen Anne's Bounty, is sufficient evidence of the augmentation of a curacy, without going on to prove, that the money had been afterwards laid out in land, and allotted by deed, under the corporation seal of the governors, to be annexed to the curacy, and that such deed was enrolled within six months after the execution in pursuance of the statutes. (10)

ECCLESIASTI-
CAL RECORDS
AND DOCU-
MENTS.

A bishop's register is evidence of the facts stated in it. (11)

Bishop's re-
gister.

A book of endowment of Hugo Wells, Bishop of Lincoln, was received as evidence of vicarial endowments. (12)

Book of en-
dowment.

Upon a question, whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of Exeter, intituled "Rentals," and containing columns of the names of their estates, with the rents reserved on each, and "*solvits*" written in different handwritings against such rents, were entries made by the receivers of the dean and chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing, that the receivers of the dean

Books in the
archives of a
dean and chap-
ter.

(1) *Ennis v. Donisthorpe*, cit. Phillipps' Ev. 354.

(2) Bull. N. P. 240.

(3) *Cazenove v. Vaughan*, 1 M. & S. 4.

(4) *Palmer v. Aylesbury (Lord)*, 15 Ves. 176.

(5) Ibid.

(6) Gilb. Ev. 21. Bull. N. P. 229.

(7) Vide Merewether and Stephens's Hist. of Boroughs, 68—72. 283. 1 Ellis on Domesday, *passim*. 1 Stephens's English Constitution, 30—34.

(8) Gilb. Ev. 69.

(9) Those who are desirous of acquiring historical and antiquarian information respecting "the public records of Great Britain, and the publications of the record commissioners," are referred to the able compilation upon such subjects by Mr. Cooper, Q. C.

(10) *Doed. Graham (Clerk) v. Scott (Clerk)*, 11 East, 478. Stat. 1 Geo. 1. c. 10. s. 2. 9 Geo. 2. c. 36.

(11) *Arnold (Clerk) v. Bath and Wells (Bishop of)*, 5 Bing. 316. 2 M. & P. 559.

(12) *Leonard v. Franklyn*, 1 Daniel, 34. *Tucker v. Wilkins*, 4 Sim. 262.

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and chapter for the last sixty years had kept their books of accounts in the same form. (1)

A book in the chapter-house of the dean and chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases. (2)

Book found in
herald's office.

A book found in the herald's office, purporting to be an account of the possession of a monastery, is not admissible evidence of that fact. (3)

**ECCLESIASTI-
CAL SENTENCES.**

The consistory court of the bishop, the court of arches, and the court of delegates are not inferior courts; and defect of jurisdiction after sentence, unless apparent on the face of the proceedings, will not be intended. (4)

Sentence when
conclusive.

The ecclesiastical courts possess the jurisdiction of determining upon the legality and illegality of marriages; and their sentences upon such subjects are conclusive. (5)

The fact of the legality of a marriage, arising incidentally in a civil suit, may be determined, in modern proceedings at least, without referring the question to the spiritual judge; though, upon issue joined in dower upon the fact of legality of marriage, the bishop's certificate is the appropriate and conclusive evidence. (6)

It is sometimes difficult to ascertain whether, in fact, an ecclesiastical court has already determined a matter, which can only in such court be the subject of a direct suit or proceeding *in rem*, but which has incidentally become the subject of controversy in a civil suit.

Inferential
matter.

It is, however, a general principle, that the judgments of courts of justice are not evidence "of any collateral matter which may be collected or inferred from their sentence." (7)

Marriage.

But a sentence in a suit of jactitation of marriage is evidence in an action in a court of common law to disprove the marriage; and, as it would seem, in favour of a stranger to the suit in an ecclesiastical court. (8)

The sentence of the spiritual court is evidence of separation without producing the libel and other proceedings (9); and the minute book of the consistory court is evidence of a decree for alimony. (10)

Excommunica-
tion.

In *Hillyard v. Grantham* (11) it was decided, that a sentence of excommunication for incontinency was inadmissible on an issue to try a question of legitimacy, as it was a criminal matter, and because it was *res inter alios acta*; but that "if it had been a sentence on the point of the marriage, on a question of the lawfulness of the marriage, it being a sentence of a court having proper jurisdiction, might have been given in evidence." (12)

Action against
husband for ne-
cessaries to his
wife.

Where a husband was sued for necessities supplied to his wife, who was living apart from him, it was held, that the sentence in the ecclesiastical

(1) *Doe d. Webber v. Thynne* (Lord), 10 East, 206.

(2) *Combs v. Coether*, M. & M. 398. *Humble v. Hunt*, Holt's N. P. C. 601.

(3) *Lygon v. Strutt*, 2 Anst. 601.

(4) *Ricketts v. Bodenham*, 4 A. & E. 493.

(5) *Bunting's case*, 4 Co. 29. (a.)

(6) *Ilderton v. Ilderton*, 2 Hen. Black. 156.

(7) *Per Lord Holt in Blackham's case*, 1 Salk. 290. *Per Eyre C. J. in the Duchess of Kingston's case*, 20 Howell's St. Tr. 598.

(8) *Jones v. Bow*, Carth. 225.

(9) *Stedman v. Gooch*, 1 Esp. N. P. C. 6.

(10) *Houliston v. Smyth*, 2 C. & P. 25.

(11) *Cit. per Lord Hardwicke*, 2 Ves. sen. 246. *Gibson v. M'Carty*, R. T. H. 311.

(12) Respecting sentences of deprivation, vide *Phillips v. Crawley*, Freem. 84. pl. 103. 12 Vin. Abr. Evidence, 128. [A. b. 128.]. Rights to pews, vide *Cross v. Salter*, 3 T. R. 639.

court in a suit, which the wife had instituted against him for alimony, and a divorce *a mensâ et thoro*, but which had been dismissed, he having set up adultery in his defence, was not receivable in evidence in such an action, as it was *res inter alios acta*. (1)

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It may be here observed, that the practice of the ecclesiastical court is a matter of fact to be proved by evidence, and left to the jury. (2)

Practice of
courts.

Examined copies of entries in the books of excise are evidence. (3)

Excise.

An entry by A. at the custom-house, in the names of A., B., and C., of premises for the keeping of beer for sale, is conclusive, where the crown is concerned, against A. as to his partnership with B. and C.; but, respecting private persons, it is merely *prima facie* evidence. (4)

Entries in ex-
cise books.

Excise books transcribed by officers of excise from the malster's specimen paper are evidence against him, without calling the officers to substantiate them; notwithstanding they may be taxed with fraud and collusion, without proof of the fact. (5)

A judgment of condemnation by commissioners of excise, in a matter exclusively within their jurisdiction, is conclusive on the right of seizure, and binds strangers. (6) Where a statute provides, that the judgment of commissioners appointed by the act shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding; consequently, a certificate from commissioners for settling the debts of the army, upon any matter relating to their office, is conclusive; and evidence cannot be received to shew their having made an erroneous decree. (7)

Judgment by
commissioners
of excise.

A document from the court of Exchequer, purporting to be an extent of crown lands, and pursuing the directions of the 4 Edw. 1. stat. 1., may be given in evidence, without producing the commission, or the authority under which it was taken. (8)

EXTENT OF
CROWN LANDS.

The proclamations on a fine are not sufficiently proved by shewing on the production of the chirograph, that they are duly indorsed. (9)

FINE (PROCLA-
MATION OF).

The Fleet books are admissible evidence on a question of pedigree (10), but not evidence to prove a marriage. (11)

FLEET BOOKS.

The prison books of the Fleet and King's Bench prisons, though admissible evidence to prove the time of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment, because they are not kept by any public authority (12), and the commitment itself is the best evidence.

The sentence of a foreign court of competent jurisdiction is evidence of *res judicata*, and is not to be called in question in a collateral cause in the courts of this kingdom. (13) A foreign judgment is *prima facie* evidence

FOREIGN
COURTS (JUDG-
MENTS OF).

(1) *Day v. Spread*, 1 Irish Circuit Cases, 141.

(2) *Beaurain v. Scott (Knight)*, 3 Camp. 388.

(3) *Fuller v. Fotch*, Carth. 346.

(4) *Ellis v. Watson*, 2 Stark. 453.

(5) *Rex v. Grimwood*, 1 Price, 369.

(6) *Terry v. Huntingdon*, Hardr. 480.

Fuller v. Fotch, Carth. 346. *Maingay v.*

Gahan, 1 Ridg. Lapp, & Sch. (Irish), 1. 1

Harg. Law Tracts, 468. n. 2 Evans' Po-

thier, 307., sed vide *Henshaw v. Pleasance*,
2 W. Black. 1174.

(7) *Moody v. Thurston*, Str. 481., vide
etiam *Lane v. Hegberg*, Bull. N. P. 19.

Radnor (Earl of) v. Reeve, 2 B. & P. 391.

Brown v. Bullen, Doug. 407.

(8) *Rowe v. Brenton*, 3 M. & R. 164. 8

B. & C. 747.

(9) *Doe d. Hatch v. Bluck*, 6 Taunt. 485.

2 Marsh. 170.

(10) *Lawrance v. Dixon*, Peake's N. P. C.

185. *Doe d. Passingham v. Lloyd*, cit. 1 Esp.

N. P. C. 215. Peake's N. P. C. 304.

(11) *Antd*, 6. tit. ADULTERY.

(12) *Salte v. Thomas*, 3 B. & P. 188. *Rex*
v. Aickles, 1 Leach, C. C. 391.

(13) *Hamilton v. Dutch E.I. Comp.* 3 Bro.
P. C. 264.

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EVIDENCE.

Form of judgment not considered, but its substance.

Impeachable for positive and apparent legal errors.

Judgment of Lord Ellenborough in *Buchanan v. Rucker*.

Absence of parties.

of a debt, and that every thing to support it was done in the court, in which it was obtained. (1)

Questions have however arisen, whether it is to be deemed conclusive, and, if not conclusive, to what extent and in what manner the original merits can be properly inquired into. (2)

The substance of the proceedings of a colonial court are regarded, and not their form (3); but a foreign judgment will not be an estoppel, if it do not appear to be final and conclusive as an estoppel in the country where it is pronounced. (4) An action cannot be supported upon a decree of a foreign court of equity, when the sum due on the decree is left indefinite. (5) But if the decree be perfected, as by stating a balance due upon partnership accounts, an action will lie on the decree. (6)

In *Martin v. Nicolls* (7) the vice-chancellor considered, that the grounds of a foreign judgment could not be reversed in England, and that a bill for discovery, and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on a foreign judgment in the country, was demurrable. (8)

But it seems, that if a foreign judgment proceed upon a positive and apparent error in law, it can be disputed, and in any kind of action. (9)

In *Buchanan v. Rucker* (10) Lord Ellenborough said, that "there might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that it could not raise an *assumpsit*, and if submitted to the jurisdiction of the courts of this country, could not be enforced." Where it appeared, that the French court had mistaken the law of England as to the effect of the cancellation of a bill of exchange, and that their decree had been founded upon such mistake, the defendant was not allowed to set up the decree in answer to the plaintiff's claim. (11)

A notarial copy of the condemnation of a ship, as not being worth repairs, is only evidence of the fact of her having been condemned, and not of the particular defects on which the condemnation was grounded. (12)

But the court will not set aside the judgment of a foreign court, unless its errors be very apparent. (13)

Although a foreign judgment is not available, if it appear on the record of the proceedings on which the judgment is founded, that the plaintiff proceeded to judgment, without serving the defendant with any species of process (14):

(1) *Arnott v. Redfern*, 11 Moore, 209. 3 Bing. 353. 2 C. & P. 88.

(2) *Kennedy v. Cassilis (Earl of)*, 2 Swanst. 326. n. *Galbraith v. Neville*, Doug. 5. n. *Boucher v. Lawson*, C. T. H. 89. *Tarleton v. Tarleton*, 4 M. & S. 21. *Philips v. Hunter* (in error), 2 Hen. Black. 410. *Walker v. Witter*, Doug. 1. *Herbert v. Cook*, Willes, 36. n.

(3) *Henley v. Soper*, 8 B. & C. 20.

(4) *Plummer v. Woodburne*, 4 ibid. 625., et vide *Obicini v. Bligh*, 8 Bing. 351.

(5) *Sudler v. Robins*, 1 Camp. 253.

(6) *Henley v. Soper*, 8 B. & C. 19.

(7) 3 Sim. 458.

(8) It seems that in an action of debt or *assumpsit*, brought in England upon a foreign judgment, such judgment is to be taken as binding and conclusive on both parties.

Guinness v. Carroll, 1 B. & Ad. 459. *Martin v. Nicolls*, 3 Sim. 458. Story's Conflict of Laws, 504—508., ante, 1177. The judgment is, however, conclusive if properly pleaded in bar. *Philips v. Hunter*, 2 Hen. Black. 410. *Burrows v. Jemino*, Str. 733. *Plummer v. Woodburne*, 4 B. & C. 625.

(9) *Novelli v. Rossi*, 2 B. & Ad. 757.

(10) 1 Camp. 67.

(11) Vide etiam *Sims v. Thomas*, 1 Longfield & Townsend (Irish), 19.

(12) *Wright v. Barnard*, 2 Esp. N. P. C. 700.

(13) *Becquet v. McCarthy*, 2 B. & Ad. 957. *Alison v. Furnival*, 1 C. M. & R. 293. *Arnott v. Redfern*, 3 Bing. 353.

(14) *Buchanan v. Rucker*, 1 Camp. 63. 9 East, 192. *Cavan v. Stewart*, 1 Stark. 525. *Frankland v. McGusty*, 1 Knapp, P. C. 274. *Obicini v. Bligh*, 8 Bing. 351.

—it is no objection to a colonial judgment, that the party against whom it was obtained, was absent from the colony, where by the law of the colony, in the case of a person formerly resident in it absenting himself, and not leaving any attorney, the procurator fiscal was bound to take care of the interests of such absent party. (1)

It seems that a person having property in an island is virtually present; thus, in *Cavan v. Stewart* (2) Lord Ellenborough said, "You must either prove that the party was summoned, or, at least, that he was once on the island" when the attachment issued. An action may be maintained on a foreign judgment obtained by default, which states, that the defendant appeared by attorney, without proving that the attorney mentioned, had authority to appear, for the judgment must have credit for the facts which it specifically alleges. (3) It seems, however, that the judgment would only furnish *prima facie* evidence of the fact of appearance by attorney.

"If a foreign judgment has been pronounced by a court of competent jurisdiction, and the losing party institutes a new suit upon the same matter, it seems contrary to the principles of general jurisprudence, that the merits should be subjected to a second inquiry; and the same principle seems to preclude an examination into a foreign judgment, which has been executed, by payment, or the vacating of securities." (4)

Judgment
where conclu-
sive.

In *Tarleton v. Tarleton* (5), which was in covenant to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, the defendant, and D. B., and from all suits, &c. proof of a copy of the proceedings in a foreign court in a suit there, instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer; *per quod* a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c. was held to be conclusive against the defendant, and that the defendant was not at liberty to shew, that the proceedings were erroneous. (6)

Since the Union, an Irish judgment is not a record, but is received upon the same principles as a foreign judgment. (7)

Irish judgment.

The sentence of a foreign court of competent jurisdiction, directly establishing a marriage in that country, would be conclusive in any of our courts on the validity of the marriage. (8)

Sentences af-
fecting mar-
riages.

It seems, that a sentence of nullity of marriage in the country where it was solemnised, would at least carry with it a great authority in this country. (9) But a judgment of a third country, upon the validity of a marriage not within its territory, nor between the subjects of that country, though admissible, would not have the like authority. (10)

(1) *Becquet v. Mc Carthy*, 2 B. & Ad. 958. *Douglas v. Forrest*, 4 Bing. 693.

(2) 1 Stark. 525.

(3) *Molony v. Gibbons*, 2 Camp. 503.

(4) *Phillipps' Ev.* 540. *Burrows v. Jemino*, Str. 733.

(5) 4 M. & S. 20.

(6) The certificate of a vice-consul is not evidence of the facts stated in it, *Waldron v. Coombe*, 3 Taunt. 162. With respect to discharges by foreign bankruptcy, vide *Potter v. Brown*, 5 East; 125. *Smith v. Buchanan*, 1 ibid. 6. *Edwards v. Ronald*, 1 Knapp. P. C.

259. *Odwin v. Forbes*, Buck, 57. *Philpotts v. Reed*, 1 B. & B. 294. *Orr v. Browne*, 5 C. & P. 414. *Sidaway v. Huy*, 3 B. & C. 14. *Phillips v. Allan*, 8 ibid. 477.

(7) *Guinness v. Carroll*, 1 B. & Ad. 463. *Harris v. Saunders*, 4 B. & C. 411.

(8) Per Lord Hardwicke in *Roach v. Garvan*, 1 Ves. sen. 159., vide etiam *Boucher v. Lawson*, C. T. H. 89.

(9) *Sinclair v. Sinclair*, 1 Hagg. 297. *Cottington's case*, 2 Swanst. 326. n.

(10) *Sinclair v. Sinclair*, 1 Hagg. 297. *Scrimshire v. Scrimshire*, 2 ibid. 340. 397.

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Divorce.

The weight of authority in the English courts is against admitting, that any valid sentence of divorce can be pronounced in a foreign country, respecting a marriage celebrated in England between English subjects. (1)

In *Conway v. Beazley* (2) the opinion of the ecclesiastical court was intimated, that an English marriage might be avoided by a Scotch divorce, if the parties were *bond fide* domiciled in Scotland. The Scottish divorce in that case was avoided, on the express ground, that there was no *bond fide* change of domicile. The language of this judgment has had the effect of unsettling the opinion of the profession derived from *Lolly's case*.

Proof of foreign
judgments.

In an action on a foreign judgment, it is not sufficient to prove the judge's handwriting subscribed to it, without proving that the seal affixed thereto, is the seal of the court (3), although it is so much worn as no longer to make any impression (4): if the court has no seal, then the judgment may be established by proving the signature of the judge. (5)

In *assumpsit* on two judgments recovered in the supreme court of Jamaica, copies of the judgments purporting to be signed by the clerk of the court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the said court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, were held to be admissible evidence to prove the judgments. (6)

The sentence of a foreign court of admiralty cannot be received in evidence, without proof of the ship having been captured. (7)

A judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which that court sits; and the fact of acknowledgment is matter of public notoriety. (8)

Where to prevent a demurrer to a bill, it was falsely alleged in it, that a revolted colony of Spain had been recognised by Great Britain as an independent state:—It was held, that the court was bound to know, judicially, that the allegation was false, and not to give it the intended effect. (9)

Foreign laws
must be proved
as facts.

In an action founded on foreign laws properly brought before the courts here, they will receive evidence of such laws, and give judgment accordingly upon the contract. (10) And a judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary be shewn. (11) But foreign laws must be proved as facts, if a question arise on their existence (12): thus, if the cause of action accrue in Scotland, and infancy be pleaded, the defendant must shew, that infancy is a legal defence to the demand, by proving it to be the law of that country. (13)

Foreign written
law.

The existence of a foreign law, which is in writing, must be proved by documents properly authenticated from the foreign country (14), and cannot

(1) *Lolly's case*, R. & R. 237. *Toovey v. Lindsay*, 1 Dow, 124. *McCarthy v. De Caix*, cit. 3 Hagg. 642. n.

(2) 3 Hagg. 639. *Phillipps' Ev.* 536.

(3) *Henry v. Adey*, 3 East, 221. 4 Esp. N. P. C. 228.

(4) *Cavan v. Stewart*, 1 Stark, 525.

(5) *Alves v. Bunbury*, 4 Camp. 28. *Buchanan v. Rucker*, 1 ibid. 63. 9 East, 192.

(6) *Appleton v. Braybrook* (Lord), 6 M. & S. 34. 2 Stark. 6., et vide *Walker v. Witter*, Doug. 1.

(7) *Marshall v. Parker*, 2 Camp. 69.

(8) *Grierson v. Eyre*, 9 Ves. 347.

(9) *Taylor v. Barclay*, 2 Sim. 213.

(10) *Crawford v. Whittall*, Lofft, 154.

Doug. 4. n.

(11) *Alivon v. Furnival*, 1 C. M. & R. 277.

(12) *Mostyn v. Fabrigas*, Cowp. 174.

Exp. *Cridland*, 3 Ves. & B. 99.

(13) *Male v. Roberts*, 3 Esp. N. P. C. 163.

(14) *Millar v. Heinrich*, 4 Camp. 155. *Clegg v. Levy*, 8 ibid. 166.

be proved by parol (1), because the written law on inspection might contain exceptions.

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Foreign commercial regulations should be proved by well authenticated copies of such regulations (2):—thus, the law of Scotland respecting marriages cannot be proved by a tobacconist. (3) But an exception exists respecting the proof of Jewish marriage law, which has been allowed *ex necessitate* to be proved by traders and others of inferior station. (4)

Unwritten foreign law can be proved by the parol evidence of witnesses possessing professional skill: thus, Sir William Scott, in *Dalrymple v. Dalrymple* (5), with reference to the law of marriage in Scotland said, “The authorities, to which I shall have occasion to refer, are of three classes: first, the opinions of the learned professors, given in the present or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say, that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the court, which has to weigh them, *stare decisis*.” (6)

Foreign un-
written law.
Judgment of
Sir William
Scott in *Dal-
rymple v. Dal-
rymple*.

In *Moss v. Smith* (7) Mr. Justice Erskine held, that a Jewish divorce cannot be proved, without producing the document of divorce delivered by the husband to the wife. But in one case, Lord Kenyon permitted a Jewess to give parol evidence of her own divorce in a foreign country, according to the custom of the Jews at Leghorn. (8)

Jewish divorce.

Upon questions respecting colonial law, the statement of text writers may be admitted, Lord Ellenborough having said, “Text writers furnish us with their statement of the law, and that would certainly be good evidence, upon the same principle as that which renders histories admissible.” “There is a case in which the History of the Turkish Empire by Cantemir was received by the House of Lords, and received after some discussion; I shall therefore receive any book that purports to be a history of the common law of Spain.” (9) So likewise, the law of France relative to marriage, has been proved by the production of a printed book, purporting to contain the code of France, and proved by parol testimony to contain the law of that country; and a book purporting to have been published at the royal printing office at Paris, which (according to the statement of the witness) was authorised to print the laws of France by the government of that country, has been also received as evidence. (10) A printed copy of the “Cinq Codes” of France, produced by the French vice-consul resident at London, who purchased it at a bookseller’s shop in Paris, was received as evidence of the law of France. (11)

Text writers.
Colonial law.

Laws of France.

The political acts of the crown are announced under its authority in the Gazette, and statements of facts in acts of state have credit attached to them

GAZETTES AND
ACTS OF STATE.

(1) *Boehtlinck v. Schneider*, 3 Esp. N.P.C. 58.

(2) *Picton’s case*, 30 Howell’s St. Tr. 491.

(3) *Rex v. Brampton (Inhab. of)*, 10 East, 287.

(4) *Lindo v. Belisario*, 1 Hagg. 216.

(5) 2 *ibid.* 81.

(6) Vide etiam *Buchanan v. Rucker*, 1 Camp. 66.

(7) 1 M. & G. 228.

(8) *Ganer v. Lanesborough (Lady)*, Peake’s N. P. C. 25.

(9) 30 Howell’s St. Tr. 492.

(10) *Lacon v. Higgins*, 3 Stark. 178. D. & R. N. P. C. 38.

(11) *Ibid.*

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in courts of justice ; therefore the Gazette, purporting to be printed by the king's printer, is good evidence of all acts of state therein contained. (1) Where certain addresses had been presented to the king from different bodies of subjects, expressing their loyalty, &c. the Gazette was admitted in evidence to prove an averment in an information for a libel, "that divers addresses, &c. had been presented to his majesty by divers of his loving subjects," &c. (2) And it seems, that the Gazette is evidence of matter therein contained, without proof, that it was bought at the Gazette printers, or other proof from whence it came. (3)

**King's procla-
mations.**

But a judge at Nisi Prius will not take judicial notice of the king's proclamations. (4)

The Gazette is sufficient evidence of a proclamation issued under an order in council, because such proclamation is a public act regarding the crown and government, and must pass the great seal before it can be admitted into the Gazette. (5) And in *Wells v. Williams* (6) Chief Justice Treby said, "The king's proclamation of war was an act of state of which all ought to take notice."

The king's proclamation, reciting that it had been represented, that certain outrages had been committed in different part of certain counties, and offering a reward for the discovery and apprehension of offenders, is admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those parts. (7)

**Gazette not
evidence of
private acts.**

The Gazette is not evidence of private titles or private interests, which have no relation to public transactions : thus, it will not abstractedly prove a grant from the crown to one of its subjects (8), nor notices relating to bankruptcies, unless he who is to be affected by the notice be in the habit of reading the Gazette. (9)

Nor is the Gazette evidence of the appointment of an officer to a commission in the army, because "the commission itself is the best evidence;" but if the commission be not produced after notice, it may be admitted. (10)

**HERALD'S
BOOKS.**

The ancient books in the herald's office contain the pedigrees and arms of the English nobility and gentry from 21 Hen. 8. to 2 James 1.; and the information contained in them having been made under the authority of a commission under the great seal (11), are receivable in evidence in questions of pedigrees, because the statements contained in such books, are the result of inquiries upon public matters under public authority. (12)

The minute book of a herald's visitation, signed by the heads of several families (13), is admissible ; and pedigrees of persons claiming dignities for

(1) *Rex v. Holt*, 2 Leach, C. C. 598. 5 T. R. 436.

(2) *Ibid.*

(3) *Rex v. Forsyth*, R. & R. C. C. 274.

(4) *Van Omeron v. Dowick*, 2 Camp. 44.

(5) *Att. Gen. v. Theakstone*, 8 Price, 89.

(6) 1 Ld. Raym. 283.

(7) *Rex v. Sutton*, 4 M. & S. 532. A preamble to an act of parliament, reciting the existence of such outrages, and making provision against them, is admissible for the same purpose. *Ibid.*

(8) *Rex v. Holt*, 5 T. R. 443.

(9) *Newsome v. Colcs*, 2 Camp. 617. *Gor-*

ham v. Thompson, Peake's N. P. C. 60. *Leam v. Holt*, 1 Stark. 186. *Munn v. Baker*, 2 *ibid.* 255. *Graham v. Hope*, Peake's N. P. C. 280. *Godfrey v. Macauley*, 1 Esp. N. P. C. 371. As to notice of blockades, vide *Harratt v. Wise*, 9 B. & C. 712.

(10) *Kirwan v. Cockburn*, 5 Esp. N. P. C. 233. *Rex v. Gardner*, 2 Camp. 513.

(11) 1 Harl. MS. p. 18. n. 69. App. 1st Rep. Com. Pub. Rec. c. 8. p. 82.

(12) 12 Vin. Abr. Evidence, 118. [A. b. 39.] *Pitton v. Walter*, Str. 162. *Matthews v. Tort*, Comb. 63. *Bell's Huntingdon Peerage*, 350.

(13) *Pitton v. Walter*, Str. 162.

merly made out by the heralds, have been admitted on their authority, by the House of Lords (1); but there are books of entries of pedigrees at the herald's college which have been rejected, as not being evidence. (2)

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An affidavit stating, the different members of deponent's family, and found in the herald's office, may be good evidence as a declaration; and where the original was lost, an entry of it in their books has been received as secondary evidence. (3)

But an extract from a pedigree (4), proved to have been taken out of the records, is not evidence, because a copy of the record might have been had, and therefore not the best evidence; and a book found at the herald's office is not evidence of that fact. (5)

Where herald's visitations are offered in evidence before the House of Lords, the commissions under which they were made should be proved. Whether such proof be absolutely necessary at *Nisi Prius* was questioned in *Sandys v. Sandys* (6) before Lord Denman, but not decided.

General histories and public chronicles are evidence to prove a matter or a universal custom relating to the kingdom in general. (7)

HISTORIES
can prove uni-
versal customs.

In order to shew that a deed was forged, which bore date 1 Ph. & M., and gave all the titles to Philip, which he used after the surrender of Charles 5., chronicles were admitted to shew, that he did not take those titles until six months after the date of the deed. (8) The deaths of sovereigns have also been proved in a similar mode. (9) The Journals of the Houses of Lords and Commons are also sufficient to prove, not only an address to the king, but the king's answer to the house (10), and are evidence without any stamp. (11)

Spelman's *Nomina Villarum* has been received to establish Newstead a vill; Bishop Wells' *Liber de Ordinationibus Vicariorum* has been allowed to prove an endowment (12); and the Year Books are evidence of the custom of the court. (13)

But histories are not admissible to establish any particular *local* rights or customs, which do not affect the whole country (14); and upon which principle Camden's *Britannia*, when tendered to prove a local custom at Droitwich respecting salt pits, was rejected. So, likewise, Dugdale's *Baronage* cannot prove a descent (15); nor Dugdale's *Monasticon*, as to whether a particular abbey was of an inferior order (16); nor a book published by authority in a foreign country, as a regular copy of treaties concluded by the state, if it have not been previously examined with the original archives. (17)

Not admissible
to prove any
local rights or
customs.

(1) *Clifford (Barony of)*, A. D. 1691, 14 Journ. 613. 15 *ibid.* 203. 31 *ibid.* 583.

(2) 12 Vin. Abr. Evidence, 119. [A. b. 39.], *sed vide Thanet (Earl of) v. Foster*, Sir T. Jones, 224. Phillipps' Ev. 583.

(3) *Doe d. Hungate v. Gascoigne*, 2 Stark. Ev. 1087.

(4) Bull. N. P. 248.

(5) *Lygon v. Strutt*, 2 Anst. 601.

(6) Cit. Roscoe's Ev. 672.

(7) Bull. N. P. 248. *Picton's case*, 30 Howell's St. Tr. 492. *Cockman v. Mather*, 1 Barnard. 14.

(8) *Neal v. Jay*, cit. Bull. N. P. 249.

(9) *St. Katherine's Hospital*, 1 Vent. 151. *Stainer v. Droitwich (Burgesses of)*, 1 Salk.

281. Skin. 623. *Brounker (Lord) v. Atkins (Sir R.)*, *ibid.* 14. Phillipps' Ev. 605.

(10) *Rex v. Franklin*, 5 T. R. 445. n.

(11) *Jones v. Randall*, Loft, 383. 428. Cowp. 17.

(12) *Tucker v. Wilkins*, 4 Sim. 262.

(13) *Stainer v. Droitwich (Burgesses of)*, 1 Salk. 281.

(14) Bull. N. P. 248. *Cockman v. Mather*, 1 Barnard. 14. *Picton's case*, 30 Howell's St. Tr. 492.

(15) *Piercy's case*, Sir T. Jones, 164.

(16) *Stainer v. Droitwich (Burgesses of)*, 1 Salk. 281. Skin. 623.

(17) *Buchanan v. Rucker*, 1 Camp. 65.

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**INQUISITIONS
post mortem.**

**Inquisitions
from the court
of Exchequer.**

**Surveys of
church and
crown lands.**

**INSURANCE
COMPANY.**

**JOURNALS OF
THE HOUSES OF
LORDS AND
COMMONS.**

**Resolution not
evidence of
facts therein
stated.**

**Where an ex-
amined copy is
evidence.**

Inquests (1) of office duly taken under legal commissions are evidence between third parties.

Thus, inquisitions *post mortem* are admissible evidence of the facts found by them; and if the originals are lost, they may be proved by a recital of them in the proceedings on a petition of right on the *coram rege* roll; but it is necessary to prove, that such a commission did actually issue, and which may be done *vivâ voce*. (2) An extent of crown lands in the Exchequer in pursuance of stat. 4 Edw. 1. st. 1. is evidence (3); and the returns of inquisitions, called the Hundred Rolls, which were taken by special commission (*temp.* Edw. 1.), are also evidence. (4)

An inquisition under a commission from the court of Exchequer, to inquire whether a prior, or the crown after the dissolution of the priory, was seised of certain lands, was held to be admissible, but not conclusive evidence of the facts stated in the return. (5)

The surveys of the church and crown lands, taken by commissioners under the authority of parliament during the commonwealth, are likewise evidence. (6)

The books of an insurance company, in which they charge themselves with the receipt of a certain sum of money, as a premium to insure a particular house in the occupation of J. S. from fire, are evidence of his occupation; and such entries are evidence against the party making them, because he charges himself with the receipt of money. (7)

The Journals of the Houses of Lords and Commons are admitted as evidence, being statements of public transactions, which have taken place in either house, and of which it is the duty of the officers of the house to preserve a faithful memorial. (8) An entry in the journals of the House of Lords, stating that a judgment of an inferior court had been reversed, is the proper record of the fact of reversal (9); and an entry containing an address of the lords to the king, and the king's answer, in which certain differences were stated to exist between the king of England and the king of Spain, was admitted to prove the fact of such differences existing. (10)

But the resolutions of either house of parliament are not evidence of facts therein stated: thus, the resolution of the House of Commons stating the existence of the Popish Plot, was held to be no evidence of that fact. (11)

Whenever an original is admitted in evidence upon the footing of a public document, an examined copy will equally be admitted (12); consequently, judgments in the House of Lords can be proved by examined

(1) *Vide* CORONER—DOMESDAY—LUNACY—SHERIFF—VALOR BENEFICIORUM.

(2) *Anderton v. Magawley (in error)*, 3 Bro. P. C. 588. *Rowe v. Brenton*, 3 M. & R. 141, 142.

(3) 3 M. & R. 164.

(4) *Ibid.* 140.

(5) *Tooker v. Beaufort (Duke of)*, 1 Burr. 146. Say. 297.

(6) *Underhill v. Durham*, 2 Gwill. 542. *Bullen v. Michel*, 4 Dow, 325. *Rowe v. Brenton*, 3 M. & R. 359.

(7) *Doe d. Smith v. Cartwright*, 1 C. & P. 218. R. & M. 62.

(8) *Rex v. Gordon (Lord George)*, Doug. 590.

(9) *Jones v. Randall*, Cowp. 17.

(10) *Rex v. Franklin*, 17 Howell's St. Tr. 637. *Rex v. Holt*, 5 T. R. 445.

(11) *Oates's case*, 10 Howell's St. Tr. 1165. 1167.

(12) *Holt C. J. in Lynch v. Clark*, 3 Salk. 153. *Rex v. Haines*, Comb. 337.

copies of the minutes of the judgment entered in the journals (1); but the printed journals are not evidence. (2)

Judge's notes are not evidence in equity. (3)

Respecting the principles applicable to the admissibility and effect of verdicts, judgments, decrees, or sentences, when used as evidence, Chief Justice De Grey in the prosecution of the duchess of Kingston observed (4), "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as evidence, conclusive between the same parties upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable; nor of any matter to be inferred by argument from the judgment.

"It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person, who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but as they are not applicable to the present subject, it is unnecessary to state them."

Again, "although a direct and decisive sentence is to be admitted as conclusive evidence upon the court, and not to be impeached from within, yet all acts, though of the highest judicial authority, are impeachable from without; although it is not permitted to shew that the court was mistaken, it may be shewn that it was misled."

Mr. Phillipps observes (5) upon these propositions, "The principles laid down by the chief justice present a very inadequate and in some measure an incorrect view of the state of the law upon this important subject. It does not appear, that the decisions of courts of concurrent and of exclusive jurisdiction have the same effect in evidence, and it is certain that the former, at least, are not as 'evidence conclusive.' The difficulties of the subject relate principally to distinctions between the sentences of courts of record or superior courts, and of courts not of record or inferior courts, but of concurrent jurisdiction; and also to the sentences of foreign courts. A material distinction, both with regard to domestic and foreign sentences, appears to exist, according as their operation is in *rem*, or in *personam*."

Judgments and verdicts in the superior courts being of record, no evi- No evidence

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JUDGE'S NOTES.
JUDGMENTS
AND VERDICTS
(GENERAL EF-
FECT OF).
Generally.
Judgment of
Chief Justice
De Grey in the
*Duchess of
Kingston's case*.

(1) *Jones v. Randall*, Cowp. 17.
(2) *Lord Melville's case*, 24 Howell's St.
Tr. 683. *Rex v. Gordon (Lord George)*,
Doug. 593.

(3) *Exp. Learmouth*, 6 Madd. 113.
(4) 20 Howell's St. Tr. 538
(5) *Ev.* 559, 560.

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allowed to con-
tradict judg-
ments and re-
cords.

Officer having
the custody of
records, cannot
be examined as
to their con-
tents.

Judgment how
used to ascer-
tain the fact of
judgment.

Transactions
between two
parties in a ju-
dicial proceed-
ing not binding
upon a third.

Real and no-
minal parties.

dence is allowed to contradict them (1), even for the purpose of proving a mistake was indorsed on the *postea* (2); and although an officer who has the care and custody of records can be examined as to their condition, he cannot be examined as to their matter or contents. (3)

"Verdicts and judgments are sometimes offered in evidence with a view to establish the mere fact, that such a verdict was given, or judgment pronounced, and those legal consequences which result from that fact: or they are offered with a view to a collateral purpose, that is, not to prove the mere fact that such a judgment has been pronounced, and so to set in all the necessary legal consequences of that judgment, but as a medium of proving some fact, as found by the verdict, or upon the supposed existence of which the judgment is founded.

"For the first of these purposes, that is, for establishing the fact, that such a verdict has been given, or such a judgment pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but usually conclusive evidence for that purpose; for it must be presumed, that the court has made a faithful record of its own proceedings. And in the next place, the mere fact that such a judgment was given, can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered; for where the law gives to a judgment a particular operation, that operation is properly shewn and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, according to circumstances." (4)

Transactions between two parties in a judicial proceeding are not binding upon a third (5): thus, Chief Baron Gilbert states, "for no body can take benefit by a verdict, that had not been prejudiced by it, had it gone contrary" (6); for otherwise he has no power of cross-examining the witnesses, of adducing evidence in furtherance of his rights, nor can he challenge the inquest; in fact, he is deprived of the means provided by the law for ascertaining the truth.

But one who claims in *privity* with another, is in the same situation with the latter, as to any verdict or judgment, either for or against him, whether he claims as privy in blood or estate, or as privy in law. (7) Accordingly, the heir may give in evidence a verdict for his ancestor (8); a verdict against the ancestor binds the heir (9); and a verdict against an intestate or testator binds his representative. (10)

In *Simpson v. Pickering* (11) it was held, that it was not sufficient to

(1) Co. Litt. 260. (a.) *Glynn v. Thorpe*, 1 B. & A. 156. *Rex v. Hopper*, 3 Price, 495. Dodderidge's English Lawyer, 200. Gilb. Ev. 5. Bull. N. P. 221. Lamb. Inst. b. i. c. 13. p. 71.

(2) *Reed v. Jackson*, 1 East, 355., vide etiam *Rex v. Shaw*, 1 R. & R. C. C. 526.

(3) *Leighton v. Leighton*, Str. 210.

(4) 1 Stark. Ev. 212, 213.

(5) *Rex v. Fleet* (Warden of), Holt, 134. Bull. N. P. 233. Co. Litt. 352. (a.) Com. Dig. Estoppel (D.). *Gaunt v. Wainman*, 3 Bing. N. C. 69.

(6) Gilb. Ev. 28. Bull. N. P. 232. *Ward v. Wilkinson*, 4 B. & A. 412. *Duchess of Kingston's case*, 20 Howell's St. Tr. 538. Phillipps' Ev. 514., sed vide *Whately v. Menheim*, 2 Esp. N. P. C. 608.

(7) *Lock v. Norborne*, 3 Mod. 141.

(8) Ibid. *Rex v. Hebden*, Andr. 389.

(9) Ibid.

(10) Ibid. Vide etiam *Kinnersley v. Orpe*, Doug. 517., sed vide *Outram v. Morewood*, 3 East, 366.

(11) 1 C. M. & R. 529.

shew, that a party to the former suit might possibly be really interested in the subsequent suit; they must be essentially so. And a record in replevin between a tenant and the bailiff of his landlord making cognisance under him, is evidence in a subsequent action between the tenant and the landlord himself. (1)

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A verdict against one defendant in case on a nuisance, is evidence of the plaintiff's right in a second action against the same and other defendants, if the latter claim under the first defendant. (2)

On a plea of usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond between the same parties, is admissible for the plaintiff. (3)

But evidence of a former judgment is not conclusive, except where it is an estoppel, and is so pleaded. (4)

It is not essential, that either the parties or form of action should be precisely the same; if they are substantially the same, it is all that is requisite: thus, a verdict on a question of tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. (5) So, likewise, a decree in the court of Exchequer, in a cause between the vicar on one side and the impropriator on the other, establishing the vicar's title to small tithes under an ancient endowment, is evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it might have been, if the ordinary had been a party to the first suit. (6)

Form of Action.

Vicar or rector.

A judgment of ouster is evidence in a *quo warranto* against a person claiming to have been admitted to a corporate office, by the party against whom the judgment was obtained. (7) Judgment of ouster has been also considered in the nature of a judgment *in rem*, and *Rex v. Hebden* and *Rex v. Grimes* (8) have been cited to shew, that the judgment was not *conclusive* against third persons. But, as observed by Lord Kenyon in *Rex v. York (Mayor of)* (9), "If you derive title to a corporate office through A., and the prosecutor shew a judgment of ouster against A., it is conclusive against you, unless you can impeach the judgment as obtained by fraud." (10)

Judgment of ouster.

Upon the principle, that the lessor of the plaintiff and the tenant are substantially the real parties to an ejectment, a judgment in ejectment is admissible evidence in an action for mesne profits; and this, whether the action be brought by the nominal plaintiff, or by the lessor of the plaintiff, and whether the judgment be upon verdict or by default. (11) But when the judgment is against the casual ejector, the landlord must have had

Parties in ejectment.

(1) *Hancock v. Welsh*, 1 Stark. 347.

(2) *Strutt v. Bovington*, 5 Esp. N. P. C. 58.

(3) *Cleve v. Powel*, 1 M. & Rob. 228.

(4) *Outram v. Morewood*, 3 East, 366.

(5) *Travis v. Chaloner*, 3 Gwill. 1237. *Ashby v. Power*, 2 ibid. 1239. *Benson v. Olive*, 2 ibid. 701.

(6) *Carr v. Heaton*, 3 ibid. 1261.

(7) Bull. N. P. 231. *Rex v. Duffin*, 2 Barnard. 370. *Rex v. Lisle*, Andr. 163. *Rex v. Hebden*, Str. 1109. *Rex v. York (Mayor of)*, 5 T. R. 72. 11 Howell's St. Tr. 216. *Rex v. Grimes*, 5 Burr. 2598. That the evidence is not conclusive, ibid.

(8) Ibid.

(9) 5 T. R. 72.

(10) A right of ferry is a matter in which the public are interested, and as to which, therefore, reputation is evidence; and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties. *Pim v. Curell*, 6 M. & W. 234.

(11) *Doe v. Huddart*, 2 C. M. & R. 322. *Doe d. Lewes v. Preece*, 1 Tyrw. 410. Bull. N. P. 87. 232. *Aslin v. Parkin*, 2 Burr. 665. *Rushworth v. Pembroke (Countess of)*, Hardr. 472. Gilb. Ev. 29, 30. 3 Bac. Abr. Evidence (F.), 256, 257.

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notice of the ejectment, or it will not be evidence against him. (1) A judgment recovered by the defendant in a former ejectment, is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties. (2)

Parties in estate.

Where several remainders are limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder (3); and a verdict and judgment for or against a lessee, is evidence for or against the reversioner. (4) But it has been held, that a verdict against a tenant for life will not bind a reversioner, unless where the reversioner, in certain ancient forms of suit, had been made a party to the proceeding, upon *aid-prayer*. (5)

Privy a witness.

A former verdict is admissible between privies, notwithstanding they may have been examined in the former suit. (6)

Against one who might have been a party.

A record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages, which he has voluntarily renounced. (7)

Want of mutuality.

It is a general rule, that a verdict shall not be used as evidence against a man, where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. (8)

Party individually the same, but suing in different characters.

If a party be individually the same in two suits, but sue in two distinct rights, a verdict or judgment in the first suit will not bar his right of action in the second. Thus, a party suing as executor in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sues as administrator; but he may shew that the letters of administration have been since repealed. (9)

It is essential, not only that the parties should be the same, but that the *same fact* should have been in issue in the former cause; for if it were not in issue, the jury could not be attainted for a false verdict. (10)

A verdict for the *same cause* of action between the same parties is absolutely conclusive. And the *cause of action* is the same, when the same

(1) *Hunter v. Britts*, 3 Camp. 455.

(2) *Doe d. Strode v. Seaton*, 2 C. M. & R. 731. Bull. N. P. 232. 3 Bac. Abr. Evidence (F.), 256, 257., vide etiam *Wright v. Doe d. Tatham*, 1 A. & E. 19.

(3) *Pyke v. Crouch*, 1 Ld. Raym. 730. Bull. N. P. 232. *Rushworth v. Pembroke (Countess of)*, Hardr. 472. Com. Dig. Evidence (A. 5.). *Lincoln (Bishop of) v. Ellis (Sir W.)*, Bunb. 110. 1 E. & Y. 777., et vide *St. Paul's (Warden of) v. Morris*, 9 Ves. 155. *Kingworth v. Leigh*, 3 Gwill. 1615. 3 E. & Y. 1385. *Carr v. Heaton*, 3 Gwill. 1258. 3 E. & Y. 1320. *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 390.

(4) Com. Dig. Evidence (A. 5.). Gilb. Ev. 29, 30. Per cur. in *Rushworth v. Pembroke (Countess of)*, Hardr. 472. *De Whelpdale v. Milburn*, 5 Price, 485.

(5) Bull. N. P. 232. 3 Bac. Abr. Evidence (F.), 257., vide 12 Vin. Abr. Evidence, 132. [A. b. 73.]. *Doe d. Smith v. Webber*, 1 A. & E. 119.

(6) *Blakemore v. Glamorganshire Canal Comp.* 2 C. M. & R. 139.

(7) 3 Bac. Abr. Evidence (F.), 257. 1 Stark. Ev. 220.

(8) Bull. N. P. 232, 233. 1 Stark. Ev. 220. 3 Bac. Abr. Evidence (F.), 257. *Hudson v. Robinson*, 4 M. & S. 479. Co. Litt. 352. Com. Dig. Estoppel (D.). *Rex v. Fleet (Warden of)*, 12 Mod. 337. In *Whateley v. Menheim*, 2 Esp. N. P. C. 608., Lord Kenyon is said to have held, that a verdict on an issue out of Chancery to try the question, whether A. and B. were partners, was evidence for a third person in an action against them to prove the partnership. Sed quare, for there was no mutuality, and the verdict might have been obtained on the evidence of the party who afterwards took advantage of it. 1 Stark. Ev. 220.

(9) *Robinson's case*, 5 Co. 32. (b.) Com. Dig. Estoppel (C.).

(10) Bull. N. P. 233: *Foster v. Jackson*, Hob. 53.

evidence will support both actions, although the actions may happen to be founded on different writs. Thus, a judgment in trespass will be a bar to an action of trover for the same taking (1); and a verdict in trover will be a bar to an action for money had and received for the sale of the same goods. (2)

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Where, however, the real merits of a present action have not been inquired into in a former proceeding, issue may be taken on the fact, the judgment being pleaded in bar. (3) Thus, a recovery in one action cannot be pleaded in bar of a second, where no evidence on the trial of the first action was given in support of the claim on which the second is founded. (4)

It is not, however, necessary, that the fact to be proved by the record, should have been solely and specifically put in issue on the former trial; it is sufficient if the fact be essential to the finding of that verdict; neither is it requisite, that the former verdict should have been founded upon the same precise subject-matter, provided the question be the same, and between the same parties: thus, Mr. Justice Buller writes, "It is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and every matter is *evidence*, that amounts to a proof of the point in question." (5)

The judgment, decree, or sentence, must be direct upon the precise point, and is not evidence of any matter which came *collaterally* in question, although it was within the jurisdiction of the court; nor of any matter *incidentally* cognisable; nor of any matter to be inferred by argument from the judgment, as having constituted one of the grounds of that judgment. (6) For it is obvious, that although the matter expressly adjudicated upon is certain, the grounds of the adjudication are often uncertain; and that a particular ground cannot be safely inferred and relied upon, especially when its effect is to be conclusive. To permit this would induce the necessity of unravelling the materials of the former decision; for it would be manifestly unjust to admit a presumption, that a particular fact was established upon the former inquiry, and yet not to allow that presumption to be rebutted by proof that it is unfounded. (7)

Judgment not
evidence of col-
lateral matters.

In *Basten v. Carew* (8) Chief Justice Abbott said, "It is a general rule and principle of law, that where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do, in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done." (9)

Judgments
protect judicial
officers.

Judgment of
Chief Justice
Abbott in *Bas-
ten v. Carew*.

Records of convictions between prosecutors and prisoners are not evidence, because it would be permitting a party to the suit to give evidence from

Verdicts in
criminal cases.

(1) *Hitchin v. Campbell*, 2 W. Black. 831. Com. Dig. Action (K. 3.).

(2) *Hitchin v. Campbell*, 2 W. Black. 827. 3 Wils. 304. 1 Stark. Ev. 221., vide etiam *Lechmere v. Toplady*, 2 Vent. 169. 1 Show. 146.

(3) *Hitchin v. Campbell*, 2 W. Black. 827. 3 Wils. 304.

(4) *Seddon v. Tutop*, 6 T. R. 107. *Raves v. Farmer*, 4 ibid. 146. *Golightly v. Jellicos*, ibid. n.

(5) Bull. N. P. 232. *Clarges (Sir W.) v. Sherwin*, 10 Mod. 343.

(6) *Duchess of Kingston's case*, 11 Howell's St. Tr. 261. 1 Hargr. Law Tracts, 456. 2 Evans' Pothier, 357. *Sintzenick v. Lucas*, 1 Esp. N. P. C. 43.

(7) *Blackham's case*, 1 Salk. 290. 1 Stark. Ev. 224.

(8) 3 B. & C. 652.

(9) Vide etiam *Brittain v. Kinnaird*, 1 B. & B. 432.

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himself. (1) It is likewise inadmissible upon the mere general ground of want of mutuality in the parties. (2)

But a conviction in a court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards come collaterally in controversy in courts of civil jurisdiction (3): thus, in the case of a father convicted on an indictment for having two wives, a conviction would be conclusive evidence in an action of ejectment, where the validity of the second marriage was disputed. (4)

**Verdicts evi-
dence of repu-
tation.**

Verdicts are frequently admitted in evidence on the footing of hearsay statements, upon matters in which hearsay evidence is receivable; in such cases the reason of the rule, that a verdict is only admissible between the parties or privies, is not applicable; nor can verdicts, when used for this purpose, be pleaded by *way* of estoppel.

**Proof of judg-
ment.**

If a judgment be of record, it must be proved, either by actual production from the proper repository, by an exemplification, or by a sworn copy.

Records are complete as soon as they are delivered into court engrossed upon parchment, and become parchment rolls of the court; then, and not before, a copy becomes evidence. (5)

**Admissibility
and effect in
evidence of
judgments of
inferior courts.**

Judgments of inferior courts, not of record, are examinable, at least where an action is expressly brought upon them, though they are *prima facie* evidence of a debt being due.

In *Gahan v. Mainjay* (6) the lord chancellor said, that the ecclesiastical and admiralty courts are not courts of record, and that, sitting in a court of law, he was not at liberty to enter into the examination of the justice or injustice of any judgment of a court of competent jurisdiction, unless it came before him by a writ of error.

It has however been frequently stated, that inferior courts, not of record, have not the privilege of having their judgments uncontroverted. (7)

**When examin-
able.**

When it appears, that a judgment has been pronounced in an inferior court, without due notice having been given to the parties of the proceedings, the judgment will not be inferred, the matter not having been duly submitted to the jurisdiction of the inferior court. (8)

A judgment of a county court is not conclusive. The existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the county court to set it aside for irregularity may have been dismissed. (9)

(1) *Smith v. Rummen*, 1 Camp. 9. *Hathaway v. Barrow*, *ibid.* 151. *Rex v. Boston*, 4 East, 581. *Burdon v. Browning*, 1 Taunt. 521. *Abrahams, q. t. v. Bunn*, 4 Burr. 2255. *Smith, q. t. v. Prager*, 7 T. R. 60.

(2) *Blakemore v. Glamorganshire Canal Comp.* 2 C. M. & R. 139.

(3) Bull. N. P. 245.

(4) *Ibid.* *Sergeson v. Sealey*, 2 Atk. 412. *Boyle v. Boyle*, 3 Mod. 164. Comb. 72., where a party had been libelled for jactitation of marriage, and the court of King's Bench granted a prohibition, because the spiritual court would not allow a plea that the plaintiff had been convicted of bigamy in marrying the defendant. Vide etiam *Brook v. Carpenter*, 3 Bing. 300. *Davis v. Nest*, 6 C. & P. 172., where

a conviction obtained on the evidence of one defendant was received in favour of the other defendants.

(5) Gilb. Ev. 18. Bull. N. P. 283.

(6) Cit. 2 Evans' Pothier, 353.

(7) Per Lord Mansfield in *Walker v. Witter*, Doug. 3. Per Buller J. in *Gallbraith v. Neville*, *ibid.* 6. n. Per Littledale J. in *Guinness v. Carroll*, 1 B. & Ad. 463. *Barnes v. Winkler*, 2 C. & P. 345. *Thompson v. Blackhurst*, 1 N. & M. 266.

(8) *Williams v. Bagot (Lord)*, 3 B. & C. 772., vide *Prat v. Dixon*, Cro. Jac. 108. *Ward v. Ellayn*, *ibid.* 261.

(9) *Thompson v. Blackhurst*, 1 N. & M. 266.

The judgment of a court for the recovery of debts under 40s. is not conclusive; but proof, that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the jury. (1)

EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

Effect of judgments in rem.

The record of an inferior court is not conclusive, but only *prima facie* evidence, that the debt arose within the jurisdiction of the court. (2) Thus, in *Huxham v. Smith* (3), where the defendant had, under process of foreign attachment in the mayor's court, paid a sum of money to a creditor of the plaintiff, it was held, that although the record was only *prima facie* evidence of the jurisdiction of the court, yet that if there were no excess of jurisdiction, it would be conclusive as to the obligation to pay the money; Lord Ellenborough observing, that, "If the money was paid pursuant to the judgment of a court of competent jurisdiction, I must suppose *omnia rite acta*. Sitting at Nisi Prius, can I unravel the proceedings before the recorder of London, and grant a new trial in the cause which he has decided? I must give credit to the record which is produced."

Judgment of Lord Ellenborough in *Huxham v. Smith*.

When a cause is removed by *habeas corpus* from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court; for the judgment may have been suffered by default, with the express view of removing the cause into the superior court, and "the effect of holding the judgment by default in the inferior court to be an admission of a cause of action by the defendants, would be to turn the trial in the superior court into an execution of a writ of inquiry." (4)

Cause removed by *habeas corpus*.

The doctrine laid down in the *Duchess of Kingston's case* (5), that "a judgment is conclusive evidence between the same parties, upon a matter directly in issue, but is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment," is illustrated by the decisions respecting the effect of judgments of courts of quarter sessions.

Courts of quarter sessions.

A judgment of a court of quarter sessions, discharging an order of removal (not for defect of form but upon the merits), is conclusive as between the contending parties (but not as to a third parish) to establish, that the settlement of the pauper was not in the appellant parish at the time of the removal. (6) And if a woman were to be removed from one parish to the other as the pauper's wife, the former judgment would be conclusive on an appeal against her removal between the same parishes, that the husband was not settled there at the time of the prior order. So, if the respondents should prove a derivative settlement for the pauper from his *father*, it would be competent to the appellants to shew, that the father was removed from the respondent parish to their parish, as his place of settlement, and that the order for his removal was reversed; such evidence would be admissible, because the precise point, which is a necessary part of the proof in the second appeal, had been determined on the first appeal. (7)

Effect of discharged order in disproving a settlement as to appellant parish.

A judgment of condemnation in the court of Exchequer is positive and

(1) *Barnes v. Winkler*, 2 C. & P. 345.

(5) 20 Howell's St. Tr. 613. Phillipp's Ev. 529.

(2) Vide *Briscoe v. Stephens*, 2 Bing. 215., where the plaintiff in the inferior court had failed. *Herbert v. Cooke*, Doug. 101.

(6) *Rex v. Sarratt*, Burr. S. C. 73. *Harrow v. Ryslip*, 2 Salk. 524.

(3) 2 Camp. 19.

(7) *Rex v. Catterall*, 6 M. & S. 83., vide etiam *Rex v. Knappoft (Inhab. of)*, 2 B. & C. 883.

(4) Per Lord Tenterden in *Bottings v. Firby*, 9 B. & C. 762.

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undeniable, where proceedings *in rem* have been instituted, that the goods were liable to be seized (1); in fact, so conclusive is such a judgment, that trespass cannot be maintained against the officer who seized the goods, to try the point of forfeiture again. (2)

A conviction *in rem* is evidence as between strangers, though obtained by the evidence of the very party who uses it (3); but a record of conviction for penalties, which is a proceeding *in personam* not *in rem*, is governed by the same principles as other judicial proceedings: thus, in an action for the price of spirits, if the defence be; that the spirits have been adulterated, such record of conviction is admissible as proof of the adulteration. (4)

In *Att. Gen. v. King* (5) it was held, that a record of condemnation of goods, proceeding upon one act of parliament, was not evidence with respect to the commission of an offence charged under another act; Mr. Baron Wood conceiving, that the record, if admissible at all, could not be admitted as proof of any immaterial allegation, which might be contained in the record.

Acquittal.

In *Cooke v. Sholl* (6) Lord Kenyon seems to have considered, that an acquittal in the Exchequer was conclusive evidence of the illegality of a seizure for want of a permit; but as Mr. Phillipps (7) justly observes, "An acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation, in an action for seizing the property against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation."

Proof of judgments in inferior courts.

A judgment of an inferior court, not of record, is usually established by the production of the book containing the minutes of the proceedings of the court from the proper place of deposit, proved to be such by oral testimony. "Copies of court rolls, or proceedings in ecclesiastical courts, are good evidence;" and the proceedings in inferior civil courts are also evidence, since the originals are public documents. (8) And it is said, that it is not usual for inferior courts to draw up their records in form, but only short notes; copies of which are good evidence. (9)

It appears also, that in the case of an inferior court, such as a court baron, hundred, or county court, evidence should be given of the proceedings previous to the judgment, as well as of the judgment itself (10), in order to shew, that the proceedings were regular. (11) In an action for a malicious

(1) *Scott v. Shearman*, 2 W. Black. 979. *Geyer v. Aguilar*, 7 T. R. 696. Bull. N. P. 244., *vide etiam* cases cit. in *Att. Gen. v. King*, 5 Price, 202.

(2) *Ibid.*

(3) *Davis v. Nest*, 6 C. & P. 167.

(4) *Per* Gibbs C. J. in *Hart v. M'Namara*, 4 Price, 154. n.

(5) 5 Price, 195.

(6) 5 T. R. 255. 12 Vin. Abr. Evidence, 94. [A. b. 22.].

(7) *Ev.* 552.

(8) 12 Vin. Abr. Evidence, 97. [A. b. 26.]. 1 Stark. *Ev.* 250.

(9) *Per* Hale C. J. in *Rex v. Haines*, 12 Vin. Abr. Evidence, 99. [A. b. 26.]. Comb. 337., *sed vide* *Pitcher v. Rinter*, 12 Vin. Abr. Evidence, 122. [A. b. 48.], *contra*. If they are not entered in the books, they may be proved by the officer of the court, or other person cognisant of the fact. *Dyson v. Wood*, 3 B. & C. 451.

(10) Com. Dig. Evidence (C. 3.). *Fisher v. Lane*, 2 W. Black. 836. *Arundell v. White*, 14 East, 216.

(11) In an action on a judgment of an inferior court, the defendant may plead that the cause of action did not arise within the

arrest, on process out of the sheriff's court in London; it was held, that, in order to prove the averment, that the former suit was wholly ended, &c. it was sufficient to shew, an entry in the minute book of "withdrawn by the plaintiff's order" opposite to the entry of the plaint, and to prove, that it was the course of the court to make such an entry upon an abandonment of the suit by a plaintiff. (1)

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Land tax assessments are evidence to prove seisin, it being the duty of a public officer to ascertain the occupier, and to charge him; and if it appear from assessments of commissioners of the land tax, that at a certain time property was assessed in the name of S. (the family surname only), it is evidence to shew, in connexion with other facts, that at such time the property was occupied by a particular individual of the family. (2)

LAND TAX
ASSESSMENTS.

So, also, entries in the books of a collector of land tax, stating J. S. to have been rated for a particular house, and the payment of the sum so rated, are admissible in evidence to shew, that J. S. was in the occupation of the premises at the time of the rates being made. (3) But land tax assessments are not evidence of seisin, if it be usual to retain the name of deceased proprietors on the books until the estate is sold to a different family. (4)

Lloyd's books are evidence of a capture, but not of notice of a loss to any person in particular, unless it be to a subscriber, and who has been accustomed to examine the books. (5)

LLOYD'S BOOKS.

In an action on a policy of insurance it was held, that Lloyd's list was evidence against the assured, it being shewn, that the broker had read it before the policy was effected (6); but "Lloyd's Register of Shipping" is not admissible in evidence to shew, that a vessel is considered as copper-fastened. (7) And a certificate by an agent of Lloyd's is not evidence of the amount of damage even against a subscriber. (8)

The log book of the man-of-war which convoyed a fleet is effectual to prove the time of the sailing of a ship under convoy. (9)

LOG BOOK.

An inquisition of lunacy is evidence against third persons, though not conclusive. (10)

LUNACY.

The rolls of manor courts are the title deeds of copyhold property, and to prove a title to copyhold estates, are receivable against all persons upon the same principle as actual conveyances. The manor rolls afford evidence of copyhold customs either by way of general statement of a custom, or as containing entries of acts done in the copyhold court, from which the existence of the custom may be inferred (they are also evidence to shew

MANOR COURT
ROLLS.

jurisdiction of the court (*Herbert v. Cook*, Willes, 36. n.); or may take advantage of it on evidence at the trial, vide *Mendyke v. Stint*, 2 Mod. 272.

(1) *Arundell v. White*, 14 East, 216., vide *Mackallay's case*, 9 Co. 69., where the brief note of the plaint was: "ss. J. M. & R. R. Debt 500l. pledges C. D. by R. F. serjeant;" which was held to be sufficient to warrant the arrest.

(2) *Doe d. Strode v. Seaton*, 2 A. & E. 171. 4 N. & M. 81.

(3) *Doe d. Smith v. Cartwright*, R. & M. 62. 1 C. & P. 218.

(4) *Doe d. Stansbury v. Arkwright*, 1 N.

& M. 731. 2 A. & E. 182. n., vide *Burton's Real Property*, ch. i. s. 7.

(5) *Abel v. Potts*, 3 Esp. N. P. C. 242.

(6) *Bain v. Case*, 3 C. & P. 496.

(7) *Freesman v. Baker*, 5 ibid. 475.

(8) *Drake v. Marryat*, 1 B. & C. 473.

(9) *D'Israeli v. Jowett*, 1 Esp. N. P. C. 427., et vide *Rundle v. Beaumont*, 4 Bing. 537. 1 M. & P. 396.

(10) *Sergeson v. Sealey*, 2 Atk. 412. *Faulder v. Silk*, 3 Camp. 126. An inquisition of lunacy is evidence on the trial of an indictment, to shew that the prisoner was insane at the time he committed the offence. *Rex v. Bowler*, Phillipps' Ev. 583.

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Are receivable
against all per-
sons upon the
same principle
as actual con-
veyances.

Customary for-
feitures.

Descents.

Proclamations.

Right of fishery.

Right of com-
mon.

Right to wreck.

the boundaries of the manor, or the boundaries of particular estates within it), between the lord, his copyholders, or between different copyholders; but, as regards strangers to the manor, it seems, that entries on the rolls can only be received on the footing of admissions, or as hearsay evidence upon matters of general right. (1)

Thus, entries on the rolls of a manor court, of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held during her chaste viduity, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her, as for a forfeiture on proof of her incontinence, although there were no instances in fact stated on the rolls, or known, of such a forfeiture having been enforced. (2)

An entry on the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent, though no instances of any persons having taken according to it, can be proved. (3)

And in *Denn v. Spray* (4), an ancient customary, not properly a court roll, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *ex assensu omnium tenentium*, was admitted as evidence to prove the course of descent within a manor.

An entry in the court-rolls is sufficient to prove proclamations. (5)

To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court-rolls, granted by the lords of the manor in consideration of certain rents, to fish in the *locus in quo*, are evidence without proof of the rents being paid, if it appear, that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery. (6)

Parchment writings preserved among the muniments of a manor, dated 1698 and 1717, purporting to be signed by many persons, copyholders of the manor, and stating, that an unlimited right of common in the commoners having been found inconvenient, it had been agreed to stock the common in a certain restricted manner; — is evidence of reputation as to the general right at that period, and in disproof, that the restricted right originated in prescription, there being no evidence, that the plaintiff's tenement belonged to any of those who had signed the writings, so as to render them admissible against him on that ground. (7)

In trespass by the lord of a manor for wreck, where a document, dated in 1639, was offered in evidence, purporting to be the answer of certain persons, tenants of the manor, to a commission issued by the lord of the manor for surveying the same, in which document it was stated, that the lord was entitled to wreck: — It was held, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the jurors having no peculiar means of knowledge. (8)

(1) *Att. Gen. v. Hotham (Lord)*, 1 T. & Russ. 217. 3 Russ. 415. Bull. N. P. 247. Phillipps' Ev. 604. *Denn v. Spray*, 1 T. R. 466. *Roe d. Beebee v. Parker*, 5 T. R. 26. *Doe v. Askew*, 10 East, 520. *Chapman v. Cowlan*, 13 ibid. 10. *Roe d. Bennett v. Jeffery*, 2 M. & S. 92. *Richards v. Bassett*, 10 B. & C. 657.

(2) *Doe d. Askew v. Askew*, 10 East, 520. et vide *Doe d. Brown v. Brown*, 11 ibid. 441. (3) *Roe d. Beebee v. Parker*, 5 T. R. 26. (4) 1 ibid. 466. (5) *Doe d. Tarrant v. Hellier*, 3 ibid. 164. (6) *Rogers v. Allen*, 1 Camp. 909. (7) *Chapman v. Cowlan*, 13 East, 10. (8) *Talbot v. Lewis*, 1 C. M. & R. 495.

Though the rolls of a manor are accessible to all the copyholders, yet in questions between them and the lords of the manor, they are not generally evidence against them by way of admission. Thus, where a book was kept by the steward of a manor, in which was entered the assessments of all fines, as well those which were paid, as those which were unpaid; but the steward made out a second book at the end of each year, in which he entered the fines which he had received:—It was held, that the first book was not admissible in evidence for the lord of the manor, to shew what fines had been paid. (1) “But in questions as to manorial customs between copyholders, or between copyholders and strangers, it seems, that entries on the rolls of the manor, besides being evidence of reputation, independently of any weight they may derive from being admissions, are also upon this ground entitled to some additional force.” (2)

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Assessments of
fines.

Ancient answers of conventional tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, have been received as evidence. (3)

Ancient an-
swers of con-
ventional te-
nants.

Upon the same principle as the chirograph of a fine, or the enrolment of a deed (4), copies of court rolls, properly stamped and signed by the steward of the manor, are evidence of the contents of the rolls to prove admissions and surrenders, as are also the original rolls (5); but entries in court rolls of amerciements imposed, are not evidence without proof of payment (6); and some evidence of identity of the admittee should be given. (7)

Copies of court
rolls.

Stat. 48 Geo. 3. c. 149. s. 32., which requires that every surrender of copyhold and admittance, &c. made out of court, or a memorandum thereof, shall be stamped; and sect. 33., which enacts that, in cases of surrender, &c. in court, the steward shall make, and deliver to the tenant a stamped copy of the court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and therefore a surrender and admittance out of court (presented and enrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c. or a memorandum thereof. (8)

Stat. 48 Geo. 3.
c. 149. ss. 32
& 33. are
merely revenue
regulations.

An examined copy from the books of the manor, that certain pits have been demised, is evidence, without production of the books themselves, to shew, that they were demisable by custom. (9)

Property de-
misable by cus-
tom.

In ejectment by the devisees of copyhold premises, to prove the admission of the lessors of the plaintiff, it is not only necessary to prove, by the

Identity of de-
visees.

(1) *Ely (Dean of) v. Caldecott*, 5 M. & P. 272. 7 Bing. 433.

(2) *Phillipps' Ev.* 376. cit. *Gilb. Ev.* 235. 4 T. R. 670. 5 *ibid.* 26. 2 M. & S. 92. 13 East, 10. 3 Wils. 63. 3 T. R. 162. 1 *ibid.* 466.

(3) *Crease v. Barrett*, 1 C. M. & R. 923.

(4) *Appleton v. Braybrook*, 6 M. & S. 38. As to the necessity of proving the signature of the steward, *vide* *Coventry Conv.* 156. *Snow v. Cutler*, 1 Keb. 567. *Lee v. Boothby*, *ibid.* 720. *Kinnersley v. Orpe*, *Doug.* 56. 3 Bac. Abr. Evidence (F.), 251. *Doe d. Croydon (Churchwardens of) v. Cook*, 5 Esp. N. P. C. 221. *Manor of Bray*, 12 Mod. 24. *Wilson v. Allen*, 1 J. & W. 617. *Ely (Dean*

of) v. Stewart (Sir Simeon), 2 Atk. 44. *Somerset (Duke of) v. France*, *Fortesc.* 43. Str.

654. Bull. N. P. 247. *Phillipps' Ev.* 640.

(5) *Doe d. Bennington v. Hall*, 16 East, 208. *Rowe v. Brenton*, 3 M. & R. 297. 8 B. & C. 765.

(6) *Ibid.*

(7) *Ibid.*

(8) *Doe d. Cawthorn v. Mes*, 4 B. & Ad. 617. *Quare*, Whether any mere examined copy proved in evidence requires a stamp? for the copy mentioned in the schedule seems to mean the copy delivered by the steward under sect. 33. of the act. *Roscoe's Ev.* 81.

(9) *Doe d. Croydon (Churchwardens of) v. Cook*, 5 Esp. N. P. C. 221.

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Presentment
and surrender
proved by draft
of an entry.

court rolls, that persons of their names have been admitted, but evidence must be given of their identity. (1)

A record of admittance to a copyhold, in the record book of a manor, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll. (2)

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such presentment and surrender was made on the rolls: — It was held, that the surrender and presentment might be proved by a draft of an entry produced from the rolls of the manor, with the parol testimony of the foreman of the homage jury who made the presentment (3); and Lord Holt admitted the rough draft of a steward as good evidence of an admittance. (4)

Presentments are not evidence of matters not within the jurisdiction of the homage, as a presentment by the freeholders of the right of common enjoyed by the owner of a certain farm (5); neither are they admissible as an award for want of mutual submission; nor even evidence of reputation, if made *post litem motam*.

Rolls of a ma-
nor not con-
clusive as re-
cords.

Stat. 55 Geo. 3.
c. 184.

When manorial
rolls must be
stamped.

MARTIAL
COURTS.

But the rolls of a manor are not so conclusive as records, but that the parties may prove a mistake in them. (6)

By stat. 55 Geo. 3. c. 184. court rolls need not be stamped; but surrenders and admittances *out* of court, and copies of surrenders and admittances made *in* court, must be stamped in accordance with the schedule to that act, unless it be a surrender to the use of a will.

Sentences of courts-martial are conclusive in any action brought in the courts of common law; but in like manner, as regards other courts of exclusive jurisdiction, the courts of common law will examine, whether courts-martial have exceeded the jurisdiction given to them. (7)

MASTER'S OF-
FICE (BOOK
RELATING TO
ATTORNEYS).

MUSTER OF A
SHIP.

The book from the master's office, wherein are entered the names of the attorneys of the court, is good evidence to prove a party an attorney, without production of the roll. (8)

Where defendant relies on coverture as a defence to an action, it is not sufficient evidence, that her husband was living at a particular time, to produce the muster of a ship from the admiralty, in which a person of his name is found, without other evidence of his identity. (9)

A book, kept at the India House, from returns given on oath pursuant to the stat. 53 Geo. 3. c. 155., containing the lists or numbers of passengers going on board an East India ship, is evidence to shew, the value of the voyage, on the ground, that it is a public book kept by the authority of an act of parliament. (10)

(1) Doe d. *Hanson v. Smith*, 1 Camp. 196., *sed vide* Archb. by Chitt. 466. n. (2.), where this case is stated not to be law.

(2) *Rex v. Thruscross (Inhab. of)*, 1 A. & E. 126.

(3) Doe d. *Priestley v. Calloway*, 6 B. & C. 484. Phillipps' Ev. 640.

(4) *Anon.* 1 Ld. Raym. 735.

(5) *Richards v. Bassett*, 10 B. & C. 657.

(6) Doe d. *Priestley v. Calloway*, 6 ibid. 494.

(7) *Vide Grant v. Gould (Sir Charles)*, 2

Hen. Black. 69. *Ship Bounty*, cit. 1 East, 312. *Stratford's case*, ibid. 313. *Mann v. Owen*, 9 B. & C. 595.

(8) *Rex v. Crossley*, 2 Esp. N. P. C. 526. *Jones v. Stevens*, 11 Price, 285.

(9) *Barber v. Holmes*, 3 Esp. N. P. C. 190.

(10) *Richardson v. Mellish*, 2 Bing. 229. 9 Moore, 435. 1 C. & P. 241. R. & M. 66., et vide *Lacon v. Hooper*, 1 Esp. N. P. C. 246., as to entries required in the whale fishery.

The register book in the navy office, with evidence of the usage to mark all persons dead (1) with the letters "dd.", has been admitted to prove the death of a sailor. (2)

The muster book of the navy office is evidence. (3)

Under Reg. Gen. H. T. 2 Will. 4., H. T. 4 Will. 4., and stat. 3 & 4 Will. 4. c. 42., regulations have been made dispensing with the necessity of proving certain deeds and documents at the trial, but the right of objecting at the trial to their admissibility after being so proved is not waved. (4)

"An office copy is in the same court and in the same cause equivalent to the record; but in another court, or in another cause in the same court, the copy must be proved." (5)

Although, with respect to causes depending in Chancery, it has been said, that office copies are the very records of the court, and prove themselves, and that no other copy can be produced therein (6); such copies will not be admitted in a court of common law without examination with the original (7), unless perhaps in the case of the trial of an issue out of Chancery. (8)

By stat. 7 Geo. 4. c. 57. s. 76., office copies of proceedings in the insolvent court are made evidence.

When the law entrusts a particular officer with the making of copies, it also gives credit to them in evidence without farther proof, and they can deliver them to the parties as part of their title, without proof of their having been actually examined (9); but a mere office copy by a person not so licensed is inadmissible. (10)

Thus, the chirograph of a fine was evidence of the fine, because the chirographer was an officer appointed by the law to make such copies; but the chirograph was not evidence of the proclamations, for of them the chirographer was not appointed to make copies. (11)

By stat. 5 & 6 Will. 4. c. 82., the office of chirographer, &c. is abolished; but the copies, &c. made by the officer of Common Pleas substituted for him, are by s. 4. made as available in evidence, as they would by law have been, if made by the former officers. So the indorsement by the proper officer on a deed of bargain and sale, enrolled according to stat. 27 Hen. 8. c. 16., is evidence of the enrolment (12); and the date of enrolment indorsed by the clerk of the enrolments is conclusive evidence of the date. (13)

A copy of an examination on interrogatories taken at a judge's chambers, signed by the judge, and delivered out by his clerk, is admissible at the trial without proof of examination with the original. (14)

But where a deed enrolled is lost, a copy of the enrolment by the clerk of the assize is not admissible in evidence, for he is empowered merely to authenticate the deed itself by enrolment, and not to make out copies of the enrolment. (15)

EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

NAVY OFFICE.
NEW RULES.
REG. GEN.
H. T. 2 WILL.
4. & H. T. 4
WILL. 4. &
STAT. 3 & 4
WILL. 4. c. 42.
OFFICE COPIES.
Office copies in
Chancery.

Stat. 7 Geo. 4.
c. 57. s. 76.

Stat. 5 & 6
Will. 4. c. 82.
s. 4.

Stat. 27 Hen. 8
c. 16.

(1) Bull. N. P. 249.

(2) Ibid.

(3) *Rex v. Fitzgerald*, 1 Leach, C. C. 20. 2 East, P. C. 953. *Rex v. Rhodes*, 1 Leach, C. C. 24. 2 East, P. C. 925.

(4) *Vide post*, Appendix, tit. NEW RULES.

(5) *Per Lord Mansfield in Denn d. Lucas v. Fulford*, 2 Burr. 1179.

(6) Ibid. 1177.

(7) *Black v. Braybrook (Lord)*, 2 Stark. 7. Bull. N. P. 229. *Burnand v. Nerot*, 1 C. & P. 578. *Highfield v. Peake*, M. & M. 109.

(8) Ibid.

(9) Bull. N. P. 229. *Appleton v. Braybrook (Lord)*, 6 M. & S. 37, 38.

(10) 3 Bac. Abr. Evidence (F.), 251.

(11) Bull. N. P. 229. *Gilb. Ev.* 20.

(12) Bull. N. P. 229. *Kinnersley v. Orp*, Doug. 56.

(13) *Rex v. Hoper*, 3 Price, 495.

(14) *Duncan v. Scott*, 1 Camp. 101.

(15) 3 Bac. Abr. Evidence (F.), 251.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

A copy of a judgment purporting to have been examined by the clerk of the treasury (who is not entrusted to make copies), is not admissible without proof of its examination with the original. (1) And a copy of a judgment made out, examined, and indorsed by the clerk of the court, is not in itself evidence, for he is entrusted to keep records, but not to make copies of them. (2)

**ORDER IN
CHANCERY.**

An order for an attachment for non payment of the costs in a suit in equity, is in itself *prima facie* evidence, that a suit has been pending. (3)

Stat. 1 & 2
Vict. c. 110.
s. 18.

An order of the court of Chancery requiring the defendants in a suit to pay a certain sum into the bank, with the privity of the accountant general, to the credit of the cause, is not an order which has the effect of a judgment within the provisions of stat. 1 & 2 Vict. c. 110. s. 18. (4)

The document delivered out by the registrar of the court of Chancery as the order of the court, is the original order; and to make it evidence, it is not necessary, that it should be compared with any book of the orders of the court. (5)

PARISH BOOKS.

Parish books are in general open to the inspection of all persons interested (6); but those which are kept only for the private use of the parish, and relate to its private interests, are not allowed to be inspected by persons claiming a right against such parish. (7)

Stat. 17 Geo. 2.
c. 38. s. 13.

Rate books in
cases of appeal.

By stat. 17 Geo. 2. c. 38. s. 13., true copies of all rates and assessments made for the relief of the poor were to be entered in a book, and attested by the churchwardens and overseers; and these books are evidence in cases of appeal at the general or quarter sessions.

Rate books are also evidence respecting the residence and existence of a parishioner, and such facts have been proved, by shewing the entry of the payment of a subscription to a parochial loan during the period in question. (8)

Stat. 2 Geo. 3.
c. 22.

Registry of in-
fants.

By stat. 2 Geo. 3. c. 22., a register was required to be kept in every parish within the bills of mortality, in which were to be registered all infants under the age of four years, who should be in the workhouse, hospital, or other place provided for the maintenance of the poor, or under the care of the churchwardens or overseers of the poor, with the times when they were received, their names, age, and whatever description related to them as far as could be traced, and such register is evidence.

Stat. 42 Geo. 3.
c. 46.

Entry of parish
indentures.

By stat. 42 Geo. 3. c. 46., overseers of the poor in every parish were required to keep a book containing the name, sex, and age, of every parish apprentice, the names and residence of their parents, and other particulars; and such books are evidence of the existence of the indentures registered in them, and also of the several particulars specified in the register respecting such indentures, in case it shall be proved to the satisfaction of the court that the indentures are lost or destroyed.

POLL BOOKS.

The poll books at an election for members of parliament are evidence in a penal action for bribery (9), and can be proved by an examined copy. (10)

(1) Bull. N. P. 229.

(2) 3 Bac. Abr. Evidence (F.), 251.

(3) *Blower v. Hollis*, 1 C. & M. 393.

(4) *Gibbs v. Pike*, 9 Dowl. P. C. 731.

(5) *Ludlow (Mayor of) v. Charlton*, 9 C. & P. 242.

(6) *Warriner v. Giles*, Str. 954.

(7) *Cox v. Copping*, 1 Ld. Raym. 337. Harrison's Ev. 79.

(8) Phillipps' Ev. 601.

(9) *Mead v. Robinson*, Willes, 422. *Rex v. Hughes*, cit. ibid. 424. *Rex v. Davis*, Str. 1048.

(10) Ibid. 1 Stephens on Elections, 292.

The court will not take judicial notice of the rules made by the poor law commissioners for the government of a union under stat. 4 & 5 Will. 4. c. 76. s. 15. (1)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

The postmark in a letter has been admitted as evidence of the date of its being sent (2), and as proof of the receipt of its contents (3); but in *Abbey v. Lill* (4) Mr. Justice Gaselee observed, "I do not lay it down, that a postmark is to be taken to be genuine without regular proof. In general, the mark is not disputed; but, where it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear."

POOR LAW
COMMISSIONERS
(ORDER OF).
POSTMARK.

The effect of proclamations has been previously discussed. (5)

PROCLAMA-
TIONS.

Parochial registers being in the nature of records will upon production prove, without the assistance of extrinsic aid, the facts to which they relate, because registers are made by persons in an official situation, whose duty it is to make accurate entries of the facts immediately within their own knowledge. Parochial registers are considered evidence, that the transactions required to be recorded in them occurred on the days specified in the register (6), and are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. (7)

REGISTERS.

Parochial re-
gisters.

Thus, an entry by a minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact made by the clerk who was present at the baptism. (8)

Registers need not be produced (9), nor proved by the subscribing witnesses (10); and an unstamped (11) examined copy is sufficient.

Examined copy
of the register.

If the clergyman of a parish be applied to for an extract of a parish register of a particular date, and produce to the applicant a book as the original register, it will be presumed to be so until the contrary be shewn. But if he say, that there is no register of the particular year, that is not sufficient proof of the loss of the register, so as to let in secondary evidence without calling the parson as a witness. (12)

It seems, that the returns made annually of the transcripts of parish registers, under the 70th canon, to the registry of the diocese, are not receivable in evidence instead of the original register or an examined copy of it, except as secondary evidence, in which case, examined copies of the returns would be receivable; but that if the returns be made under stat. 52 Geo. 3. c. 146., examined copies of them would be evidence, without proof of the loss of the original register. (13)

Stat. 52 Geo. 3.
c. 146.

Conflicting opinions have arisen, as to the species of document which

Documents not

(1) *Reg. v. Dolgelly Union (Guardians of)*, 8 A. & E. 561.

(2) *Abbey v. Lill*, 5 Bing. 299. *Plumer's case*, R. & R. C. C. 264.

(3) *Arcangelo v. Thompson*, 2 Camp. 620.

(4) 5 Bing. 299.

(5) *Antè*, 1658.

(6) *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 386., *antè*, 1674.

(7) *Doe d. Warren v. Bray*, 8 B. & C. 813. *Wihen v. Law*, 3 Stark. 63. *Burghart v. Angerstein*, 6 C. & P. 690. *Rex v. Clap-*

ham, 4 *ibid.* 29. *Rex v. North Petherton*, 5 B. & C. 508. *Dufins v. Donovan*, 3 Hagg. 301.

(8) *Doe d. Warren v. Bray*, 8 B. & C. 813., *vide antè*, 1674.

(9) *Birt v. Barlow*, Doug. 170.

(10) *Rex v. Allison*, R. & R. C. C. 103.

(11) Bull. N. P. 247. 52 Geo. 3. c. 146. s. 17.

(12) *Phillipps' Ev.* 642. *Walker v. Beauchamp (Countess of)*, 6 C. & P. 559. *Roscoe's Ev.* 84.

(13) *Ibid.*

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

regarded as registers.

Mutilated registers.

Inadmissibility of two parish registers.

MARRIAGES—
BIRTHS—,
DEATHS.
Stat. 6 & 7 Will.
4. c. 86.

Stat. 6 & 7 Will.
4. c. 85.

constitutes a register: thus, the books of the Fleet Prison seem not to be admissible in evidence to prove a marriage not having been made under public authority. (1) The copy of a register of a foreign chapel is not admissible here to prove a marriage abroad. (2) Neither is a copy of a register of baptism in Guernsey (3), nor the register of a dissenting chapel (4), admissible to prove a marriage; and Mr. Phillipps states (5), that it seems the "originals of such registers would not be receivable in evidence." But parish registers are evidence, notwithstanding the loss of a leaf, provided the series of entries be not destroyed. (6)

Where it appeared, that the practice was to make entries in the general parish register once in three months out of a day-book, in which the entries were made immediately after the christening, or on the same morning; and in the day-book after a particular entry, the letters B. B. (signifying base born) were inserted, which were omitted in the register: — It was held, that evidence of the day-book could not be received, because there could not be two parish registers. (7)

By stat. 6 & 7 Will. 4. c. 86. (8) certain copies of entries purporting to be sealed with the seal of the registrar general's office, are evidence of the birth, death, or marriage to which it relates, without other proof of such entry. (9) It seems that entries of other registrars, besides the registrar general, may be evidence under certain limitations (10); and as well they, as all rectors, curates, &c. are bound to give certified copies (11); but it is not expressly enacted, that such certified copies are to be evidence without additional proof.

By stat. 6 & 7 Will. 4. c. 85. (12) provisions are made respecting the registration of marriages solemnised under that act, and after incorporating the provisions of stat. 6 & 7 Will. 4. c. 86. relating to the register of marriages, or certified copies thereof, extends them to marriages under stat. 6 & 7 Will. 4. c. 85.

A marriage can be proved without evidence of registration, licence, or banns. (13) If the register be produced for the purpose of identifying the parties to a marriage, their handwriting need not be proved by an attesting witness to the register. (14)

If an original parish register be produced on a trial, in order that certain entries in it should be read, the jury may look at the book to see, whether the entries which have been read, are in their proper places or not, but for no other purpose. (15)

(1) *Reed v. Passer*, Peake's N. P. C. 303. *Lloyd v. Passingham*, 16 Ves. 59. *Doe d. Orrel v. Madox*, 1 Esp. N. P. C. 196. *Haywood v. Firmin*, cit. Peake's N. P. C. 306. n. *Howard v. Burtonwood*, ibid. *Cooke v. Lloyd*, ibid. The Fleet books have occasionally been received as evidence. *Lawrance v. Dixon*, Peake's N. P. C. 185. *Read v. Passer*, 1 Esp. N. P. C. 213. Peake's Ev. 87. 1 Stark. Ev. 206. Phillipps' Ev. 595.

(2) *Leader v. Barry*, 1 Esp. N. P. C. 353. *Whitehead v. Wynn*, 1 J. & W. 483.

(3) *Huet v. Le Mesurier*, 1 Cox, Cas. 175.

(4) *Newham v. Raithby*, 1 Phill. 315. *Duins v. Donovan*, 3 Hagg. 301. *Exp. Taylor*, 1 J. & W. 483.

(5) Ev. 596.

(6) *Walker v. Wingfield*, 18 Ves. 443.

(7) *May v. May*, Str. 1073. *Lee v. Meacock*, 5 Esp. N. P. C. 177. *Walker v. Wingfield*, 18 Ves. 443.

(8) *Antè*, 6. tit. ADULTERY.

(9) s. 38.

(10) ss. 22, 23. 28.

(11) s. 35.

(12) *Antè*, 6. tit. ADULTERY.

(13) *Allison's case*, R. & R. C. C. 109.

(14) *Birt v. Barlow*, Doug. 172.

(15) *Walker v. Beauchamp* (Countess of), 6 C. & P. 552.

"The entry in the register is not essential to the validity of a marriage; so that if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must, therefore, be established by some other medium of proof." (1)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

An unstamped examined copy of a register is sufficient proof of a marriage *in fact* between two parties, describing themselves by such and such names and places of abode. (2) But a certificate of marriage is not evidence, unless it be shewn as a copy from the parish register. (3)

Entry in the
register not
essential to the
validity of a
marriage.

Where, in an action to recover damages for a criminal conversation with the plaintiff's wife, the proof of the marriage was an examined copy of the marriage register; and the person who examined the copy with the original register being acquainted with the handwriting of the plaintiff and his wife, stated, that the signatures to the original register were in their handwriting:—It was held sufficient evidence to prove the identity of the parties to the marriage. (4)

Identity of
parties.

A register of marriage is evidence between strangers of the time of the marriage. (5)

Time of mar-
riage.

A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register made at a subsequent period by a succeeding incumbent, founded upon such minute. (6) And if a parish register of baptisms state, that the person baptized was born on a particular day, that is not evidence of the date of his birth. (7)

Baptisms.

The register of baptism is not *alone* sufficient evidence of the place of a person's birth (8): and an entry in the baptismal register, that the defendant was born on a day there mentioned, is not evidence of that fact. (9)

Where a registry of baptism stated that the child was illegitimate, Mr. Justice Alderson admitted it in proof of that fact, observing, that similar evidence had been admitted in *Morris v. Davies*. (10) But the evidence was allowed to be of little weight, and to amount to mere reputation in the village. (11)

An entry in the register of the christening of a child, as to the time of its birth, is not of itself sufficient evidence of the age. (12) But it may be evidence, if it can be shewn on whose information it was made, as a declaration (13), and in the ecclesiastical courts it is adminicular evidence of minority. (14)

Christenings.

In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives, a register of burials at a Wesleyan chapel is not admissible to prove the death of one of the *cestuique vie*; nor is the evidence of a witness, who heard in the family, that another of the *cestuique vie* was dead. (15)

Burials.

(1) Phillipps' Ev. 596. *Rex v. Allison*, R. & R. C. C. 109.

(2) Bull. N. P. 27. (b.)

(3) *Anon.* Loft, 328.

(4) *Bain v. Mason*, 1 C. & P. 202. M. & M. 362., ante, 6. tit. ADULTERY.

(5) *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 386.

(6) *Doe d. Warren v. Bray*, 3 M. & R. 428. 8 B. & C. 813.

(7) *Rex v. Clapham*, 4 C. & P. 29.

(8) *Rex v. North Petherton*, 5 B. & C. 508. 8 D. & R. 325.

(9) *Burghart v. Angerstein*, 6 C. & P. 690.

(10) 3 C. & P. 215.

(11) *Cope v. Cope*, 1 M. & Rob. 269. 276.

(12) *Wihen v. Law*, 3 Stark. 63.

(13) *Ibid.*

(14) *Roscoe's Ev.* 151. cit. 2 Phill. 345.

(15) *Whittuck v. Waters*, 4 C. & P. 375.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

**REGISTRY AT
SECRETARY OF
STATE'S OFFICE.**

**RECORDS
(PROOF OF).
Exemplifica-
tion.**

The registry at the secretary of state's office is evidence to prove the contents of a licence from the crown, which has been lost. (1)

Records may be proved, either by mere production or by copy.

Copies of records may be made either by exemplifications, or by an authorised officer, or by sworn copies.

Exemplifications are twofold, under the broad seal, or under the seal of a particular court. (2)

Where any record is exemplified, the whole must be exemplified, for the construction must be gathered from the whole taken together. (3)

The seals of the king's courts of justice are of public credit, and are part of the constitution of the courts and supposed to be known to all (4); and this, whether the court has existed from time beyond memory, or has been recently created by act of parliament.

But the seals of private courts and persons are not receivable in evidence, "without an oath concurring to their credibility, for it is not possible to suppose, these seals to be universally known." (5)

Office copies.

A copy is never admissible, where the original is produced: thus, a copy of an entry in a customal being offered in evidence against a corporation, was rejected on production of the original. (6)

If the law entrust a particular officer with the duty of making copies, credit is given to them in evidence without further proof. (7)

**Proof of re-
cords by a
sworn copy.**

Records can be proved by means of a copy proved on oath to have been examined with the original, upon the principle of public convenience.

In fact, whenever the thing to be proved, would require no collateral proof upon its production, it is proveable by a copy; and that conversely, where the document when produced would require support from collateral proof, a copy of it is not admissible.

**Copy should be
of the whole
record.**

The copy must be one of a complete record, for until it become a permanent record it is transferable, and the reason for admitting a copy to be evidence, does not apply. (8) Consequently, a sworn copy of a sworn judgment in paper, although signed by the master, upon which judgment might be taken out, is not admissible. And the copy should be of the whole record, or of so much at least as concerns the matter in question. (9)

**Mode of
examination.**

The copy of a record must be proved by a witness, who swears he has compared it with the original taken from the proper place of deposit, and has examined it line for line with the original, or who has examined the copy while another person read the original. (10) And it is not necessary for the persons examining to exchange papers, and read them alternately. (11) It ought to be shewn, that the record from which the copy was taken, either came out of the hands of the proper officer, or from the proper place of depositing the records of the court of which it purports to be a record; and the contents of the document cannot be referred to, in support of such proof. (12)

(1) *Marsh v. Collnett*, 2 Esp. N. P. C. 665.
Mann v. Carey, 3 Salk. 155.

(2) *Gilb. Ev.* 12.

(3) 2 Inst. 273. *Gilb. Ev.* 17.

(4) *Gilb. Ev.* 16, 17. 20.

(5) *Ibid.* 16.

(6) 10 Howell's St. Tr. Append. 137.

(7) 3 Bac. Abr. Evidence (F.), 251. Bull. N. P. 229.

(8) 3 Bac. Abr. Evidence (F.), 251.

(9) 3 Inst. 173.

(10) *Reid v. Margison*, 1 Camp. 469.

(11) *Gyles v. Hill*, *ibid.* 471. n. *Rolf v. Dart*, 2 Taunt. 52.

(12) *Adamthwaite v. Synge*, 1 Stark. 183. 4 Camp. 372.

Where a record has been lost, a copy may, if a possession have accompanied such copy, be read in evidence without proof upon oath that it is a true copy. (1) But to warrant such evidence, the document must be according to the rule of civil law, "*si vetustate temporis et judiciaria cognitione sint roboratae.*" (2)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

Where record
lost.

Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of those printed copies is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shewn to have been examined with the original. (3)

A rule, making a judge's order a rule of court, is evidence of the order (4); because it is an original, and the court adopt and act upon it.

RULES OF
COURT.

The production of a rule of court for committing a defendant convicted of a misdemeanour to gaol, to be imprisoned for a term according to his sentence, is evidence to prove an allegation, that he has received judgment of imprisonment for that term. (5)

But the allegation of a fact in a rule *nisi* is not evidence of the fact, for the party at whose suggestion it is obtained (6); and an allegation in a court, that defendant procured a defective security, which was set aside by a rule of court, is not proved by merely producing the rule without other proof of the security. (7)

The production by the defendant of a rule to pay money into court, does not, at least in the Common Pleas, give the plaintiff's counsel a right to reply. (8)

An inquisition by a sheriff's jury to ascertain the value of property for the information of the sheriff, is not, as it seems, admissible evidence of property against the sheriff (9); nor is it evidence in his favour (10), unless perhaps, the question be, whether the sheriff acted maliciously. (11)

SHERIFF'S JURY
(INQUISITIONS
BY).

The book kept at the sick and hurt office, containing copies of the returns made by the officers of persons who have died on board of king's ships, is evidence of the deaths of seamen. (12)

SICK AND HURT
OFFICE.

The Sound List, containing the account of the arrival of ships there, is not evidence of that fact. (13)

SOUND LIST.

The entry in the South Sea Company's books of the minutes of a licence granted by them, is admissible in evidence, as being a declaration adverse to their interest, without calling as a witness the officer who made the entry. (14)

SOUTH SEA
COMPANY.

Laws which concern the king, the public, spiritual persons, officers in general, and traders, are public acts. (15)

STATUTES.

(1) Gilb. Ev. 86. 3 Bac. Abr. Evidence (F.), 251.

(2) Dig. 292. *Green v. Proude*, 1 Mod. 117.

(3) *Dance v. Robson*, M. & M. 294.

(4) *Still v. Halford*, 4 Camp. 17.

(5) *Carlile v. Parkins*, cor. Abbott C. J., Westminster Sitt. after M. T. 1822, cit. 2 Stark. Ev. 721.

(6) *Woodroffe, q. t. v. Williams*, 6 Taunt. 19.

(7) *Compton v. Chandless*, 4 Esp. N.P.C. 18.

(8) 2 Taunt. 267.

(9) *Lathow v. Eamer*, 2 Hen. Black. 437.

(10) *Glossop v. Pole*, 3 M. & S. 175.

(11) *Per Lord Ellenborough*, ibid. 177.

(12) *Wallace v. Cook*, 5 Esp. N. P. C. 117.

(13) *Roberts v. Eddington*, 4 ibid. 88.

(14) *Hodgson v. Fullarton*, 4 Taunt. 787.

(15) 3 Bac. Abr. Evidence (F.), 249. Gilb. Ev. 99, 40. Runnington's Hale, Hist. of Com. Law, 15, 16. *Physicians (College of) v. Harrison*, M. & M. 191. *Brett v. Beales*, ibid. 421. 2 Saund. 155. (a.) *Samuel v. Evans*, 2 T. R. 575. *Trelawny (Bart.) v. Winchester (Bishop of)*, 1 Burr. 224. Phillipps' Ev. 610.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

Public statutes defined.

Judges bound to take judicial notice of their contents.

Allegation of a fact in a public statute not conclusive.

Stat. 41 Geo. 3. c. 90. s. 9.

Incorrect print of the statute.

Private statutes defined.

Mode of proving.

Public statutes are binding upon every subject; the judges are bound to take judicial notice of their contents; the printed statute, being in theory, only used to refresh the memory of the court: every subject is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an act of parliament is a public proceeding in all its stages, and when the act is passed, it is, in the contemplation of law, the act of the whole body of the kingdom.

Under these principles, a preamble to an act of parliament, reciting the existence of outrages, and making provision against them, is admissible to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed. (1)

An allegation of fact in a public statute is not conclusive. Thus, although Gateshead was named as a corporation in the schedule to the Municipal Reform Act, proof was allowed to shew, that it had never existed as a municipal corporation. (2)

By stat. 41 Geo. 3. c. 90. s. 9., the statutes of England and of Great Britain, printed and published by the king's printer, are made conclusive evidence in the Irish courts; and the statutes of Ireland, prior to the union, so printed and published, are made in like manner evidence in any court in Great Britain.

The printed statute is in theory only used to refresh the memory of the court, and if it be incorrectly printed, the court will be guided by the parliament rolls. (3)

Laws which relate to the nobility only, or to the spiritual lords, or particular places, or particular trades, are private acts. (4)

The mode of proving a private act of parliament is by exemplification under the great seal (5), or by an examined copy compared with the parliament roll; but if a private act contain clauses of a public nature, then the act, as far as those clauses are concerned, is regarded as a public act. Thus, where a clause relating to a public highway occurred in a private enclosure act, it was held by Mr. Justice Holroyd to be proveable in the same way as a public act. (6) So, also, if a private statute be afterwards recognised in a public act, it will be judicially noticed. (7)

Where an act for the regulation of the affairs of an insurance company contained a clause directing, that it should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded:—It was held, that the act was sufficiently proved for all legal purposes by the production of a copy purchased at the office of the king's printer. (8)

(1) *Rex v. Sutton*, 4 M. & S. 532.

(2) *Rex v. Greene*, 6 A. & E. 548. *Rex v. White*, 5 *ibid.* 613.

(3) *Rex v. Jefferies*, Str. 446. *Price v. Hollis*, 1 M. & S. 105. *Rex v. Newark-upon-Trent (Inhab. of)*, 3 B. & C. 71. *Crooke's case*, 1 Show. 210. *Rex v. Williams*, 1 W. Black. 95. *Chance v. Adams*, 1 Ld. Raym. 77. *Phillipps' Ev.* 611.

(4) 3 Bac. Abr. Evidence (F.), 249. *Gilb. Ev.* 39, 40. *Runnington's Hale*, Hist. of Com. Law, 15, 16. *Physicians (College of) v. Harrison*, M. & M. 191,

Brett v. Beales, *ibid.* 421. 2 Saund. 155. (a.) *Samuel v. Evans*, 2 T. R. 575. *Phillipps' Ev.* 610.

(5) *Gilb. Ev.* 10—12.

(6) *Rex v. Utterby*, cit. *Phillipps' Ev.* 610. *Needler v. Winchester (Bishop of)*, Hob. 227.

(7) *Samuel v. Evans*, 2 T. R. 575. 1 Burr. 224.

(8) *Beaumont v. Mountain*, 4 M. & S. 177. 10 Bing. 404. *Brett v. Beales*, M. & M. 421.

In *Woodward v. Cotton* (1) it was held, that a local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such, without being specifically pleaded, need not be proved either to have been examined with the parliament roll, or to have been printed by the king's printer.

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By the ecclesiastical canons, an inquiry is directed to be made from time to time of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop: these returns are denominated terriers (2); and they are considered as public documentary evidence, because they are admissions by persons who stood in a degree of privity with the parties, between whom they are sought to be used: therefore a terrier is never admitted for a parson, unless it be signed by a churchwarden; or, if the churchwardens are nominated by him, by some substantial inhabitants of the parish. (3)

TERRIERS.

Terriers are admissible in suits between a vicar and impropriator (4): and a terrier, although not signed by the impropriate rector, nor by any person for him, is evidence against him as to tithes due to him in the parish. (5)

Terrier not
signed by the
impropriate
rector.

A valuation of tithes made by a surveyor at the instance of the rector, with reference to certain money payments reputed to have been always made in lieu of such tithes, is not evidence to fix the rector with an acknowledgment of such money payments, unless it be distinctly proved; that the surveyor was expressly required by the rector to make the valuation with reference to such payments. (6)

Terriers are not documents of such conclusive authority, as to exclude all other evidence, but are to be construed and explained by the usage proved, respecting the subject-matter to which they refer (7); and the evidence afforded by the ecclesiastical and parliamentary surveys, either for or against a *modus*, is entitled to very little weight. (8)

Terriers are
not conclusive
evidence.

The bishop's registry is the proper place of custody for the sequestrator's receipts, accounts, &c. with reference to their admissibility as legal evidence, in questions of disputed right to tithes (9); and when the defendant

Place of de-
posit.

(1) 1 C. M. & R. 44. 6 C. & P. 491. 4 Tyrw. 689. *Rex v. Shaw*, 12 East, 479. In *Brett v. Beales* (M. & M. 420.) it was held, that an act of parliament, private in its nature, was not made admissible in evidence against strangers, by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded."

Upon this case Lord Lyndhurst in *Woodward v. Cotton* (1 C. M. & R. 47.) is reported to have said, "The case of *Brett v. Beales* has been much misconceived. It is certainly not well reported; but I think that, upon the whole scope of it, Lord Tenterden meant to rule the same law, that is decided in *Beaumont v. Mountain*. The history of the law with regard to the proof of private acts of parliament is this: originally they were required to be proved by a copy examined with the parliament roll. To avoid this inconvenience, a clause was usually inserted, declaring that a copy printed by the king's printer

should be evidence. It was then objected, that, in such cases, it was necessary to prove, that the act produced, was in fact printed by the king's printer; and, to meet this objection, the present form of clause was adopted."

(2) Phillipps' Ev. 603.

(3) Bull. N. P. 248. *Earl (Clerk) v. Lewis*, 4 Esp. N. P. C. 3., vide etiam *Mytton v. Harris*, 3 Price, 19. As to imperfect terriers, and when they may be used, vide *Illingworth v. Leigh*, 4 Gwill. 1615. *Atkins v. Drake*, M'Clel. & Y. 214. *Bertie v. Beaumont*, 2 Price, 310. *Maddison v. Nuttall*, 6 Bing. 226. *Potts v. Durant*, 3 Anst. 796.

(4) *Potts v. Durant*, 3 Anst. 796. *Illingworth v. Leigh*, 4 Gwill. 1615.

(5) *Potts v. Durant*, 3 Anst. 795.

(6) *Bertie v. Beaumont*, 2 Price, 310.

(7) *Atkins v. Drake*, M'Clel. & Y. 214.

(8) Ibid.

(9) *Pulley (Clerk) v. Hilton*, 12 Price, 625.

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in a tithe suit offered in evidence a receipt, purporting to be a receipt from one B. to one A. fifty years before, without shewing who B. was, or where the paper had been kept, it was rejected. (1)

The proper repositories for terriers, in order to make them evidence, are the bishop's register office (2), the registry of the archdeacon of the diocese (3), or the parish chest (4); but a paper, purporting to be a terrier, found in the charter chest of a college, which had property in the parish, is considered inadmissible to disprove a *modus*. (5)

But terriers have been admitted in evidence, though not coming from the "proper repositories," where there appeared to be a proper connection between the terriers and the place where they were found. Thus, a terrier found in the registry of the dean and chapter of Lichfield, was admitted in evidence against a prebendary. (6)

A book from the registry of Lincoln, containing *inter alia* what were called copies of endowments of certain vicarages, was received as evidence of an endowment of a vicarage in Northamptonshire. (7)

A copy from the parish registry, if the original cannot be found, is evidence. (8)

An entry, purporting to be a terrier, in an old book called a parish register, produced from an iron chest in the vicarage-house, of which the only key was kept by the vicar, and accompanied by other suspicious circumstances, was admitted in evidence at Nisi Prius, and left to the jury to receive its due weight, but was found by them not to be authentic, and therefore rejected by the court. (9)

Private custody.

Where the custody of terriers is merely private, and unconnected with the subject-matter, such terriers cannot be received as evidence. (10)

An instrument, purporting to be an endowment, without a seal remaining, and another, purporting to be an *inspeximus* of the former, under the seal of the ordinary, were rejected as coming out of private hands, unconnected with the matter in dispute. (11)

TREATIES.

In *Richardson v. Anderson* (12), the counsel on the part of the defendant proposed to give in evidence—a book purporting to be a collection of treaties concluded by America, and published by the authority of the American government; and to prove by the American minister resident at this court, that the book produced, was the rule of his conduct, as an equivalent to a regular copy from the archives in Washington; but Lord Ellenborough rejected the evidence, and held, that it was necessary to have a copy examined with the archives.

TRUSTEES.

In an action of ejectment against a schoolmaster, removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held, that it was not necessary for the lessors of the

(1) *Manby v. Curtis*, 1 Price, 225.

(2) *Armstrong v. Hewitt*, 4 *ibid.* 216.
Atkins v. Hatton, 4 Gwill. 1406. *Miller v. Foster*, 2 Anst. 387. n.

(3) *Armstrong v. Hewitt*, 4 Price, 216.
Potts v. Durant, 4 Gwill. 1450. 1454. 3 Anst. 789.

(4) *Armstrong v. Hewitt*, 4 Price, 216.

(5) *Atkins v. Hatton*, 4 Gwill. 1406.

(6) *Miller v. Foster*, 4 Gwill. 1406. *Phillips' Ev.* 644., vide etiam *Tucker v. Wil-*

kins, 4 Sim. 241. *Maddison v. Nuttall*, 6 Bing. 226.

(7) *Leonard v. Franklin*, 4 Price, 264., et vide *Halse v. Eyston*, *ibid.* 417. *Hebden v. Freeman*, *ibid.* 420.

(8) *Armstrong v. Hewitt*, 4 Price, 216.

(9) *Atkins v. Drake*, M'Clel. & Y. 214.

(10) *Potts v. Durant*, 4 Gwill. 1450. *Atkins v. Drake*, M'Clel. & Y. 214.

(11) *Potts v. Durant*, 3 Anst. 195.

(12) 1 Camp. 65. (a.)

plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. (1)

The *valor beneficiorum*, or Pope Nicholas's taxation, is admissible to prove the rate and value at which the persons employed in that taxation estimated the ecclesiastical benefices. (2)

A new *valor beneficiorum* was made (26 Hen. 8.) by virtue of commissions under the great seals, and the surveys under these commissions are admissible to prove the value of the first-fruits and tenths of ecclesiastical foundations at that period, but they are not conclusive respecting such questions. (3)

A verdict (4) is not evidence without producing the judgment, or an examined copy, for perhaps the judgment was arrested, or a new trial granted (5); but the rule does not hold, where the trial was upon an issue out of Chancery, for there the decree is evidence, that the verdict was satisfactory. (6) But the production of the *postea* without the judgment is evidence to shew the fact, that there was a trial between the parties (7), and the amount of the damages. (8)

Old entries in vestry books are evidence to prove an averment in an indictment for libel (9), or in cases where reputation would be sufficient (10); and entries in a parish register respecting the application of sums of money (11), the total of which was in the handwriting of a deceased vicar, are evidence. (12)

Extracts from the register of the bishop of the diocese prove the parochial electoral rights; so, also, entries of vestry meetings at which the rector was present. (13)

Old entries in the vestry books of a parish are not evidence to shew the right of election to a parish office to be in the parishioners and rector, when it did not appear, whether the incumbent was present at the meeting to which they related. (14)

But an entry in a vestry book, stating that A. was duly elected treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of such election and its regularity (15); but it must appear on the entry, or *aliunde*, that the meeting was duly convened after proper notice. (16)

On the question, whether a place is parcel of a certain parish, old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs, &c. done to a

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VALOR BENEFI-
CIORUM, OR
POPE NICHOLAS'S TAX-
ATION.

VERDICT
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VESTRY BOOKS.

(1) *Doe v. Haddon*, Doug. 310.
(2) *Bullen v. Michel (Clerk)*, 2 Price, 477.
(3) *Drake v. Smyth*, 5 ibid. 377. *Bullen v. Michel*, 4 Dow, 324.

(4) *Ante*, 1661. tit. JUDGMENT.
(5) *Pitton v. Walter*, Str. 162. *Fisher v. Kitchingman*, Willes, 367. Bull. N. P. 234. *Olive v. Gwin*, Hardr. 118.

(6) *Montgomery v. Clarke*, 3 Bac. Abr. Evidence (F.), 260. Bull. N. P. 234. *Garland v. Scoones*, 2 Esp. N. P. C. 649.

(7) *Pitton v. Walter*, Str. 162. Barnard. 243. *Rex v. Browne*, M. & M. 315., vide *Harrap v. Bradshaw*, 9 Price, 359. *Fisher v. Kitchingman*, Willes, 367.

(8) *Foster v. Compton*, 1 Stark. 365.

(9) *Rex v. Martin*, 2 Camp. 100.

(10) *Price v. Littlewood*, 3 ibid. 288.

(11) *Perigal v. Nicholson*, Wightw. 63.

(12) Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish found in the late incumbent's possession, are evidence. *Earl (Clerk) v. Lewis*, 4 Esp. N. P. C. 1. Harrison's Ev. 79.

(13) *Hartley v. Cook*, 5 C. & P. 441. 9 Bing. 728. 3 M. & Sc. 230.

(14) *Ibid.*

(15) *Rex v. Martin*, 2 Camp. 100. *Hartley v. Cook*, 5 C. & P. 441.

(16) *Hysham v. Forster*, 5 M. & R. 277.

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chapel in the parish church, alleged to belong to the place in question, are not evidence. (1)

An entry in a book kept in a parish chest, is not evidence for the parish of a certificate. (2)

VISITORS.

Where founders of colleges, or persons creating any trust, confer on certain individuals, whether visitors or trustees, the exclusive power of determining the rights of persons seeking a benefit under the donation or trust, the courts of common law receive the determinations of the visitors or trustees as the criterion of the rights of the parties: thus, a *mandamus* to restore the fellow of a college will not be granted (3); a sentence of deprivation by the visitor of a college, acting within the limits of his visitorial jurisdiction, has been held to be conclusive (4); and a sentence of expulsion of a member of a college by the master and fellows is also unimpeachable. (5) But the sentences of visitors may be impeached for excess of jurisdiction (6), although the sentence will not be impeached for informality or irregularity. (7)

WRITS.

If the writ have been returned it is a record, and should be proved in the same manner as any other record; if not returned, the original should be produced.

When the writ is mere matter of inducement, it may be proved by the production of the writ itself (8) without a copy of the record, for possibly it may not have been returned, and then it is no record; but when a record is the gist of the action, a copy from the record is necessary, because that is the best evidence.

The production of a writ with the sum indorsed, is evidence of the amount for which the arrest was made. (9)

A copy of the judgment rolls containing an award of an *elegit*, and the return of the inquisition, is evidence of the *elegit* and inquisition. (10)

A writ superseding a commission, is evidence both of the fact of the commission and of the date of it as recited. (11)

To prove that a writ issued in a particular cause, it is not sufficient to prove the *præcipe* by the filazer's book, and to give notice to the party to produce it; it should be shewn, that, after the return, the treasury was searched, and no such writ found; and that it was in the party's hands, who had notice to produce it. (12)

A return to a writ by a sheriff, is sufficient proof of the delivery of the writ to him. (13)

(1) *Cooke v. Banks*, 2 C. & P. 478.

(2) *Rex v. Debenham (Inhab. of)*, 2 B. & A. 185., vide etiam *Goss v. Watlington*, 3 B. & B. 132.

(3) *Dr. Widdrington's case*, 1 Lev. 23. *Dr. Patrick's case*, ibid. 65. *Rex v. New College*, 2 ibid. 14.

(4) *Philips v. Bury*, Skin. 447. 1 Ld. Raym. 5. 2 T. R. 346.

(5) *Rex v. Grundon*, Cowp. 315.

(6) Vide *Rex v. Chester (Bishop of)*, 1 W. Black. 22.

(7) *Ely (Bishop of) v. Bentley*, 1 W. Black. 85.

(8) Bull. N. P. 234.

(9) *Brown v. Dean*, 2 N. & M. 317.

(10) *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(11) *Gervis v. Great West. Canal Comp.* 5 M. & S. 76. *Ledbetter v. Salt*, 4 Bing. 623—626.

(12) *Edmonstone v. Plaisted*, 4 Esp. N. P. C.

(13) *Fenton's case*, Loft, 524.

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IV. *Inspection of Documents.*

1. *Generally.*

INSPECTION OF
DOCUMENTS.

GENERALLY.

From *Barry v. Alexander* (1) it appears, that in those cases where the defendant would be entitled to a bill of discovery for the inspection of documents, he will have redress at law, without going into equity. (2)

Whenever party will be entitled to a bill of discovery, he can have redress at law.

A party cannot be compelled to produce evidence against himself, because it would be contrary to every principle of justice. (3) But, if the plaintiff be either an actual party, or a party in interest to an instrument in the defendant's possession, the court will, if it be necessary, compel the production of it, in order to be stamped, or that a copy may be taken, although the interest of the party does not appear except by his own declaration, by which he claims an interest. (4) In order however to obtain this rule, the applicant must either be an *actual party* to the instrument, or a party in interest. (5) Where one part only of an indenture was executed, the court compelled the defendant, who had possession of it, to produce it for the inspection of the other party (6); for one part only having been executed, there was an implied agreement by the party who had its possession to produce it, and in such a case the court will direct an inspection, although the plaintiff may require it, for the purpose of discovering some defect in the deed. (7)

Party not compelled to produce evidence against himself.

Where a party produces his title deeds to defeat his adversary's claim, the court will give the latter an opportunity of inspecting them (8): thus, where a deed has been produced and read on a trial by one party, the court will oblige him to permit the other party to inspect that deed in case of a new trial. (9)

Where title deeds produced, an inspection of them will be ordered.

The court will sometimes confine its order for the inspection of a deed to particular parts of it. (10)

Orders for inspection will sometimes be confined to particular parts.

And when a party is ordered to produce the documents which bear upon the issue, he is not bound to produce such parts of documents as do not relate to the issue; but if the applicant insist, that any thing material has been withheld, the other party must, in analogy to the practice in the court of Chancery, deny by affidavit, that what he withholds is relevant. (11)

It seems to be a general rule, that a court will not compel a party to discover his evidence before trial, by the production of his books or other private documents. (12) And the court refused the application, where the object was to enable the defendant to plead in abatement the non-joinder of

Party will not be compelled to discover his evidence before trial.

(1) M. T. 25 Geo. 3. K. B. cit. Tidd, 592.

5 M. & P. 252. 7 Bing. 400. S. C. not

(2) Et vide etiam *Witter v. Cazalets*, cit. ibid. *Goater v. Nunnely*, Str. 1130.

S. P. 5 C. & P. 75.

(3) Per Abbott C. J. in *Rex v. Chester (Sheriff of)*, 1 Chitt. 476.

(10) *Ramsbottom v. Cooper*, 2 Chitt. 231.

(4) *Bateman v. Phillips*, 4 Taunt. 161. 2 Stark. Ev. 412.

If a bill be filed for discovery, it is not competent to the plaintiff to call for all the defendant's deeds indiscriminately: some specific deed or deeds should be pointed out, and the object of the party calling for them fully and clearly stated. *Shaw v. Shaw*, 12 Price, 163.

(5) *Taylor v. Osborne*, cit. 4 Taunt. 159. *Lambert v. Rogers*, 4 Meriv. 489. *Jones v. Jones*, 3 ibid. 172.

(11) *Clifford v. Taylor*, 1 Taunt. 167. 1 Camp. 562.

(6) *Blakey v. Porter*, 1 Taunt. 386.

(7) *King v. King*, 4 ibid. 666.

(8) *Willis v. Farrer*, 2 Y. & J. 242.

(12) 2 Stark. Ev. 413.

(9) *Hewitt v. Pigott*, 1 Dowl. P. C. 219.

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Inspection will
be refused,
when the ap-
plicant is not
interested.

parties. (1) In another case the court refused a motion for the inspection of the bill of exchange on which the action was brought, and for impounding it in the hands of the prothonotary, on a suggestion of its being a forgery ; for this is matter of defence on the trial. (2)

When the applicant is neither an actual party to the instrument, nor a party in interest, the court will not compel the production of an instrument to be stamped. (3) Where an action was brought on a bond, and the defendant, on a suggestion of forgery, moved that it might be examined in the hands of the plaintiff by an officer from the stamp office, the court refused the application, since it might be the means of convicting the party of a capital felony. (4) And where each party has his own part of the instrument, the court will not compel the defendant to produce his part or copy ; and if the plaintiff lose the bond on which the action is brought, the court will not compel the defendant to produce his copy. (5)

If an information be filed by the attorney general against an officer of the East India Company on charges of delinquency in India, founded upon the report of a board of inquiry in that country, the defendant has no right to an inspection of that report. (6)

In an action by an attorney for his work and labour as such, against a corporation of which he was a burgess, the court refused to grant him inspection of the books of the corporation. (7)

Inspection was refused to a plaintiff in replevin, of a deed to which he was no party—the deed being an assignment to the avowant of the reversion of the demised premises. (8)

Insufficiency of
affidavit.

Where one part only of an indenture of apprenticeship was executed by the plaintiff and defendant, and sworn to be in the possession of the latter:—It was held, on a notice given by the plaintiff to produce it, that an affidavit of the defendant, stating, that he had no such indenture in his possession, and that he had not divested himself of it, nor destroyed it, and that he did not know in whose possession it was, or what had become of it, was insufficient, because he should have stated, that it never existed, that he had never possessed it, or that he had not been enabled to find it. (9)

DOCUMENTS IN
THE POSSESSION
OF TRUSTEES.

In *King v. Chester (Sheriff of)* (10) Chief Justice Abbott said, “The ordinary case, where the court allows a party to inspect documents in the hands of a third person, is that in which the party called upon is the trustee for the applicant. Those cases are, not where the documents come originally into the trustee’s hands for his own benefit, but for the benefit and advantage of the party desiring to see them.”

Stakeholders.

Thus, where the defendant was a stakeholder, the court ordered him to give the plaintiff, at his expense, a copy of the articles for Epsom races, and to produce the same at the trial. (11) So where an action is brought

Ship’s articles.

by a sailor for his wages on ship’s articles, against the captain in whose custody they are, it seems that under the equity of the stat. 2 Geo. 2

(1) *Beale v. Bird*, 2 D. & R. 419.

(2) *Hildyard v. Smith*, 1 Bing. 451.

(3) *Taylor v. Osborne*, cit. 4 Taunt. 159.

(4) *Chetwynd v. Marnell*, 1 B. & P. 271.

(5) *Street v. Brown*, 6 Taunt. 302.

(6) *Rex v. Holland*, 4 T. R. 691.

(7) *Stevens v. Berwick (Mayor of)*, 4 Dowl. P. C. 277 1 H. & W. 517.

(8) *Brown v. Rose*, 6 Taunt. 283.

(9) *Cooke v. Tanswell*, 1 Moore, 465.

S. C. not S. P. 2 ibid. 513. 8 Taunt. 131.

(10) 1 Chitt. 478.

(11) *Tidd*, 592. *Gracewood v.* —

Barnes, 439.

c. 36. s. 8., the defendant, if required, must produce and give a copy of the articles.

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EVIDENCE.

If one part of a deed be executed by the plaintiff alone, but remains in the possession of the defendant's attorney, the court of Common Pleas will order the latter to give an inspection and copy of it to the plaintiff; and the affidavit for such inspection need not set out the plaintiff's cause of action. (1)

Where deeds in the possession of attorneys or agents.

Where an agreement for a lease was in the hands of an attorney, and it was doubtful, whether he acted as attorney for both the parties to the agreement in drawing it up, the court allowed one of the parties to inspect and take a copy of it. (2)

Where certain books of the plaintiff had come into the defendant's possession as his agent; and the plaintiff was desirous of inspecting them; the court ordered the defendant to allow an inspection, but would not order him to deliver them up. (3)

The court will not on motion compel a person not a party to the suit to produce for inspection a deed, which he holds as a mere trustee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it. (4)

Where the court will not compel delivery for inspection.

Nor will the court exercise their authority in this respect over an attorney, where the deed has not come into his hands by virtue of his professional character. (5)

Where a deed of assignment was deposited in the hands of A. as a security for money lent, he is not bound to produce it on an application by the assignor in an action between the latter and a third person. (6)

2. Records of Courts.

A party to a proceeding has usually a right to an inspection of records when it is necessary for the purposes of a civil suit. Where the plaintiff had been sued in the London court of conscience, and taken in execution, for which he brought an action of trespass, the court granted a rule, that he should be at liberty to inspect the books of proceedings, so far as they related to the cause against himself. (7) And in an action for malicious prosecution, where it was requisite, in order to support the action, that the plaintiff should have copies of the examinations before the justices, and of the warrant on which he was apprehended, the court granted a rule for an inspection, and copies, and directed that the originals should be produced at the trial. (8)

RECORDS OF
COURTS.

Examinations
before justices.

(1) *Morrow v. Saunders*, 2 Moore, 671.
1 B. & B. 318.

(2) *Exp. Bretter*, 1 H. & W. 212.

(3) *Jones v. Palmer*, 4 Dowl. P. C. 447.

(4) *Cocks v. Nash*, 3 M. & Sc. 164. 9 Bing. 723.

(5) *Ibid.*

(6) *Schlencker v. Morey*, 1 C. & P. 178.
5 D. & R. 747. 3 B. & C. 789.

(7) *Wilson v. Rogers*, Str. 1242.

(8) *Tidd*, 593. *Rex v. Smith*, Str. 126.
Welch v. Richards, Barnes, 468. *Herbert v. Ashburner*, 1 Wils. 297. *Rex v. Chester (Sheriff of)*, 1 Chitt. 479. *Rex v. Purnell (Vice-chancellor of Oxford)*, 1 Wils. 239.
Edwards v. Vesey, R. T. H. 128.

**EFFECT AND
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EVIDENCE.**

Books of sessions.

County rates

Record of acquittal.

**CORPORATION
BOOKS.**

Stat. 32 Geo. 3.
c. 58. s. 4.

Stat. 3 Geo. 3.
c. 15.

Corporators
have the right
of inspection,
but not strangers.

Questions relating
to tolls.

Debt under a
bye-law.

Customs.

The books of quarter sessions have been considered as public books, which every one has a right to inspect. (1)

And the court has granted a *mandamus* for the inspection of county rates. (2)

But upon an indictment for felony, it is not usual to grant a copy of the record of acquittal, where any probable cause for the prosecution existed. (3)

3. Corporation Books.

By stat. 32 Geo. 3. c. 58. s. 4., the officer having the custody of corporation records is to permit any member thereof, to inspect the book of admission of freemen under a penalty of 100*l*.

The stat. 32 Geo. 3. c. 58. does not bind an officer of a corporation, having the custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freemen, &c. of the corporation; and therefore, where the town clerk offered to permit an inspection of the entries made upon stamps of the admission and swearing-in of burgesses, but refused an inspection of the common council book, in which it was usual to enter the order for the admission and swearing-in of the burgesses: — It was held, that he did not thereby incur a penalty. (4)

And persons empowered by stat. 3 Geo. 3. c. 15. to inspect the entries of freemen, have a right to inspect all books, papers, &c. in which the admissions of freemen are entered. (5)

With respect to a member of a corporation, the corporate books are public books; they are common evidence, which must of necessity be kept in some one's hands, and then each individual possessing a legal interest in them, has a right to inspect and to use them as evidence of his rights; but with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. (6)

Thus, in *Bristol v. Visger* (7), which was an action for tolls due to a corporation, it appeared, that the defendant had acquired the character of a corporator after the cause of action arose, but before trial; when it was held, he had no right to inspect the corporation books, and must still be considered as a foreigner *quoad* this action.

But in a suit by the city of London, the defendants obtained an order to inspect the city books and their bye-laws (8); and in an action of debt for a penalty under a bye-law, the defendant was allowed an inspection of the bye-law, and of the corporation books; for as the law was made for the public good of the residents, the defendant could not be regarded as a stranger. (9)

Inspection has been ordered of the books of a corporation in a case, where a custom was in question. (10)

(1) *Herbert v. Ashburner*, 1 Wils. 297.

(2) *Rex v. Leicestershire (Justices of)*, 4 B. & C. 891.

(3) *Groenvelt v. Burrell*, 1 Ld. Raym. 253.

(4) *Davies v. Humphreys*, 3 M. & S. 223.

(5) *Schuldam v. Bunniss*, Cowp. 192., *vide* 1 Stephens's Corporation Acts, 2d ed. 455—461.

(6) *Southampton (Mayor of) v. Graves*,

8 T. R. 590. *Hodges v. Atkis*, 3 Wils. 398. 1 Stephens's Corporation Acts. 2d ed. 455—461.

(7) 8 D. & R. 434.

(8) *London v. Thomson*, 3 Swanst. 265.

(9) *Harrison v. Williams*, 3 B. & C. 162.

(10) *Anon. Lofft*, 654.

The court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of a corporation, unless it be shewn, that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested, and the inspection will then only be granted to such an extent, as may be essential for the particular occasion. (1)

EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

Limited inspection.

Thus, where members of a corporation, merely alleging grounds on which they believed its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves, or any matter then in dispute, applied for a *mandamus* to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens belonging to the company, or relating to its affairs, the court discharged the rule with costs. (2)

Improper conduct and election of officers.

So, likewise, where the defendants were sued by a corporation for making, while directors, false entries in the books of the corporation, it was holden, that they were not entitled to inspect them; at all events, not without an affidavit, that such inspection was necessary for their defence. (3)

Pending an action by a corporation for tolls, the courts will not grant leave to inspect the corporation books or muniments on the application of the defendant, a stranger to the corporation. (4)

Pending an action for bills by a stranger, inspection will not be granted.

Rules of inspection, in cases of copyholds, corporations, &c. are never granted, but only where civil rights are depending (5); for it is an invariable rule, that in criminal cases, the party shall never be obliged to furnish evidence against himself. (6)

In criminal cases, rules of inspection not granted.

4. Public Documents.

PUBLIC DOCUMENTS.

One who has an interest in any public books, whether bank, east india, parish, or custom-house books, has a right to inspect them when they are material, and to take copies of them. Thus, a prebendary may inspect charters, &c. of a chapter, in a suit concerning his prebend at seasonable times. (7) In *Gery v. Hopkins* (8) an order was made for the production of the books of the East India Company in a cause between parties having stock there, since the books, the court said, were the titles of the buyers of stock; so the books of the commissioners of the lottery and their numerical lists are of a public nature, and ticket-holders may have an inspection of them by rule of court. (9)

Ecclesiastical charters.

East India Company.

Commissioners

An action for negligence in effecting a purchase was brought against a sworn-broker of the city of London, who is bound to enter in a book all

Brokers.

(1) *Rex v. Merchant Tailors' Comp. (Masters and Wardens of)*, 2 B. & Ad. 115.

(2) *Ibid.*

(3) *Imperial Gas Comp. v. Clarke*, 7 Bing. 95. 4 M. & P. 727.

(4) *Southampton (Mayor of) v. Graves*, 8 T. R. 590.

(5) *Rex v. Heydon*, 1 W. Black. 351. *Rex v. Purnell (Vice-chancellor of Oxford)*, 1 Wils. 240.

(6) *Rex v. Worsenham*, 1 Ld. Raym. 705. Tidd, 595.

(7) *Young v. Lynch*, 1 W. Black. 27. *Gery v. Hopkins*, 7 Mod. 129. *Warriner v. Giles*, Str. 954. *Crew, q. t. v. Saunders*, *ibid.* 1005.

(8) 7 Mod. 129. 2 Ld. Raym. 851.

(9) *Vide etiam Schinotti v. Bumstead*, *cit.* Tidd, 594.

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.Registry of
presentation.

contracts made by him. The court granted a rule to compel the broker to produce this book to the plaintiff, in order that he might take a copy. (1)

A bishop's registry of presentation is a public book; and a *mandamus* lies to him to grant inspection of it, to one claiming a right to present to a vacant living, though the bishop claim a right to collate to it. (2)

In an action against the marshal for an escape, the court will compel the marshal to grant an inspection of the *habeas corpus* and *committitur*. (3)

Warden of the
Fleet.

But, in an action against the warden of the Fleet for the escape of a prisoner committed to his custody in execution, it was held, that the party, at whose suit he was committed, could not call for an inspection of the writ of *habeas corpus* and return thereto, or of the *committitur*; nor was the warden bound to furnish copies of them, as all the proceedings under which a prisoner was charged in his custody, were incorporated in the list of cases under which he was detained, and which were deposited with the clerk of the papers of the prison. (4)

Habeas corpus
and *committitur*.

Public offices.

Access is not allowed to the books of public offices, in collateral actions brought by persons who have no interest in the books (5); and when the disclosure of official matters would be contrary to the public interest, the production of the documents relating to such matters, cannot be enforced. (6)

Canal company.

Where a canal act provided, that "proprietors, landowners, and others interested in the said navigation," should have a right to inspect the books of the company:—It was held, that a creditor by bond, was a person interested in the navigation, within the spirit of the above enactment. (7)

But where a canal act gave the control over the company's affairs to a committee, and authorised every proprietor to inspect the books in which the committee were directed to enter accounts, &c. it was held, that a *mandamus* could not be granted to compel the company to permit a proprietor to inspect the books, where there had been no refusal by the committee, although there had been a direct refusal by the clerk in whose possession the books were. (8)

Private books
belonging to
public bodies.

The East India Company are not obliged to produce their private books or letters (9), nor any private books relating to the appointment of their servants (10); nor will the court allow an inspection in such cases, unless it be material (11), nor the inspection and copying of more than is material to the question. (12)

Nor will the production of public books be enforced upon a question between parties who have no interest in them:—It was held, that the officer

(1) *Browning v. Aylwin*, 7 B. & C. 204. 9 D. & R. 801., sed vide *London (Mayor of) v. Brandon*, Holt's N.P.C. 438. 2 Stark. 14.

(2) *Finch v. Ely (Bishop of)*, 2 M. & R. 127. S. C. nom. *Rex v. Ely (Bishop of)*, 8 B. & C. 112.

(3) *Fox v. Jones*, 1 M. & R. 570. 7 B. & C. 732.

(4) *Davies v. Brown*, 9 Moore, 778.

(5) *Crew, q. t. v. Saunders*, Str. 1005. 1 T. R. 689. n. *Benson v. Port*, cit. 1 Wils. 240. *Crew, q. t. v. Blackburn*, ibid.

(6) *Atherfold v. Beard*, 2 T. R. 616.

(7) *Pontet v. Basingstoke Canal Comp.* 2 Bing. N. C. 370. 2 Scott, 543.

(8) *Rex v. Wiltshire Canal Comp.* 5 N. &

M. 344. So, although upon an application to the committee, they say that they must consider of the application, as it is a novel one, and inspection is afterwards positively refused by the clerk. Ibid. Before the court will grant a *mandamus*, there must be a direct refusal by the proper parties to do the act. Ibid.

(9) *Shelling v. Farmer*, Str. 646.

(10) *Murray v. Thornhill*, ibid. 717.

(11) *Benson v. Port*, cit. 1 Wils. 240. *Rex v. Purnell*, 1 W. Black. 40. *Rex v. Newcastle-upon-Tyne (Hostmen of)*, Str. 1223.

(12) *Slade v. Walter*, 12 Vin. Abr. Evidence, 146. [F. b.].

served with a *subpoena duces tecum*, in order to decide a wager between two persons as to the amount of the revenue, was not bound to produce the books. (1) And a doctor, who is not a member, has no right to inspect the books of the college of physicians. (2)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

5. *Parochial Documents.*

Parish documents are for some purposes considered as public, and persons interested in them, have a right to inspect and take copies of such parts, as relate to their interest. (3)

PAROCHIAL
DOCUMENTS.

Persons inter-
ested have a
right to inspect
parochial docu-
ments.

Thus, in a suit touching the validity of a parish rate, the plaintiff is entitled to inspect the parish books without paying any costs (4); and a rule for an inhabitant of a parish to inspect the parish books may be absolute in the first instance. (5)

But in an action between the impropriator and the parishioners, as to the right to a house, the court refused to the former the inspection of the parish books, and copies of so much as regarded his title, saying, that the case differed from that of copyholders, because all the tenants of the manor have an interest in the court rolls; but the impropriator had a distinct interest from the parishioners; it was not a parochial right, but a title which was in question, and therefore it was not reasonable, that the parish books should be produced, which would be to show the defendant's evidence. (6)

But impropri-
ator has no
right to demand
such inspection.

Under stat. 22 Geo. 3. c. 83. s. 7. a rated parishioner is entitled to inspect the accounts kept by the guardians of the poor, although the time for appealing may be gone by. (7)

Stat. 22 Geo. 3.
c. 83. s. 7.

But a parishioner has no right to inspect parish books, for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish. (8)

Parishioner no
right to inspect
for private ob-
jects.

Pending an indictment, at the instance of a parish, against a county, for not repairing a bridge, the object being to try whether the parish or the county were liable to repair the bridge, the defendants have no right to inspect the parish books relating to former repairs of the bridge. (9)

Upon a question between the parish of St. Margaret and the dean and chapter of Westminster, as to the right of nominating the parish clerk, the court refused an inspection of the parish books to the dean and chapter. (10)

Dean and
chapter no ab-
solute right to
inspect pa-
rochial records.

When in trespass for entering to distrain for poor's rates, the defendant (who acted on behalf of the parish officers) averred, in justification, that the plaintiff's house was within the parish, which the plaintiff denied:—It was held, that the plaintiff could not demand an inspection of the parish books, on the ground, that the defendant alleged him to be a parishioner. (11)

Actions against
overseers.

(1) *Atherfold v. Beard*, 2 T. R. 616.

(2) *West v. Physicians (College of)*, cit. 1 Wils. 240. *Cox v. Copping*, 5 Mod. 395.

(3) *Geery v. Hopkins*, 2 Ld. Raym. 851. *Warriner v. Giles*, Str. 954. *London (Mayor of) v. Swinland*, 1 Barnard. 154.

(4) *Newell v. Simpkin*, 6 Bing. 565. 4 M. & P. 395.

(5) *Anon.* 2 Chitt. 290.

(6) *Cox v. Copping*, 5 Mod. 395., vide

etiam *Rex v. Worsenham*, 1 Ld. Raym. 705. *Reg. v. Mead*, 2 ibid. 927.

(7) *Rex v. Great Farringdon (Overseers of)*, 9 B. & C. 541.

(8) *Rex v. Smallpiece*, 2 Chitt. 288.

(9) *Rex v. Buckingham (Justices of)*, 2 M. & R. 412. 8 B. & C. 375.

(10) *Turner v. Gethin*, 12 Vin. Abr. Evidence, 146. [F. b.].

(11) *Burrell (Sir Charles) v. Nicholson*, 3 B. & Ad. 649.

**EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.**

Vestry clerk will not be compelled to produce parochial records, except for parochial purposes.

Where a *mandamus* will be granted under stat. 17 Geo. 2. c. 38. s. 1.

Upon an information against overseers for making an illegal rate, the parish books cannot of right be inspected. (1)

And an inspection of the books at Clement's Inn, to prove payment of poor's rates, as being within the parish of A., was denied. (2)

The court will not compel a vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. (3)

The court will not grant a *mandamus* to churchwardens to allow an inspection of their accounts under stat. 17 Geo. 2. c. 38. s. 1., unless the applicant state some public ground for desiring such inspection (4); and the 14th sect. of the act, which imposes a penalty upon churchwardens wrongfully refusing an inspection, is no answer to the application. (5)

6. Manorial Court Rolls.

**MANORIAL
COURT ROLLS.**

The court rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights; to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants themselves (6); but the privilege of inspecting the court rolls and books of a manor is confined to the tenants of the manor. (7)

Thus, in a question between two, as to the right to a manor, the court refused to grant a rule for the production of the rolls at the trial, since it was out of the common case between two tenants. (8)

Although a freehold tenant of a manor has no right to the inspection of the rolls, unless there be some cause depending, yet a copyholder who claims an interest, may have an inspection of so much of the rolls of a manor as concerns his own interest, although no cause be depending at the time. (9)

Where the question is on the custom of a manor between the lord and a stranger, the lord will not be obliged to let him have an inspection of the rolls, because in a dispute with a stranger, they may be considered as his private evidence. (10)

A *mandamus* will not lie to the lord and steward of a manor to inspect court rolls for the purpose of supporting an indictment against the lord, for

(1) *Rex v. Lee*, cit. 1 Wils. 240., et vide *Orr v. Morice*, 6 Moore, 347. 3 B. & B. 139.

(2) *Allan v. Tap*, 2 W. Black. 850. Upon a bill of discovery in aid of an action to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parochial rates, the court ordered the defendants, the parish officers, to produce for his inspection the rate books, account books, minute books, orders, and other documents, which related to the matter in question, and were admitted by their answer to be in their possession. *Burrell (Sir Charles) v. Nicholson*, 1 M. & K. 680.

(3) *May v. Gwynne*, 4 B. & A. 301.

(4) *Rex v. Clear*, 7 D. & R. 393. 4 B. & C. 899.

(5) *Ibid.*

(6) *Roe v. Aylmer*, Barnes, 236. *Hobbs v. Parker*, *ibid.* 237. *Addington v. Clode*, 2 W. Black. 1030. *Folkard v. Hemet*, *ibid.* 1061. *Rex v. Shelley*, 3 T. R. 141. *Rex v. Lucas*, 10 East, 235. *Bateman v. Phillips*, 4 Taunt. 162. *Phillipps' Ev.* 807.

(7) *Tidd*, 594.

(8) *Wood v. Whitcomb*, 12 Vin. Abr. Evidence, 146. [F. b.].

(9) *Rex v. Lucas*, 10 East, 235. *Bateman v. Phillips*, 4 Taunt. 162.

(10) *Phillipps' Ev.* 810.

Strangers cannot compel an inspection of court rolls.

not repairing a road within the manor (1); nor to decide a question of boundaries in an action of trespass by a stranger against the lord (2); nor to allow the inspection of the records of a court-leet, unless the party assigns some satisfactory reason for the inspection. (3)

Under Reg. Gen. H. T. 2 Will. 4., "an order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit, that the copyhold tenant has applied for and been refused inspection." (4)

If an application to inspect the court rolls of a manor be made, when no cause is pending, the rule is *nisi* in the first instance. (5)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

Court-leet.
Reg. Gen.
H. T. 2 Will. 4.

7. *Private Documents.*

On an application for liberty to inspect a private instrument in the hands of the opposite party, it must appear to the court, that the instrument is held in the possession of the latter, upon an implied or expressed trust, for the benefit of the party making the application (6), it being a general rule, that a party shall not be compelled to discover the evidence before trial by the production of his books or other instruments (7); nor will they grant a rule for the inspection of books or documents of a private nature in the hands of third persons (8): thus, in an action for goods sold and delivered, the court of King's Bench would not compel a defendant to allow an inspection of the goods to enable the plaintiff to give evidence of their identity, &c. (9)

Where a defendant seeks to obtain a copy of an annuity deed, bond, and warrant of attorney, to secure the payment of the annuity, he must shew, that only one copy or part of those instruments was made, at the time of their execution. (10)

But, where there is an agreement between the plaintiff and defendant, of which there is only one part, the party who has the agreement in his possession ought, when applied to, to give the other party a copy; and he has no right to impose terms as a condition for so doing. (11)

A lessee of a corporation elected to pay an increased rent, pursuant to the finding of a jury under stat. 5 & 6 Will. 4. c. 76. s. 97., and indorsed the finding of the jury on his part of the original lease. In an action for the increased rent, the lessee was compelled to produce his part of the lease for the inspection of the corporation, and to allow a copy of the indorsement to be taken, although it was admitted, that the original lease was still in the

PRIVATE DO-
CUMENTS.

Instrument
must be held
upon an implied
or expressed
trust to author-
ise an inspec-
tion.

Where there is
only one copy
or part of an
instrument.

Stat. 5 & 6
Will. 4. c. 76.
s. 97.

Where lessee
compelled to
produce his
lease.

(1) *Rex v. Cadogan (Earl of)*, 1 D. & R. 550. 5 B. & A. 902.

(2) *Talbot v. Villeboys*, cit. from MS. by Buller J., 3 T. R. 142. *Smith v. Davies*, 1 Wils. 104. *Hereford (Bishop of) v. Bridgewater (Duke of)*, Bunb. 269. *Att. Gen. v. Coventry (City of)*, *ibid.* 290. *Phillipps' Ev.* 810.

(3) *Rex v. Maidstone (Mayor of)*, 6 D. & R. 334.

(4) 1 Dowl. P. C. 197. 8 Bing. 304. 1 M. & Sc. 430. 3 B. & Ad. 389. 2 C. & J. 197. 2 Tyrw. 350. 4 Bligh, N. S. 605.

(5) *Exp. Best*, 3 Dowl. P. C. 38., vide

Rex v. Tower, 4 M. & S. 162. *Rogers v. Jones*, 5 D. & R. 484.

(6) *Alexander v. Alexander*, 1 Alcock & Napier (Irish), 109.

(7) Tidd, 592. *Ward v. Apprice*, 6 Mod. 264.

(8) Tidd, 593.

(9) *Dell v. Taylor*, 6 D. & R. 388.

(10) *Griffin v. Smythe*, 8 Dowl. P. C. 490.

(11) *Reid or Read v. Coleman*, 2 C. & M. 456. 2 Dowl. P. C. 354. 4 Tyrw. 274. An application for a copy of an agreement ought to be made to a judge at chambers, and not to the full court. *Ibid.*

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possession of the corporation, as well as the inquisition taken before the jury. (1)

Where the plaintiff in an action on a deed, has had it taken from him under a warrant against him for felony, the court will, upon an affidavit of demand upon the magistrate and constable, who granted and served the warrant, direct them to give the plaintiff a copy to declare upon and to produce the deed at the trial, on the plaintiff's undertaking to pay the expenses. (2)

A judge at chambers having made an order upon the plaintiff to permit the defendant to inspect and take a copy of a promissory note, upon which the action was brought, the court refused to grant a rule to rescind that order, although it was sworn, that no special grounds were stated at chambers, upon which the order was founded. (3)

Where plaintiff declares upon a specialty or written instrument, inspection will be directed.

If a plaintiff declare upon a specialty, the defendant is entitled as of course to oyer of the deed; and although the instrument be not declared upon, but is wanted for the purposes of evidence only, the courts will compel the production for the purpose of inspection, stamping, or taking a copy, upon the application of the party who has an interest in the instrument. (4)

But the court refused to allow the plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the action, upon an affidavit of the plaintiff, that if such document existed, and purported to be signed by him, the signature was a forgery. (5)

A judge will upon summons order a copy of the instrument on which the action is founded to be delivered to the defendant or his attorney, whenever the action is founded upon a written instrument, whether it be a policy of insurance (6), bill of exchange (7), lease (8), or special agreement or undertaking in writing to pay the debt of another, if special grounds be laid, as that the demand is of long standing, and the defendant has no copy of the instrument (9); and it is not material whether the instrument be or be not stated in the declaration to be in writing. (10)

The plaintiff, assignee of A., who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff, on the joint account of A. and B.; the court allowed B. to inspect the books of A. in the hands of the plaintiff as his assignee, in order that he might discover, what the alleged contracts were. (11)

On an application by the defendant, who was sued as the acceptor of a bill of exchange, the court will order the bill to be lodged with the officer for the personal inspection of the defendant, when it appears upon his affidavit, that the cause of his refusal to pay, is a reasonable suspicion of the acceptance having been forged. (12)

Where the plaintiff declared on an agreement, that he should be employed

(1) *Arundel (Mayor of) v. Holmes*, 8 Dowl. P. C. 118.

(2) *Harris v. Aldrit*, 2 Chitt. 229.

(3) *Woolner v. Devereux*, 9 Dowl. P. C. 672.

(4) Tidd, 591, 592.

(5) *Jessel v. Millingen*, 1 M. & Sc. 605.

(6) Stat. 19 Geo. 2. c. 37. s. 6.

(7) *Exp. Partridge*, 1 H. & W. 350.

(8) *Doe d. Morris v. Roe*, 1 M. & W. 207.
Doe d. — v. Slight, 1 Dowl. P. C. 168.

(9) Tidd, 591.

(10) 2 Stark. Ev. 412.

(11) *Whitbourne v. Pettifer*, 4 M. & Sc. 182.

(12) *Richey v. Ellis*, 1 Alcock & Napier (Irish), 111.

by the defendant at the end of a year, and the defendant pleaded the general issue, and that there was no memorandum in writing of the agreement, as required by the Statute of Frauds; to which the plaintiff replied, that there was such a writing:—It was held, he was bound to permit an inspection of it by defendant, although it consisted only of a letter from the defendant's agent. (1)

A rule absolute has been granted, for inspecting a lease, in order that the names of the witnesses thereto, might be ascertained, to subpoena them. (2)

Where defendant surreptitiously obtained possession of an unstamped agreement, executed by himself and the plaintiff (thereby preventing the plaintiff from affixing a stamp as he had intended, in twenty-one days after execution), and then swore that he had lost the agreement, the court ordered that he should produce a copy in his possession to the plaintiff, and that if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original. (3)

EFFECT AND
PROOF OF
DOCUMENTARY
EVIDENCE.

Inspection of
lease to obtain
the names of
witnesses.

Where posses-
sion of a docu-
ment has been
surreptitiously
obtained.

V. Proof of Handwriting.

The obvious proof of handwriting is the testimony of a witness who saw the paper or signature actually written, but other evidence equal in degree is admissible, where the witness is enabled to form his judgment from the handwriting, and not from abstract extrinsic circumstances (4); and there is no limit of time defined by the law, within which the handwriting, which is the foundation of the witness's belief, must have been seen by him. (5)

Although comparison of handwriting is not admissible evidence when the fact to be proved is the handwriting of a particular person, whose supposed signature is upon a paper put into the witness's hand, yet if such witness has a document, to which is affixed the handwriting of that person (as to whose signature the question arises), and which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory, a basis being first laid from his having once seen the defendant sign his name, though he had forgotten the character of his handwriting. (6)

Upon the trial of an indictment at Nottingham against the servant of the duke of Portland for sending a threatening letter, the duke's steward spoke to having received accounts from the prisoner, which he handed over to the comptroller; the comptroller, from his knowledge of the prisoner's handwriting, acquired by means of inspecting these accounts, swore to his belief, that the prisoner wrote the threatening letter. He was allowed to refresh his memory by inspecting the accounts in the witness box. (7)

PROOF OF
HANDWRITING.
Generally.

Witness al-
lowed to refresh
his memory.

(1) *Blogg v. Kent*, 6 Bing. 614. 4 M. & P. 493.

(2) *Anon.* 2 Chitt. 230.

(3) *Bousfield v. Godfrey*, 5 Bing. 418. 2 M. & P. 771.

(4) *Mendes Da Costa v. Pym*, Peake's Add. Cas. 144.

(5) *Eagleton v. Kingston*, 8 Ves. 467. Phillipps' Ev. 693. Where a witness pre-
varicated in his evidence as to the hand-

writing of the defendant, as indorser of a bill of exchange, and swore both negatively and affirmatively as to his belief upon the subject, and there was no other evidence of the handwriting, the judge refused to stop the cause, leaving it to the jury to decide, what credit was due to the witness. *Beauchamp v. Cash*, D. & R. N. P. C. 3.

(6) *Burr v. Harper*, Holt's N. P. C. 420.

(7) Phillipps' Ev. 696.

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Where identity
of writer must
be proved.

But as the witness must speak respecting the general character of the handwriting, which he has derived from all the papers he has seen, he may be asked on cross-examination, whether the inspection of one of several papers revives in his mind an impression of such a general character, or only creates an impression derived from the particular specimen.

If a witness offer to prove the handwriting of a person, with whom he has had no personal acquaintance, the jury must be satisfied, that the party whose handwriting is in dispute, is identified as the person with whose handwriting the witness is acquainted: thus, if a party has received letters from another, and has acted on them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person. (1)

A witness who had never seen the defendant, but had corresponded with a person by the same name living at Plymouth Dock, where the defendant resided (and it appeared that there was no other person of that name there), stated that the handwriting of certain letters was that of the person with whom he had corresponded:—It was held sufficient evidence to admit the letters to be read against the defendant. (2)

In an action by the indorsee against the acceptor of a bill, the witness called to prove the handwriting of the drawer said, that neither the drawing nor the indorsement, were the handwriting of the person they purported to be. But it was proved, that the defendant had acknowledged the acceptance to be his; and it was contended, that as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought upon inspection of the bill, that the drawing and indorsement were of the same handwriting. But it was held to be necessary, that some proof should be given relative to the writer of the handwriting. (3)

Insufficient evi-
dence of hand-
writing.

Handwriting cannot be proved by a person, who has seen letters from time to time franked by the defendant, but never corresponded with or seen him write. (4)

If a person prove, that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office which the attorney of the party admitted to be his handwriting, and the person has acted on these papers so admitted, this is not such a knowledge of the party's handwriting, as will enable that person to prove a written document alleged to be in his handwriting. (5)

If a witness, called for the plaintiff, in his cross-examination admit, that a letter was written by him with the authority of the plaintiff, but denies that a second letter is his handwriting, the defendant's counsel will not be allowed to shew both letters to another witness called for the plaintiff, and ask him, whether he does not believe the second letter was written by the same person who wrote the first. (6)

Proof by cor-
respondence.

If, from communications in the ordinary intercourse of society, a reasonable presumption can be raised, that the letter or document is the handwriting of the party it purports to be, the belief of the party to whom it

(1) *Tharpe v. Gisburne*, 2 C. & P. 21. P. C. 714. *Randolph (Clerk) v. Gordon*, 5
(2) *Harrington v. Fry*, R. & M. 90. 1 Price, 312. *Ferrars (Lord) v. Shirley*, Fitg.
C. & P. 289. 9 Moore, 344. 2 Bing. 179. 195.
(3) *Allport v. Meek*, 4 C. & P. 267. (5) *Greaves v. Hunter*, 2 C. & P. 477.
(4) *Carey v. Pitt*, Peake's Add. Cas. 130. (6) *Clermont v. Tullidge*, 4 ibid. 1.
Batchelor v. Honeywood (Sir J.), 2 Esp. N.

is addressed, or a party who has been in the habit of examining the correspondence, is admissible evidence to prove such handwriting.

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Thus, in an action of *assumpsit* against the drawer and indorser of a bill of exchange, to which there was a plea denying the drawing and indorsement, it appeared, that the plaintiff stated he had received letters from the defendant's place of business in the same handwriting as that, in which the bill was drawn and indorsed, and that an offer to the defendant to compromise, after action brought, was also made. For the defence three witnesses swore positively, that the writing was not the defendant's:—It was held, that though the three witnesses for the defence rebutted the inference, that the writing upon the bill was the defendant's, yet the offer to compromise was evidence recognising the handwriting upon the bill, whether that of the defendant or of some other person, sufficient to go to a jury. (1)

Respecting the necessity of the correspondence being *acted upon*, it is not implied, that any business must be transacted, or any act done in consequence thereof (2), in order to render the evidence admissible.

Writings acted
upon.

“The clerk who constantly reads the letters, the broker who was ever consulted upon them, is as competent to judge, whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others, has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me.” (3)

Witness ad-
dressed.

It seems the evidence of a witness, who, upon the inspection of handwriting, states his belief that it is forged, having from his habits acquired the requisite experience and skill, is strictly admissible, although he is not acquainted with the handwriting supposed to be imitated (4); yet, practically speaking, it is useless; Lord Denman in *Doe d. Mudd v. Suckermore* (5) having said, “that neither court nor jury would place reliance on such an opinion.” (6)

Imitated hand-
writing.

In *Batchelor v. Honeywood (Sir John)* (7) it was holden, that the evidence of a clerk in the post-office, employed in detecting forgeries of the franks, but who had no acquaintance with the handwriting of a member of parliament, except from seeing his franks pass through the office, was not sufficient proof of such member's handwriting.

Such evidence has been received. Thus, an inspector was admitted to swear, that a libel was in a disguised hand (8); and in a trial at bar, a clerk to the post-office, accustomed to inspect franks, was allowed to prove, that a certain handwriting was in an imitated and not a natural hand, and that two writings, suspected to be in imitated hands, were written by the same person. (9) But, in *Carey v. Pitt* (10) and in *Gurney v. Langlands* (11) Lord Kenyon and Baron Wood rejected similar evidence. (12)

(1) *Harding v. Jones*, 1 Tyrw. & G. 135.

(2) *Doe d. Mudd v. Suckermore*, 5 A. & E. 720. 1 N. & P. 43. *Doe v. Wallinger*, Manning's Index, 131.

(3) *Per* Denman C. J. in *Doe d. Mudd v. Suckermore*, 5 A. & E. 740., vide etiam *Rex v. Slaney*, 5 C. & P. 213. *Gould v. Jones*, 1 W. Black. 384. Bull. N. P. 236.

(4) Phillipps' Ev. 696., *sed vide post*, 1669.

(5) *Doe d. Mudd v. Suckermore*, 1 N. & P. 63.

(6) Vide etiam *Eagleton v. Kingston*, 8 Ves. 438.

(7) 2 Esp. N. P. C. 714.

(8) *Rex v. Cator*, 4 ibid. 117. 145.

(9) *Goodtitle d. Revett v. Braham*, 4 T. R. 497.

(10) Peake's Add. Cas. 130.

(11) 5 B. & A. 330.

(12) Vide etiam *Kemp v. Mackrill*, Sayer, 132. *Stanger v. Searle*, 1 Esp. N. P. C. 14.

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EVIDENCE.Relevancy of
writings.Comparison of
handwriting.Court and jury
can institute a
comparison be-
tween docu-
ments that are
in evidence.Standard of
handwriting
purposely ac-
quired.Ancient writ-
ings.Judgment of
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Documents irrelevant to the issue on the record cannot be received in evidence at the trial, in order to enable a jury to institute a comparison of handwritings; and much less can it be permitted to introduce writings in order to enable a witness to institute such a comparison. (1)

Evidence of handwritings from direct comparison of hands is not, generally speaking, admissible (2) either in civil or criminal cases (3); because the "specimens selected may have been garbled and fallacious, and may not exhibit a fair specimen of the general character of the handwriting; and secondly, that this species of evidence may lead to numerous collateral issues, and may often come, without notice, and by surprise, against the party to be affected by it; for the genuineness of each specimen produced, by way of testing the specimen pertinent to the issue, may become a distinct subject of litigation, dependent on the same species of testimony." (4)

But the rule that comparison of handwriting is not evidence, does not extend so far, as to prevent the court or jury from instituting a comparison between two documents of which *prima facie* evidence has been given (5); and a jury may judge of a disputed handwriting by comparing it with other documents in evidence for other purposes, and admitted to be the handwriting of the party (6); but such documents must be in evidence, and not selected by the party for comparison. (7)

Some questions have arisen, whether, consistently with the above rule, a witness may speak to handwriting, not from a direct comparison, but from a standard in his own mind, when that standard has been obtained purposely with a view to the particular cause.

Thus, a witness will not be admitted to prove a writing not to be a party's handwriting from only having seen such party write in his presence, while the action was depending (8), because the interested party might have written differently from his common mode of writing through design.

But a witness who formed his opinion of the handwriting from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved, was held to be evidence, because the writing was not made expressly with the view to evidence. (9)

In Doe d. *Mudd* v. *Suckermore* (10) Mr. Justice Coleridge said, "As to ancient documents, you cannot call a witness who has seen the party write, or corresponded with him; nor is there much danger in resorting to comparison, of an unfair selection of specimens;" further, "In ancient documents it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies." (11)

(1) Doe d. *Mudd* v. *Suckermore*, 5 A. & E. 703. 1 N. & P. 49. Doe d. *Perry* v. *Newton*, *ibid.* 1. *Griffith* v. *Williams*, 1 C. & J. 47. *Rex* v. *Morgan*, 1 M. & Rob. 134. n. *Bromage* v. *Rice*, 7 C. & P. 548. *Waddington* v. *Cousins*, 7 *ibid.* 596. *Allport* v. *Meek*, 4 *ibid.* 267. *Phillipps*' Ev. 700.

(2) *Stanger* v. *Searle*, 1 Esp. N. P. C. 14.

(3) *Macferson* v. *Thoytes*, Peake's N. P. C. 29.

(4) *Phillipps*' Ev. 697., vide etiam Doe d. *Mudd* v. *Suckermore*, 5 A. & E. 704. 1 N. & P. 54. *Clermont* v. *Tullidge*, 4 C. & P.

1. *Greaves* v. *Hunter*, 2 *ibid.* 477. *Per* Dallas C. J. in *Burr* v. *Harper*, Holt's N. P. C. 420.

(5) *Griffith* v. *Williams*, 1 C. & J. 47.

(6) *Solita* v. *Yarrow*, 1 M. & Rob. 133.

(7) *Ibid.*

(8) *Stanger* v. *Searle*, 1 Esp. N. P. C. 15.

(9) *Smith* v. *Sainsbury*, 5 C. & P. 196.

(10) 5 A. & E. 717.

(11) Vide etiam Doe d. *Perry* v. *Newton*, 1 N. & P. 6., sed vide Doe d. *Tilman* v. *Tarrow*, 7 R. & M. 141. Roe d. *Brunc* v. *Rawlings*, 7 East, 282. *Morewood* v. *Wood*, 14 *ibid.* 328.

Ancient writings can be laid before a witness at the time of the trial, in the first instance, for the purpose of his inspection; and, after a comparison made in court by the witness between those writings and the writing produced for the purpose of the issue, he can be inquired of, as to his judgment and belief (1): and it is sufficient, if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings, bearing the same signature, and preserved as authentic documents. (2)

But to prove that a paper was the handwriting of a deceased rector, whose name it bore, it is not sufficient to produce many of the returns to the spiritual court, made in the time of that rector, and signed with his name. (3)

Entries in a book coming out of the possession of a defendant, who was the grandson of a preceding rector, cannot be read as evidence to support a *modus*, on the testimony of a witness who said he believed them to be in the rector's handwriting, from comparing them with the original will of the rector in Doctors' Commons. (4)

The foregoing propositions will be illustrated by the judgment of Mr. Justice Patteson in *Doe d. Mudd v. Suckermore* (5), where that learned judge observed, "All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains, upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods, and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname (6): or the knowledge may have been acquired by the witness having seen letters, or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party (7), evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a

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(1) Phillipps' Ev. 701.

(2) Bull. N. P. 236. *Taylor v. Cook*, 8 Price, 652.

(3) *Brookbard v. Woodley (Clerk)*, Peake's N. P. C. 30. n.

(4) *Randolph (Clerk) v. Gordon*, 5 Price, 312. If the handwriting of a will be difficult to read, the evidence of persons skilled in decyphering writing is admissible to shew what the writing is. *Norman v. Morrell*, 4 Ves. 769. *Masters v. Masters*, 1 P. Wms. 425. *Goblet v. Beechey*, 3 Sim. 24. Where a question arose at Nisi Prius, from the obscurity

of the handwriting, as to what the words of a written instrument produced in evidence really were, the Lord Chief Justice decided it, and refused to have it put to the jury. *Remon v. Hayward*, 2 A. & E. 666.

(5) 5 A. & E. 730.

(6) *Garrells v. Alexander*, 4 Esp. N. P. C. 37. *Powell v. Ford*, 2 Stark. 164. *Lewis v. Sapio*, M. & M. 39.

(7) *Ferrers (Lord) v. Shirley*, Fitzg. 195. Bull. N. P. 236. *Carey v. Pitt*, Peake's Add. Cas. 130. *Tharpe v. Gisburne*, 2 C. & P. 21. *Harrington v. Fry*, R. & M. 90.

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knowledge of handwriting, which have hitherto, as far as I have been able to discover, in our law been considered sufficient to entitle a witness to speak as to his belief, in a question of handwriting. In both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.

“A third mode is now sought to be introduced, viz. by satisfying the witness by some information or evidence, that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it; or by merely putting certain papers into the witness's hands, without telling who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards shewing him the writing in question, and asking his belief whether they are written by the same person; and calling evidence to prove to *the jury* that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words.

“The very foundation of this mode is the establishment of the fact, that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.”

“I find no express authority, that direct comparison of handwriting is admissible in evidence, but many to the contrary.

“I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested; and, for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned judge was right in rejecting the evidence.” (1)

**PROOF BY SUB-
SCRIBING WIT-
NESSES.**

GENERALLY.

If an instru-
ment be at-
tested by a sub-
scribing wit-
ness, such wit-
ness must be
produced.

VI. Proof by subscribing Witnesses.

1. Generally.

As a general rule, if an instrument be attested by a subscribing witness, such witness ought to be produced at the trial to prove it (2); because “a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor; and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction.” (3) It is not, however, the sequent, that because the subscribing witnesses are the plighted witnesses to prove the execution, they must be the best witnesses,

(1) The foregoing principles were acquiesced in by Mr. Justice Coleridge, but partially dissented from by Lord Denman and Mr. Justice Williams.

(2) *Rex v. Harringworth (Inhab. of)*, 4 M. & S. 352. Jenk. Cent. ca. 89. 47.

(3) *Per Le Blanc J. in Call (Bart.) v. Dunning*, 4 East, 53. *Bowles v. Langworthy*, 5 T. R. 366. *Burrowes v. Lock*, 10 Ves. 470.

for others may know more of the transaction than they; but, inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential. (1)

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The rule requiring proof of attestation equally exists, whether the acknowledgment be offered as evidence against the party himself who made it (2), or against a third person (3); or whether the deed be an existing instrument, or cancelled (4); or whether it be the foundation of the action, or comes in question collaterally, as part of the evidence in the cause. (5)

Proof of the handwriting of a witness is equivalent to the proof of the execution of the instrument by the parties named in it; but it does not prove, that the party executing the instrument was the party to the suit. Some evidence of identity is requisite (6); but slight evidence of identity is sufficient (7), as that the defendant was present when the instrument was prepared, or that the maker of the instrument resided in the same place. (8)

Identity of
party execut-
ing.

But mere identity of name is not sufficient (9); — thus, where a witness to a bond stated, that he saw it executed by a person who was introduced under the name of Hawkshaw (the name of the defendant), but could not identify him, the plaintiff was nonsuited. (10)

It will not be assumed, that a name subscribed to an instrument is that of an attesting witness; — thus, in *Doe d. England (Bank of) v. Chambers* (11), where a deed purported to be “Sealed by order of the court of directors of the governor and company of the Bank of England. — J. Knight, secretary,” it was held not to be requisite to call J. Knight; Mr. Justice Littledale observing, “When a corporation affixes its seal, it cannot, of course, do so by its own hands. This memorandum merely imports, that the party signing it, is the person who is deputed by the corporation to affix its seal, and who accordingly does so by that authority.”

Where it will
not be assumed,
that a name
subscribed to a
document is
that of an at-
testing witness.

Where a subscribing witness denies his own handwriting, and an inquiry is instituted upon the subjects of handwriting and identity, it is the province of the judge, and not of the jury, to decide the question. (12)

Where witness
denies his hand-
writing, it is
the province of
the judge to
decide the
question.

An attesting witness ought not to be admitted to deny his own attestation. (13) But, if he do deny having seen the deed executed, other evidence of the execution is admissible. (14)

Where the subscribing witnesses to a bond disavow having seen it executed, other persons who saw it executed, or can prove the party's handwriting, may be called. (15)

And subscribing witnesses can prove, contrary to their attestation, that the party did not execute the instrument in dispute. (16)

(1) *Doe d. Sykes (Sir F.) v. Durnford*, 2 M. & S. 62. *Higgs v. Dixon*, 2 Stark. 180. *Phillipps' Ev.* 649.

(2) *Call (Bart.) v. Dunning*, 4 East, 53.

(3) *Abbot v. Plumbe*, Doug. 216.

(4) *Breton v. Cope*, Peake's N. P. C. 43.

(5) *Phillipps' Ev.* 650. *Manners, q. t. v.*

Postan, 4 Esp. N. P. C. 239., vide etiam *Leith*

v. Post, 1 ibid. 196. *Rex v. Harringworth*

(Inhab. of), 4 M. & S. 354. *Edinburgh*

v. Crudell, 2 Stark. 284. *Higgs v. Dixon*,

ibid. 180. *Gordon v. Secretan*, 8 East,

548. *Johnson v. Mason*, 1 Esp. N. P. C. 89.

(6) *Whitelocke v. Musgrove*, 1 C. & M. 521.

(7) *Nelson v. Whittall*, 1 B. & A. 19.

(8) *Whitelocke v. Musgrove*, 1 C. & M. 521.

(9) Ibid.

(10) *Parkins v. Hawkshaw*, 2 Stark. 239. *Middleton v. Sandford*, 4 Camp. 34.

(11) 4 A. & E. 410.

(12) *Phillipps' Ev.* 660.

(13) *Goodtitle d. Alexander v. Clayton*, 4 Burr. 2224.

(14) *Talbot v. Hodson*, 7 Taunt. 251. 2 Marsh. 527.

(15) *Ley v. Ballard*, 3 Esp. N. P. C. 173.

(16) Ibid.

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If the attesting witness to a deed swear, that he did not see it executed, it may be proved by evidence of the handwriting of the party (1); and if the subscribing witness to a note swears, that he did not see it drawn, it may be proved by evidence of the handwriting of the maker. (2)

**DEEDS HAVING
RASURES AND
INTERLINEA-
TIONS.**

2. Deeds having Rasures and Interlineations.

Rasure.

If there be any blemish in the deed by rasure or interlineation, it has been said, the deed ought to be proved, though above thirty years old (3), and the blemish satisfactorily explained; but seemingly, to require this proof, the alteration should be material.

Interlineation.

In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding: it is only after the delivery, that a rasure or interlineation can affect a deed; and even then they are in some cases immaterial.

To ascertain the time of delivery, the first and best evidence to be resorted to, is the testimony of a subscribing witness, if any can be produced; or, if there be no subscribing witness, other persons may be called, who were present when the deed was delivered; or, if no person was present, the time of delivery will be reckoned from the date of the deed. And the fact of the rasure having been after the delivery may be proved, either by a subscribing witness, or by any other person who saw the rasure made. (4)

3. Insertion of the Name of a fictitious Person.

**INSERTION OF
THE NAME OF
A FICTITIOUS
PERSON.**

Where the name of a fictitious person is inserted as the name of the witness (5); or where the subscribing witness, on being called, denies having any knowledge of the execution (6); or where the person, who has put his name as the subscribing witness, did so without the knowledge or consent of the parties to an instrument (7), purporting to be attested by a subscribing witness, it may be proved by calling some one intimate with the handwriting of the person executing, or who was present when it was executed, or who heard the party admit the execution.

**Insanity of party
executing
deeds.**

If a subscribing witness declare, that at the period when the party executed the instrument he was insane, the assertion of the witness may be contradicted by other evidence. (8)

Several witnesses.

Where there is more than one attesting witness, the absence of all must be accounted for, before evidence of handwriting can be given. (9) But

(1) *Fitzgerald v. Elsee*, 2 Camp. 635., et vide *Phipps v. Parker*, 1 ibid. 412. *Boxer v. Rabeth*, Gow, N. P. C. 175.

(2) *Lemon v. Dean*, 2 Camp. 636. n.

(3) *Gilb. Ev.* 89. *Bull. N. P.* 255.

(4) *Phillipps' Ev.* 653.

(5) *Fasset v. Brown*, Peake's N. P. C. 23.

(6) *Fitzgerald v. Elsee*, 2 Camp. 635. *Grellier v. Neale*, Peake's N. P. C. 198. *Ley*

v. Ballard, 3 Esp. N. P. C. 173. n. *Lemon v. Dean*, 2 Camp. 636. n. *Boxer v. Rabeth*, Gow, N. P. C. 175. *Talbot v. Hodson*, 7 Taunt. 251., overruling *Phipps v. Parker*, 1 Camp. 412.

(7) *McCraw v. Gentry*, 3 Camp. 232. *Wright v. Wakeford*, 4 Taunt. 220.

(8) *Lowe v. Jolliffe*, 1 W. Black. 365.

(9) *Cunliffe v. Sefton*, 2 East, 183

where the absence of all the subscribing witnesses is accounted for, it will be sufficient to prove the handwriting of one of them. (1)

Where it is competent to prove the handwriting of the subscribing witness, it is not necessary to prove the handwriting of the party to the instrument. (2)

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Handwriting of
party.

4. *Proof of Execution, when dispensed with.*

If a deed be enrolled under the provisions of a statute, proof of enrolment by an examined copy, dispenses with proof of the execution by any of the parties to the deed. (3)

Where a deed not requiring enrolment is enrolled on the acknowledgment of one of the parties, it is evidence of execution against that party. (4) But it seems, that unless such enrolment be a record, or be rendered evidence by statute, it will not dispense with proof by a subscribing witness, as in the case of the assignment enrolled under stat. 6 Geo. 4. c. 17. (5), or of a lease of crown land enrolled in the office of the auditor of the land revenue. (6) But in *Rowe v. Brenton* (7), such an enrolment of duchy land was admitted as primary evidence. (8)

PROOF OF EX-
ECUTION, WHEN
DISPENSED
WITH.

Deeds requir-
ing enrolment
by statute.

Deed not re-
quiring enrol-
ment by sta-
tute.

A deed may be given in evidence, under a rule of court, made by consent, without proof of execution. (9) So, if the execution of the deed, or the handwriting of the witness, be one of the admissions in the cause (10); or if money have been paid into court on the count in which the deed is stated (11); or if the party be estopped to dispute it, as by recital (12): but if the plaintiff declare on a deed which recites another deed, and neither deed is denied by the pleadings, yet the recital deed cannot be put in evidence without proof by its attesting witness. (13)

From the inconvenience and inutility of searches after attesting witnesses to ancient deeds, and the expediency of fixing some definite limit, it has become a general rule, that instruments of thirty years old may be admitted in evidence without any proof of their execution (14), although the attesting witnesses may be in existence (15); and the rule of computing the thirty years from the date of a deed is equally applicable to a will. (16)

Instrument
thirty years old.

The execution or writing of ancient documents need not be proved, where they have been acted upon, or brought from such a place, as to afford a reasonable presumption, that they were honestly and fairly obtained and

(1) *Adam v. Kerr*, 1 B. & P. 360.

(2) *Kay v. Brookman*, 3 C. & P. 556. Phillipps' Ev. 661.

(3) *Thurle v. Madison*, Sty. 462. *Smartle v. Williams*, 1 Salk. 280. Stat. 10 Anne, c. 18. s. 3.

(4) Bull. N. P. 255, 256.

(5) Roscoe's Ev. 95. *Gomersall v. Serle*, 2 Y. & J. 5.

(6) *Jenkins v. Biddulph*, R. & M. 339.

(7) 3 M. & R. 218.

(8) Roscoe's Ev. 95.

(9) Bull. N. P. 256., *antè*, 1611.

(10) *Antè*, 1611, 1612.

(11) *Meager v. Smith*, 4 B. & Ad. 673. *Seaton v. Benedict*, 4 Bing. 28.

(12) *Antè*, 1618.

(13) *Gillett v. Abbott*, 7 A. & E. 783.

(14) *Doe d. Spilsbury v. Burdett* (Sir F.), 4 A. & E. 19. *Rex v. Farrington* (Inhab. of), 2 T. R. 471. *Rex v. Farleigh*, 6 D. & R. 147. Bull. N. P. 255. *Forbes v. Wale*, 1 W. Black. 532. cit. per Lord Kenyon, 1 Esp. N. P. C. 278. *Wynne (Bart.) v. Tyrwhitt*, 4 B. & A. 376. 12 Vin. Abr. Evidence, 83. [A. b. 5.], cit. 7 East, 291. Phillipps' Ev. 651.

(15) *Marsh v. Collnett*, 2 Esp. N. P. C. 665. *Doe d. Oldham v. Wolley*, 8 B. & C. 24.

(16) *McKenire v. Fraser*, 9 Ves. 5. Where a written instrument is not produced, what distance of time and other circumstances will justify the admission of parol evidence, vide *Rex v. North Bedburn*, Cald. 452.

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preserved for use, and are free from suspicion of dishonesty. (1) Thus, on the trial of an issue, as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title deeds kept at the family seat, was admitted as genuine, without proof of the handwriting, by Chief Justice Dallas (2) and by Lord Tenterden. (3)

But a bond of thirty years' standing cannot be read in evidence, if there be no payment of interest, or other marks of authenticity. (4)

This exception applies generally to deeds concerning lands (5), to bonds (6), and to receipts. (7)

It has been also held sufficient, on an appeal against a removal, for the respondent parish to produce a certificate thirty years old given by the appellant parish, without shewing, that it had been kept in the parish chest. (8)

Corporation
seal.

Judgment of
Lord Tenterden
in *Rex v. Bath-
wick (Inhab.
of)*.

It is questionable, whether the seal of a court or corporation is within the rule as to thirty years. Lord Tenterden in *Rex v. Bathwick (Inhabitants of)* (9) said, "It may be argued, that it is not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."

Deed in pos-
session of ad-
verse party.;

Notwithstanding, the fact of a written instrument coming out of the possession of the adverse party, the necessity of proving its execution cannot be dispensed with (10): but if a party, who claims a beneficial interest under a deed, produce it under a notice, he is not entitled to insist on the execution being proved, either by the attesting witness, or in any other manner; because, by calling for the production of the deed, he is considered as affirming its due execution. (11)

Thus, in an action for the use and occupation of premises against the assignees of a bankrupt, it was held, that the deed of assignment of the bankrupt's effects, produced by the defendants at the trial under a notice from the plaintiff, was admissible in evidence without proof of the execution by the subscribing witness, as it appeared, that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed. (12)

In an action against the vendor of an estate, to recover a deposit on a contract for the purchase, if the defendant, on notice produce the contract,

(1) 12 Vin. Abr. Evidence, 83. [A. b. 5.], cit. 7 East, 291. Bull. N. P. 255. *Forbes v. Wale*, 1 W. Black. 532. cit. per Lord Kenyon, 1 Esp. N. P. C. 278. 4 B. & A. 376.

(2) Sitt. after M. T. 1821, cit. Phillipps' Ev. 652. n.

(3) Sitt. after T. T. 1823, ibid.

(4) *Forbes v. Wale*, 1 W. Black. 532. 1 Esp. N. P. C. 275. n.

(5) Phillipps' Ev. 562.

(6) *Chelsea Water Works (Governor of) v. Cowper*, 1 Esp. N. P. C. 275.

(7) *Manby v. Curtis*, 1 Price, 232. *Bertie v. Beaumont*, 2 ibid. 308. *Bullen v. Michel*

(Clerk), ibid. 399. *Ely (Dean and Chapter of) v. Stewart*, 2 Atk. 44. *Wynne (Bart.) v. Tyrwhitt*, 4 B. & A. 376.

(8) *Rex v. Ryton (Inhab. of)*, 5 T. R. 259.

(9) 2 B. & Ad. 648.

(10) *Knight v. Martin*, Gow. N. P. C. 26. *Gordon v. Secretan*, 8 East, 548., overruling *Rex v. Middlezoy*, 2 T. R. 41. *Doe d. Wilkins v. Cleveland (Marquess of)*, 9 B. & C. 863.

(11) *Carr v. Burdiss*, 1 C. M. & R. 785.

(12) *Orr v. Morris*, 6 Moore, 347. 3 B. & B. 139., vide etiam *Pearce v. Hooper*, 3 Taunt. 60.

the plaintiff need not prove the execution. (1) In an action by the lessee against the assignee of a lease, the plaintiff having proved the execution of a counterpart of the lease, and the defendant having put in the original lease, which was produced by a party to whom he had assigned it, it was held to be unnecessary, for the plaintiff to call the subscribing witness to prove the execution of the original lease. (2)

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Where both parties claim similar interests under the instrument produced, the execution of it need not be proved, and extrinsic evidence is admissible to prove the fact, for it cannot appear from the inspection of the instrument until it is read.

Both parties claiming similar interests under the same deed.

It is unimportant what the object of the opposite party may be in requiring the production of the document; and proof of execution is unnecessary, even though the object of using the deed be to impugn it on the ground of fraud. (3)

Object of using the deed.

Where the defendant, upon notice from the plaintiff, produced a deed, and it was proved, that the defendant's attorney had stated before the trial that the defendant claimed under the deed:—It was holden, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened. (4)

Where notice was given to the defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence, the feoffment not being produced, that it had livery indorsed, and was witnessed:—It was considered to be unnecessary, as against the defendant, to call the subscribing witnesses, or to prove livery. (5)

But where a party produced at the trial of a cause a deed, which had been some months in his possession, it was held, that he was not excused from proving its execution, because he received the deed from the adverse party, who formerly claimed a benefit under it. (6)

Receipt of deed from an adverse party.

Proof of execution is not necessary, where the opposite party who produced the deed is a public officer, who, in the discharge of his official duties, was obliged to prepare such deed and get it executed. (7)

Deed in possession of public officer.

In an action against the sheriff for taking insufficient sureties, where the defendant produces the *replevin* bond in pursuance of a notice so to do, and it purports to have been duly executed and attested; or if the sheriff has assigned it to the plaintiff (8), it seems, in either of such cases, to be unnecessary to prove its execution by calling the attesting witness. (9)

Where in covenant on an indenture of apprenticeship, the plaintiff proved, that it was in the possession of the defendant, to whom he gave a notice to produce it:—It was held, that, on non production, parol evidence of its contents might be let in, without calling the subscribing witness. (10)

Non production of deed after notice.

In an action for double value under stat. 4 Geo. 2. c. 28. s. 1., where

Stat. 4 Geo. 2. c. 28. s. 1.

(1) *Bradshaw v. Bennett*, 1 M. & Rob. 143.

(2) *Burnett v. Lynch*, 5 B. & C. 589.

(3) *Carr v. Burdiss*, 1 C. M. & R. 785.

(4) *Doe d. Wilkins v. Wilkins*, 4 A. & E. 86. *Knight v. Martin*, Gow, N.P.C. 26. *Doe v. Wainwright*, 1 N. & P. 8. *Doe d. Tyndale v. Heming*, 6 B. & C. 28., *sed quare*, Whether the hearsay of the attorney, not made by way of express admission, was receivable?

(5) *Doe d. Rowlandson v. Wainwright*, 5 A. & E. 520.

(6) *Vacher v. Cocks*, 1 B. & Ad. 145. In *Carr v. Burdiss* (1 C. M. & R. 785.) Parke B. observed, that "if the deed had been given up before the action, the case might have been different."

(7) *Scott v. Waithman*, 3 Stark. 168.

(8) *Barnes v. Lucas*, R. & M. 264.

(9) *Scott v. Waithman*, 3 Stark. 168.

(10) *Cooke v. Tanswell*, 2 Moore, 513. 8 Taunt. 131., *vide etiam Doxon v. Haigh*, 1 Esp. N. P. C. 409.

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the defendant had notice to produce the original notice to quit, but refused, and the plaintiff then produced and proved a copy, by which it appeared that there was an attesting witness: — It was held, that the attesting witness need not be called. (1)

Where the defendant refused to produce a deed, the plaintiff proved, that a notice was given him for that purpose, and that he was in possession of the deed, and then produced an examined copy, upon which the defendant produced the original: — It was held, that he could not insist on such original being proved by the attesting witness. (2)

**Wilful absence
of witness.**

If the subscribing witness to the acceptance of a bill of exchange, be one of the acceptor's family, and cannot be served with a *subpoena* in consequence of the conduct of his family, the bill may be read without his evidence. (3)

**Names of wit-
nesses un-
known.**

Where the plaintiff declared on a lost bond, and a witness stated, that there were subscribing witnesses, but he did not know the names, the plaintiff can recover without calling them; but if their names are known, it is essentially requisite, that they should be called. (4) And it seems, that where an executor shews payment of a bond under *plene administravit*, he must prove the bond in the regular way, unless perhaps where the action is on a simple contract (5), even though it have been burnt. (6)

**PROOF OF
HANDWRITING
OF SUBSCRIBING
WITNESS.
Generally.**

5. Proof of Handwriting of subscribing Witness.

Where a witness to an instrument becomes incapacitated, proof of the party's handwriting is admissible (7); as in cases of death (8), blindness (9), insanity (10), infamy (11), absence abroad (12), or being out of the jurisdiction of the superior courts. (13)

Illness.

But it is no sufficient ground for receiving evidence of the handwriting of a witness, that he is unable to attend the trial from indisposition, and lies without hope of recovery. (14)

**Interested sub-
scribing wit-
ness.**

If the subscribing witness to a bond be interested therein, as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his handwriting sufficient for that purpose (15); and it seems to be sufficient to prove the signature of the party alone. (16)

(1) *Poole v. Warren*, 8 A. & E. 582.

(2) *Jackson v. Allen*, 3 Stark. 74.

(3) *Hill v. Phillips*, 5 C. & P. 356.

(4) *Keeling v. Ball*, Peake's Ev. App. 82.

(5) Bull. N. P. 143.

(6) *Gillies v. Smither*, 2 Stark. 528.

(7) *Buckley v. Smith*, 2 Esp. N. P. C. 697.

(8) *Page v. Mann*, M. & M. 79. *Kay (Bart.) v. Brookman*, 3 C. & P. 555. M. & M. 286. *Nelson v. Whittall*, 1 B. & A. 19. *Adams v. Kerr*, 1 B. & P. 360.

(9) *Wood v. Drury*, 1 Ld. Raym. 734. *Pedler v. Paige*, 1 M. & Rob. 258.

(10) 12 Vin. Abr. Evidence, 223. [T. b. 48.] *Burnet v. Taylor*, 9 Ves. 381. *Currie v. Child*, 3 Camp. 293.

(11) Com. Dig. Testmoigne (B. 3.). *Jones v. Mason*, Str. 833.

(12) *Wallis v. Delancey*, 7 T. R. 266. n. *Coghlan v. Williamson*, Doug. 93. *Adam v. Kerr*, 1 B. & P. 361.

(13) *Ward v. Wells*, 1 Taunt. 161. *Prince v. Blackburn*, 2 East, 250. *Adam v. Kerr*, 1 B. & P. 361. *Hodnett v. Forman*, 1 Stark. 90. *Jones v. Brewer*, 4 Taunt. 46. *Phillipps' Ev.* 657.

(14) *Harrison v. Blades*, 3 Camp. 457. *Doe d. Lloyd v. Evans*, 3 C. & P. 21. In *Jones v. Brewer* (4 Taunt. 46.) Mansfield C. J. said, "Perhaps in some instances of sickness the handwriting of a subscribing witness may be proved."

(15) *Swire v. Bell*, 5 T. R. 371.

(16) *Ibid.*

But where a defendant, knowing the situation of a person whom he requests to attest the execution of the instrument, is afterwards sued upon it, he cannot object to his competency. (1)

If a subscriber acquire an interest *after* the execution of the instrument attested by him, proof of his handwriting may be received to establish such instrument; as where he has been appointed executor or administrator (2), or married the person to whom the instrument was given (3); and the principle seemingly extends to persons entering into partnership. (4)

But where the plaintiff in an action on a charter-party had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument, it was held, that he was incompetent to prove the execution, and that evidence of his handwriting was inadmissible; because the plaintiff had himself caused the disqualification by giving an interest in the subject-matter of the instrument, and thus the plaintiff would thereby deprive the defendant of the advantage of the witness's cross-examination by his own act. (5)

If, upon fair, serious, diligent inquiry, without evasion, an attesting witness is not to be found, evidence of his handwriting is admissible to prove the attestation, and it is a question for the jury to determine, whether sufficient search has been made for the witness (6); but such evidence appears to be only admissible, when it is of an original and not of a hearsay character.

What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case. (7)

Thus, in order to dispense with the production of an attesting witness to a will, bearing date the 15th May, 1806, it was proved, that applications had been made by letter to the attorney in whose office the witness was at the time a clerk; in the first place, for general information respecting the will, and afterwards for information respecting the witnesses by whom it was attested; and that advertisements for their discovery had a week before the trial been inserted in three daily and one weekly newspapers, but without success:—It was held, that sufficient had been done to entitle the party to have the will read on proof of the handwriting of the witnesses, although the attorney of whom the inquiries had been made stated, that one of the witnesses was examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which (it was suggested) he could not fail to have remembered, had any strict inquiry been instituted. (8)

It is sufficient to dispense with the necessity of calling the subscribing witness to a deed, to shew, that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, and that his relations have not seen him since he expressed his intention of

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Where witness becomes interested after the execution of the instrument attested by him.

Party in the suit causing disqualification.

WHERE WITNESS CANNOT BE DISCOVERED.

Expressing an intention of leaving the country, and not heard of subsequently.

(1) *Honeywood (Bart.) v. Peacock*, 3 Camp. 196.

(5) *Ibid.* 3 M. & P. 146.

(2) *Goss v. Tracy*, 1 P. Wms. 287. *Godfrey v. Norris*, Str. 94.

(6) *Bampton v. Paulin*, 4 Bing. 264. 12

Moore, 407. *Crosby v. Percy*, 1 Taunt. 364. 1 Camp. 303.

(3) *Buckley v. Smith*, 2 Esp. N. P. C. 697.

(7) *Miller d. Miller*, 2 Bing. N. C. 76.

(4) *Per Best C. J. in Hovill v. Stephenson*, 5 Bing. 493.

(8) *Ibid.*

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No account of
witness at his
usual place of
residence.

going (1); or that the witness went abroad twenty years ago, and has never since been heard of. (2)

Where, in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him: — It was held sufficient, to let in proof of the handwriting of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. (3)

Where the defendant's clerk was the subscribing witness to a bond, and upon being subpoenaed refused to attend, and the trial was twice put off in consequence of his non attendance, and due search was made for him, and information received, that he was gone to Margate, where inquiry was also made but without success: — It was decided, principally on the ground of collusion, that evidence of his handwriting might be given. (4)

Where an attesting witness could not be found after sufficient inquiry: — It was held, that evidence of his handwriting was admissible, although a letter, not disclosing his retreat, had been received from him a few days before the trial. (5)

**INADMISSIBLE
EVIDENCE.**

Declarations as
to particular
facts.

A search must
be made at the
last known
place of resi-
dence.

In accounting for the absence of an attesting witness, or the loss of a written instrument, general answers to inquiries, that nothing is known concerning them, are admissible in evidence; but declarations as to particular facts are not, if the party making them is capable of being called as a witness. (6)

It is requisite that a search be made, at the last known place of residence of the subscribing witness: thus, where in an action on a *post-obit* bond it appeared, that the attesting witness was an attorney who formerly had an office in London and resided at Sydenham: — It was holden, that it was not enough to let in evidence of his handwriting, to prove the execution of the deed, that he had disappeared from his office in London for twelve months before the trial, and had not been heard of during that period by persons who knew him, without shewing that search had been made after him at the house he occupied at Sydenham (7); although evidence of his handwriting was held to be admissible, on proof that twelve months ago a commission of bankruptcy had been sued out against him, to which he had never appeared. (8)

Witness keep-
ing out of the
way to avoid
an arrest.

Where in an action of debt on bond, the attesting witness kept out of the way to avoid an arrest: — It was considered, that this was not a sufficient reason for dispensing with the attendance of such subscribing witness to prove the execution of the bond by the obligor; and evidence of his handwriting having been given *aliunde*, on which the obligee obtained a verdict, the court of Common Pleas ordered a new trial. (9)

**SUBSCRIBING
WITNESS
ABROAD.**

Where the subscribing witness is resident abroad, evidence of his handwriting must be given, as if he were dead. (10)

(1) *Kay (Bart.) v. Brookman*, 3 C. & P. 555. M. & M. 286.

(2) *Doe v. Johnson*, Phillipps' Ev. 658. n.

(3) *Cunliffe v. Sefton*, 2 East, 183.

(4) *Burt v. Walker*, 4 B. & A. 697.

(5) *Morgan v. Morgan*, 9 Bing. 359. 2 M. & Sc. 491., vide etiam *Bampton v. Paulin*, 12 Moore, 497. 4 Bing. 264. *Evans v.*

Curtis, 2 C. & P. 296. *Coghlan v. Williamson*, Doug. 93.

(6) *Doe d. Johnson v. Johnson*, 2 Chitt. 196.

(7) *Wardell v. Fermor*, 2 Camp. 282.

(8) *Ibid.*

(9) *Pytt v. Griffith*, 6 Moore, 538.

(10) *Holmes v. Pontin*, Peake's N. P. C. 135. *Cooper v. Marsden*, 1 Esp. N. P. C. 2.

If an attesting witness appear upon search made at the admiralty to be serving in the navy, his absence is sufficiently accounted for to render secondary evidence admissible (1); and if an attesting witness have set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an English port by contrary winds just at the time of the trial. (2)

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Witness serving
in the navy.

It seems, that if an attesting witness to a bond reside in Ireland, his handwriting may be proved, although no steps have been taken to procure his personal attendance. (3)

Resident in
Ireland.

Where a lease purported to have been signed by the mark of one of the parties, and where the handwriting of the subscribing witness was proved, and that he had gone abroad, and that the defendant had spoken of the term that he had under the lease:—It was held, that this was sufficient proof of the execution of the lease by the defendant. (4)

An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the handwriting of the witness and of the contracting party, but not by the latter alone. (5)

Instrument ex-
ecuted abroad,
and witnessed
by a foreigner
residing there.

VII. *Proof of Execution of Deed.*

If there are several attesting witnesses, it is sufficient to call one only (6); although it may be the case of a will, provided he can prove the execution of the will by the testator, and that he and the rest of the witnesses subscribed their names in the presence of the testator. (7) A proof executed by a marksman, may be proved by a person who has seen the party make his mark, and can speak to its peculiarities. (8)

PROOF OF EX-
ECUTION OF
DEED.
Proof by one of
several attesting
witnesses.

It is not requisite, that the witness who proves the sealing and delivery, should also be able to prove the state of the instrument at the time of execution, and that all the blanks were then filled up. In practice it seldom occurs, that a witness can prove more than the sealing and delivery of the deed, and the identity of the parties. (9)

State of the
instrument.

In *Maugham v. Hubbard* (10) Mr. Justice Bayley said, “Where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says, that he is, therefore, sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add, that he has no recollection of the fact of the execution of the deed.” (11)

Judgment of
Mr. Justice
Bayley in
Maugham v.
Hubbard.

Where the subscribing witness to a bond stated, that he saw it executed by a person who was introduced by the name of Hawkshaw (the name of the defendant), but was unable to identify him with the defendant in the

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| (1) <i>Parker v. Hoskins</i> , 2 Taunt. 223. | the execution, it is prudent to call all the |
| (2) <i>Ward v. Wells</i> , 1 <i>ibid.</i> 461. | witnesses. <i>Goodtitle d. Alexander v. Clayton</i> , |
| (3) <i>Hodnett v. Forman</i> , 1 Stark. 90. | 4 Burr. 2224. |
| (4) <i>Doe d. Wheeldon v. Paul</i> , 3 C. & P. | (8) <i>Per Tindal C. J. in George v. Surrey</i> , |
| 613. Rule to set aside nonsuit refused. | M. & M. 516. |
| (5) <i>Barnes v. Trompowsky</i> , 7 T. R. 265. | (9) <i>England v. Roper</i> , 1 Stark. 304., et |
| (6) <i>Holdfast d. Anstey v. Dowsing</i> , Str. | <i>vide Talbot v. Hodson</i> , 7 Taunt. 251. |
| 1254. | (10) 8 B. & C. 16. |
| (7) Bull. N. P. 264. <i>Willis v. Lucas</i> , 1 | (11) <i>Vide etiam Rex v. St. Martin, Leicester</i> , |
| P. Wms. 471. But if any suspicion attach to | 4 N. & M. 204. |

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action, the plaintiff was nonsuited. (1) Where a bond had been executed and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the hearing of the defendant was attested by another witness who knew the defendant's handwriting:—It was held, that the execution of the deed was sufficiently proved by the latter witness, since the whole might be considered as one entire transaction. (2)

Where a party executes a deed with a blank in it, which is afterwards filled up with his assent, and he subsequently recognises the deed as valid, the filling up of the blank, will not avoid it; for till the blank is duly supplied, it is incomplete and *in fieri*. (3)

SEALING.

It is not essential, that the sealing should be with the seal of the obligor, nor be actually made at the time; it is sufficient, if the obligor acknowledge any impression already made to be his seal (4); and it seems, that one piece of wax will suffice for several obligors, if they make distinct and several prints upon it. (5) In *Lord Lovelace's case* (6) it was said, that "if one of the officers of the forest put one seal to the rolls by assent of all the verderers, regarders, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And if one partner, in the presence of the other, seal and deliver a deed of sale for both, it is binding upon both. (7)

In the execution of powers, sealing is essentially requisite, if required by the creator of the powers.

If a deed be executed under some special authority, which prescribes the mode and form of execution, the execution will not be valid unless those requisites be observed. Where a certificate under stat. 8 & 9 Will. 3. c. 30. (which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers when there are no churchwardens), was signed by two churchwardens and one overseer, but bore two seals only, the court held, that it was not a valid certificate. They said it was the case of an execution of a power, and that in the execution of powers all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance. (8)

If a party write his name opposite to the seal on an instrument, which purports to be sealed and delivered by him, it is evidence of a sealing and delivery to go to a jury. (9)

Substituting a mark with a pen for a seal.

In *Adam v. Kerr* (10), which was an action on a bond alleged to have been sealed, evidence was admitted to prove a custom in Jamaica (where the bond in question had been executed), by substituting a mark with a pen for a seal. The court of Common Pleas, after a verdict for the plaintiff,

(1) *Parkins v. Hawkshaw*, 2 Stark. 239. Bull. N. P. 271. *Nelson v. Whittall*, 1 B. & A. 20. *Middleton v. Sandford*, 4 Camp. 34.

(2) *Parke v. Mears*, 2 B. & P. 217., vide etiam *Powell v. Blackett*, 1 Esp. N. P. C. 97.

(3) *Hudson v. Revett*, 5 Bing. 368. *Hall v. Chandless*, 4 ibid. 123. "If a deed is executed with blanks, and afterwards filled up, it is void." Dict. Alderson B. in *Hutchins v. Scott*, 2 M. & W. 812.

(4) Com. Dig. Fait (A. 2.).

(5) Touchst. by Atherley, 56. Perkins a. 134.

(6) Sir W. Jones, 268.

(7) *Ball v. Dunsterville*, 4 T. R. 313.

(8) *Rex v. Austrey*, E. T. 1817, cit. 1 Stark. 322. *Hawkins v. Kemp*, 3 East, 440., vide etiam 1 Sugden on Powers, 240—490.

(9) *Talbot v. Hodson*, 7 Taunt. 251.

(10) 1 B. & P. 361.

subject to the opinion of the court, granted a rule *nisi* to set aside the verdict and enter a nonsuit, but no decision was given.

No particular form of delivery is requisite; it is sufficient, if the obligor by any act indicate his intention to put the deed into the possession of the other party, as by throwing it down upon the table for the other to take it up. So, if a stranger deliver it with the assent of a party to the deed. (1) If the deed be made by a corporate body, it is sufficient to prove, that it was sealed by the corporate or any other seal, which was used for the occasion, without proving a delivery of the deed. (2) But if the corporation, by their letter of attorney, have appointed an agent to deliver the deed, it is not their deed till delivery. (3) Where a deed is executed by virtue of a power of attorney from the obligor, the power of attorney must be proved. (4)

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DELIVERY.
No particular
form of delivery
requisite.

8 PROOF BY WITNESSES.

I. *Subpœna ad Testificandum*.

The writ of *subpœna ad testificandum* commands the witness to appear at the trial, to testify what he knows in the cause, under the penalty of 100*l.* to be forfeited to the king. (5)

By stat. 5 Eliz. c. 9. s. 12., if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending therein, and having tendered unto him according to his countenance or calling such reasonable sum of money for his costs and charges, as, having regard to the distance of the place, is necessary to be allowed) do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l.*, and yield such further recompense to the party grieved, as, by the discretion of the judge of the court out of which the process issues, shall be awarded.

The court has no power to compel a person to appear and give evidence before the master. (6) And where a person has been served with a *subpœna*, not issued from the crown office, to appear and give evidence at quarter sessions, and makes default, the court of King's Bench cannot attach him for contempt, either by its general authority, or by virtue of the above statute. (7)

In the stat. 45 Geo. 3. c. 92. s. 3., for enforcing the appearance of persons served with *subpœna* in one part of the United Kingdom to give evidence in another; the "parts" signified, are England, Scotland, and Ireland. (8)

PROOF BY WIT-
NESSES.

SUBPœNA AD
TESTIFICAN-
DUM.

Commands the
attendance of
the witness un-
der the penalty
of 10*l.*

Stat. 5 Eliz.
c. 9. s. 12.

Appearance
before the
master cannot
be enforced.

Construction of
stat. 45 Geo. 3.
c. 92. s. 3.

(1) Com. Dig. Fait (A. 3.). Co. Litt. 36. (a.) *Thoroughgood's case*, 9 Co. 137. (a.) *Murray v. Stair* (*Earl of*), 2 B. & C. 82.

(2) Perkins, s. 132.

(3) Co. Litt. 36. (a.)

(4) *Johnson v. Mason*, 1 Esp. N. P. C. 89.

(5) Tidd, 805.

(6) *McDougall v. Nicholls*, 4 Dowl. P. C. 76.

(7) *Rex v. Brownell*, 1 A. & E. 598.

(8) Ibid.

PROOF BY
WITNESSES.

II. *Habeas Corpus ad testificandum.*

HABEAS COR-
PUS AD TESTIFI-
CANDUM.

If the witness be in *custodia legis*, or on board a ship, under the command of an officer his attendance is enforced by the writ of *habeas corpus ad testificandum*. (1)

If a witness be in a lunatic asylum, an *habeas corpus* will lie, on an affidavit that he is fit for examination and not dangerous. (2)

Stat. 43 Geo. 3.
c. 140.

By stat. 43 Geo. 3. c. 140. a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in England, before a court-martial, or before commissioners of bankrupts, or commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant.

Stat. 44 Geo. 3.
c. 102.

Judges can
award writs of
habeas corpus.

Stat. 44 Geo. 3. c. 102. authorises the judges of the court of King's Bench, or Common Pleas, or Exchequer, in England or Ireland, or justices of oyer and terminer or gaol delivery (being such judge or baron), to award writs of *habeas corpus* for bringing prisoners detained in gaol before any of the courts, or any sitting at Nisi Prius, or before any court of record in such parts of the United Kingdom, to be there examined as witnesses in any civil or criminal cause. By the same act, justices of great sessions in Wales, and the county palatine of Chester, have the same authority within the limits of their jurisdiction.

Application for
writ ought to
be made at
chambers.

The application for a writ of *habeas corpus* under stat. 43 Geo. 3. c. 140. ought to be made to a judge at chambers. (3)

House of Com-
mons.

Witness resid-
ing at a dis-
tance.

A *habeas corpus* will issue to bring up a prisoner before a committee of the House of Commons. (4)

On an application for a *habeas corpus ad testificandum*, it must be sworn, that the witness is material and willing to attend (5); and if it be at a distance, the court will expect it to be especially shewn, how he is material. (6)

Where the
writ will be
refused.

The court will not grant a *habeas corpus ad testificandum* to bring up a prisoner of war (7); or a prisoner in custody for high treason (8); or to bring up a prisoner in execution, where the application appears to be a mere contrivance. (9)

The court of Common Pleas will not grant an order to commit a defendant to the custody of the warden of the Fleet, who had been charged in custody of the sheriff upon an extent, and brought up on a *habeas corpus* for the pur-

(1) Tidd, 809. Exp. Tillotson, 1 Stark. 470. To obtain this writ, application must be made to the court or to a judge, upon affidavit of the applicant, stating that he is a material witness, and ready to attend (*Rex v. Roddam*, Cowp. 672. 19 Howell's St. Tr. 3. *Lay's case*, Fortesc. 396.); and if the application be considered reasonable, a fiat will be granted for the writ (*Rex v. Burbage*, 3 Burr. 1440.), which is then sued out, signed, and sealed.

The writ should be left with the sheriff or other officer, who will be bound to bring up the body on being paid his reasonable charges. If the witness be a prisoner of war, he may

be examined on interrogatories, but cannot be brought up without an order from the secretary of state. *Furly v. Newnham*, Doug. 419. Phillipps' Ev. 784.

(2) *Fennell v. Tait*, 1 C. M. & R. 584.

(3) *Gordon's case*, 2 M. & S. 582.

(4) In re Price, 4 East, 587. *Rex v. Pilgrim*, 4 Dowl. P. C. 89.

(5) *Rex v. Murray*, Tidd, 809.

(6) *Standard v. Baker*, *ibid*.

(7) *Furly v. Newnham*, Doug. 419. *Langston v. Cotton*, Peake's Add. Cas. 21.

(8) *Langston v. Cotton*, Peake's Add. Cas. 21.

(9) *Rex v. Burbage*, 3 Burr. 1440.

pose of being examined as a witness in a civil suit, without the express consent of the crown. (1)

PROOF BY
WITNESSES.

III. *Subpœna duces tecum.*

Where a witness is possessed of certain deeds or writings which are required at the trial, a special clause is inserted in the *subpœna*, called a *duces tecum*, which commands him to bring them with him, and thus a writ of *subpœna duces tecum* is equally obligatory with the *subpœna ad testificandum*.

SUBPœNA DUCES
TECUM.

A *subpœna duces tecum* without being *ad testificandum* is good; and the party is bound to obey it by producing the document, but is not thereby made a witness. (2)

When the writings are in possession of the adverse party or his attorney, notice should be given to produce them; and if after proof of a reasonable notice they are not produced, secondary evidence of their contents will be admitted: — and notice to the attorney of either party, is in all cases a notice to the client. (3)

Notice to produce.

When defendant proves documents by plaintiff's witness, plaintiff's counsel are entitled to see the documents immediately. (4)

Notice to the attorney, is a notice to his client.

A witness must bring all documents in his possession relating to the point at issue—because, every person is bound to produce such documents as are essential to the discovery of truth and the great ends of justice; but it is a question for the judge, whether, in any particular case, the actual production of deeds or writings should be enforced. (5)

Defendant proving documents by the plaintiff's witnesses.

Witness bound to bring all documents in his possession.

A judge has no more right than the jury to look at a privileged instrument in the hands of an attorney subpœnaed to produce it. (6)

An attorney must state, whether he has in his possession a letter addressed to his client, so as to let in secondary evidence of its contents, after service of a *subpœna duces tecum* to produce it. (7)

In general, a plaintiff has no right to the production of a deed not connected with his own title, and which gives title to the defendant (8), and the court will not compel an inspection, where the parties have an adverse interest. (9) Production of documents will not be enforced, if the disclosure would subject the party to a criminal charge or penalty. (10), or involve a breach of professional confidence. (11)

Party no right to the production of a deed not connected with his own title.

Production of documents not enforced, if the disclosure would subject the party to a criminal charge.

The court of review will not order the registrar to attend with the proceedings at the trial of an action, on behalf of a party who is a stranger to

(1) *Liegh v. Sherry*, 2 Moore, 33.

(2) *Evans, q. t. v. Moseley*, 2 Dowl. P. C. 364.

(3) *Cates, q. t. v. Winter*, 3 T. R. 306. *Att. Gen. v. Le Merchant*, 2 ibid. 203. n. *Cash v. Trevor*, 1 Armstrong & Macartney (Irish), 60. Phillipps' Ev. 780.

(4) *Cash v. Trevor*, 1 Armstrong & Macartney (Irish), 60.

(5) *Amey v. Long*, 9 East, 485. *Field v. Beaumont*, 1 Swanst. 209. Phillipps' Ev. 780., post, 1714.

(6) Per Denman C. J. in *Doe d. Carter v. James*, 2 M. & Rob. 47.

(7) *Cash v. Trevor*, 1 Armstrong & Macartney (Irish), 60.

(8) *Sampson v. Swettenham*, 5 Madd. 16. *Pickering v. Noyes*, 1 B. & C. 263.

(9) *Threlfall v. Webster*, 1 Bing. 161. But a purchaser for valuable consideration, was, in *Neeson v. Clarkson* (1 C. P. Cooper, 93.), ordered to produce deeds, from the recital of which, as set forth by the answer, a constructive notice was apparent.

(10) *Whitaker v. Izod*, 2 Taunt. 115.

(11) *Harris v. Hill*, 3 Stark. 140. *Rez v. Woodley*, 1 M. & Rob. 390. *Falmouth (Earl) v. Moss*, 11 Price, 455.

PROOF BY WITNESSES.	the fiat. (1) And such court has no jurisdiction to order a commissioner to compel a witness to produce a document, which the commissioner thinks he ought not to produce. (2)
Custom-house entries.	A <i>subpœna duces tecum</i> will be granted to enforce the attendance of an officer of the customs with entries and warrants. (3)
Where attorney not bound to produce a will.	A witness is not bound to produce, in obedience to a <i>subpœna</i> , a will which he holds as attorney for a devisee claiming under it; although it be suggested, that it is a will of personalty as well as of realty, and ought, therefore, to be deposited in the ecclesiastical court. (4)
Witness may produce a document without being sworn.	A witness who appears to produce a document under a <i>subpœna duces tecum</i> , may be compelled to produce it without being sworn. (5) And where a person called only to produce a document is sworn as a witness by mistake, and a question is put to him which he does not answer, the opposite party is not entitled to cross-examine him. (6)
When not competent to shew, that the instrument required was immaterial.	It is not competent for a person served with a <i>subpœna duces tecum</i> to shew, that the instrument he was required to produce, was immaterial in the cause, in answer to a rule for an attachment. (7)

SERVICE OF
SUBPœNA.

IV. *Service of Subpœna.*

Only four witnesses can be included in one writ of subpœna. Effect of altering subpœna.	In one writ of subpœna only four witnesses can be included (8), and it must be regularly served on the witness; but the service of a ticket, containing the substance of the writ, is equally compulsory as service of the writ itself (9). If a cause appointed for one sitting be made a <i>remand</i> , the <i>subpœna</i> must be resealed and reserved (10); and a witness is not bound to obey a <i>subpœna</i> altered by the attorney from the sittings for which it was originally sued out to a subsequent sitting, without being resealed. (11)
Difficulty of service.	It is requisite, that there should be a personal service of the writ or ticket upon the witness (12); and difficulty in serving a <i>subpœna</i> will not dispense with the necessity of personal service, unless it be sworn, that the person keeps out of the way to avoid personal service. (13) It seems to be prudent, if the required witness be a married woman, that she should be served personally with the <i>subpœna</i> , and that the tender of the expenses should be made to herself. (14) Whether a <i>subpœna</i> has been served in reasonable time before the trial, is matter for the court.
Writ must be served a reasonable time before trial.	Service of the writ should always be made in a reasonable time before the day of trial (15): thus, a notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too late (16); and service

(1) Exp. <i>Munk</i> , 3 D. & C. 233.	(9) <i>Goodwin v. West</i> , Cro. Car. 522. 540.
(2) Exp. <i>Groom</i> , 2 Mont. & Ayr. 143.	<i>Maddison v. Shore</i> , 5 Mod. 355.
(3) <i>Anon.</i> 1 Alcock & Napier (Irish), 112.	(10) <i>Sydenham v. Rand</i> , 3 Doug. 429.
(4) <i>Doe d. Carter v. James</i> , 2 M. & Rob. 47.	(11) <i>Barber v. Wood</i> , 2 M. & Rob. 172.
(5) <i>Perry v. Gibson</i> , 3 N. & M. 462. 1 A. & E. 48.	(12) <i>Smalt v. Whitmill</i> , Str. 1054. <i>Walefield's case</i> , R. T. H. 313.
(6) <i>Rush v. Smith</i> , 1 C. M. & R. 94. 2 Dowl. P. C. 687. 4 Tyrw. 675.	(13) <i>Barnes v. Williams</i> , 1 Dowl. P. C. 615.
(7) <i>Doe d. Butt v. Kelly</i> , 4 Dowl. P. C. 273.	(14) <i>Goodwin v. West</i> , Cro. Car. 522. 540.
(8) <i>Doe d. Jupp v. Andrews</i> , Cowp. 846.	Sir W. Jones, 430. <i>Phillipps' Ev.</i> 782.
	(15) <i>Hammond v. Stewart</i> , Str. 509.
	(16) <i>Tidd</i> , 806.

on a person living close to the place of trial at half past eleven o'clock in the morning, for a cause called on at two o'clock, is likewise not in sufficient time. (1)

PROOF BY
WITNESSES.

An attachment was refused against a witness for not obeying a *subpœna* dated on the 18th of June, calling on him to attend the trial on the 2d of July, but which *subpœna* was not served until the 3d, as the *subpœna* and service were inconsistent with each other. (2)

But where a *subpœna* was tested on the 9th of May, and served on the 19th, requiring the defendant to appear "on Monday the 21st day of March instant," the court refused to set aside the service. (3)

The name of a witness, though not in the original *subpœna*, may be inserted therein at any time, if he have been regularly served with a copy. (4)

Insertion of name of witness may be made in the original *subpœna* at any time.

Where an officer of the court is served with a *subpœna duces tecum*, to produce a judgment book, if the personal attendance of the officer be necessary, he must be informed of it, or the court will not grant an attachment against him, his clerk having attended with the book, though the plaintiff was nonsuited in consequence. (5)

V. Expenses of Witnesses.

EXPENSES OF
WITNESSES.

If a person reside within the weekly bills of mortality, and be summoned to give evidence within the same, it is usual to leave a shilling with the *subpœna* ticket (6); and no conduct money need be tendered. (7) But under other circumstances, no witness is bound to appear in civil cases, unless his reasonable expenses for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the time of serving the *subpœna*; nor if he appear, is he bound to give evidence till such charges are actually paid or tendered (8); but where an attachment is moved for, the court will not enter into any nice calculation as to the expenses, but will consider, whether the non attendance originated in obstinacy or not. (9)

Witness not bound to appear in civil cases, unless his reasonable expenses have been tendered.

It is not necessary, that a witness's expenses should be tendered to him at the time of serving the writ, for, if they be tendered to him a reasonable time before he is required to appear, it will be sufficient. (10)

Not requisite to tender a witness's expenses at the time of serving the writ.

If a witness be *subpœnaed* and attend at the trial, but refuse to give evidence unless his expenses be paid, and is in consequence not examined, he can, notwithstanding, maintain *assumpsit* for his necessary expenses of attendance against the party who *subpœnaed* him. (11)

Where a witness was taken to the assizes, and there kept at the plaintiff's expense until the day of the trial, when she refused to go into court without being first paid a certain sum:—It was held, that to entitle the

(1) *Barber v. Wood*, 2 M. & Rob. 172.

(2) *Alexander v. Dixon*, 1 Moore, 387.
1 Bing. 366. *Postan v. Rose*, 4 C. & P. 271.

(3) *Page v. Carew*, 1 C. & J. 514.

(4) *Wakefield v. Gall*, Holt's N.P.C. 526.

(5) *Bennett v. Jones*, 2 Chitt. 403.

(6) 3 Black. Com. 369. Tidd, 806.

(7) *Jacob v. Hungate*, 3 Dowl. P. C. 457.

(8) *Chapman v. Pointon*, Str. 1150. cit. 13 East, 16. n. *Fuller v. Prentice*, 1 Hen. Black. 49. *Hallet v. Mears*, 13 East, 15. Exp. *Roscoe*, 1 Meriv. 191. *Bowles v. Johnson*, 1 W. Black. 36.

(9) *Chapman v. Pointon*, Str. 1150.

(10) *Whiteland v. Grant*, 4 Jur. 1061.

(11) *Hallet v. Mears*, 13 East, 15.

**PROOF BY
WITNESSES.**

What are rea-
sonable ex-
penses,

plaintiff to move for an attachment against the witness for not attending pursuant to her *subpœna*, it must be shewn, that a reasonable sum had been tendered to the witness for her conveyance home. (1)

In *White v. Brazier* (2) a master of a vessel detained as a necessary witness, was allowed in the taxation of costs the expenses of his living and his travelling expenses, but a claim of 7*l.* per month for wages was disallowed, which, if he had sailed, he would have been entitled to.

A witness is entitled to her reasonable expenses for travelling in the mode suited to her station in life, and the particular circumstances in which she may be placed; and therefore, where the wife of an innkeeper was subpœnaed to attend a trial at Lancaster, which was sixty miles distant by the high road, and fifty by a more direct one, and she was tendered 2*l.* 1*s.* (the outside fare by the coach by the latter road being only 11*s.* 6*d.*), but it appeared that she had a sick child who must have travelled with her, and the money tendered was insufficient, if she travelled inside, a rule for an attachment against her was discharged, but without costs, as she took the money tendered, and made no objection at the time. (3)

Expenses of
witnesses paid
by both parties.

A witness from the country subpœnaed there by the defendant without receiving sufficient for his expenses, and afterwards, when in *London*, subpœnaed by the plaintiff and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expenses in some other way, than by objecting to be examined. (4)

If the opposite parties require a witness to attend, and he receive payment from both although the payment made by the successful party be afterwards repaid him by the loser in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received. (5)

Witnesses re-
siding abroad.

Witnesses out of the jurisdiction of the courts can be examined on interrogatories; and it seems, that a special ground must be shewn to entitle party to the costs of bringing a witness from abroad. (6)

But if a necessary witness be brought over from a foreign country, whether brought after or before the commencement of an action, the reasonable expenses both of his coming to this country and of his subsistence here pending the action, and of his return, will be allowed in the taxation of costs, provided he be brought over *bonâ fide* for the purposes of the particular action (7); and though a witness be not called at the trial, the master may exercise a discretion in allowing his expenses, if there were reasonable grounds for supposing his evidence would be admissible, and that he would be required. (8)

In order to review a taxation by the master for disallowing the expenses of detention of a foreign witness in this country, it should be shewn, that the master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him. (9)

(1) *Newton v. Harland*, 1 Scott, N. C. 502. 4 Jur. 992.

(2) 3 Dowl. P. C. 499.

(3) *Dixon v. Lee*, *ibid.* 259. 1 C. M. & R. 645. 5 Tyrw. 180.

(4) *Edmonds v. Pearson*, 3 C. & P. 113.

(5) *Crompton v. Hutton*, 3 Taunt. 230., et vide *Benson v. Schneider*, 1 Moore, 76. 7

Taunt. 272. Holt's N. P. C. 416. *Bettley v. M'Leod*, 3 Bing. N. C. 405.

(6) Phillipps' Ev. 785. n.

(7) *Tremain v. Faith*, 6 Taunt. 88. 1 Marsh. 563.

(8) *Rushworth v. Wilson*, 1 B. & C. 267.

(9) *White v. Mayor*, 5 Tyrw. 487.

The master, in taxing the expenses of witnesses according to a certain scale, cannot allow more than is actually paid for their travelling expenses. (1)

PROOF BY
WITNESSES.

Although compensation for loss of time has been usually allowed to medical men and solicitors, yet the general rule is, that it ought not to be allowed. (2)

COMPENSATION
FOR LOSS OF
TIME.

The expenses of a witness in attending a trial, are allowed pursuant to a scale graduated according to his situation in life (3);—thus, a clerk who prepares law costs and writings, is entitled to remuneration at the rate of whatever he earns by the day, for such time as he may lose in attending as a witness in Dublin, although he reside in that city. (4)

The legality of allowing, in taxation of costs, a compensation to any witnesses for loss of time, was doubted in *Collins v. Godefroy* (5); and that case decided, “that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness.” But under stat. 1 Will. 4. c. 22. and 3 & 4 Will. 4. c. 42. the expenses of witnesses examined upon interrogatories and before arbitrators are specially provided for.

Stat. 1 Will. 4.
c. 22. and
3 & 4 Will. 4.
c. 42.

VI. Remedies for Disobedience to the Writ of Subpœna.

If a witness after having been regularly served with a *subpœna* and a tender of his expenses, neglect to attend the trial, he is liable to a special action on the case for damages at common law (6), or an action under stat. 5 Eliz. c. 9. s. 12. for the penalty of 10*l.*, and also for the further recompense recoverable under that statute; but an action for the “further recompense” cannot be maintained, unless the amount has been previously assessed by the court out of which the process issued, neither the jury nor the judge at *Nisi Prius* being competent to make the assessment (7); but when the assessment has been made, an action of debt will lie.

REMEDIES FOR
DISOBEDIENCE
TO THE WRIT
OF SUBPœNA.

Action on the
case.

Stat. 5 Eliz.
c. 9. s. 12.

Action of debt.

In an action against a party for not appearing to give evidence in obedience to a writ of *subpœna ad testificandum*, it is not necessary to shew, that the defendant was called on his *subpœna* by the officer of the court, if it be shewn, by other satisfactory evidence, that he was not present at the proper time and place, when he was required to give evidence; or even that he was absent, when the cause was called on for trial under such circumstances, that he could not have been forthcoming when required to give evidence; and in such case it is not necessary that the jury should have been sworn and the plaintiff nonsuited; it is sufficient if he withdraw the record, being unable safely to go to trial in the absence of the witness. (8)

What will con-
stitute a dis-
obedience to
the writ.

To render a person liable to an attachment for not attending upon a *subpœna*, it is incumbent on the party applying to state, that he was a material and necessary witness. (9)

(1) *Radcliffe v. Hall*, 3 Dowl. P. C. 802.

(2) *Moor v. Adam*, 5 M. & S. 156. *Willis v. Peckham*, 1 B. & B. 515. *Lowry v. Double-day*, 5 M. & S. 159. n. *Severn v. Olive*, 3 B. & B. 72. 6 Moore, 239. *Collins v. Godefroy*, 1 B. & Ad. 957. An apothecary is not entitled to remuneration for time lost in attending a trial as a witness. *Geeves v. Marks*, 1 Armstrong & Macartney (Irish), 50.

(3) *Phillipps' Ev.* 785.

(4) *Richardson v. Thornhill*, 1 Armstrong & Macartney (Irish), 78.

(5) 1 B. & Ad. 957.

(6) *Pearson v. Iles*, Doug. 561.

(7) *Ibid.* *Phillipps' Ev.* 786.

(8) *Lamont v. Crook*, 6 M. & W. 615. 8 Dowl. P. C. 737. 4 Jur. 489. *Mullett v. Hunt*, 1 C. & M. 752., overruling *Bland v. Swafford*, Peake's N. P. C. 85.

(9) *Taylor v. Willans*, 4 M. & P. 59.

PROOF BY
WITNESSES.Attachment for
contempt.Where an at-
tachment will
not be granted.

In *Blandford v. De Tastet* (1) Chief Justice Mansfield said, "If a witness from an ill motive or from negligence and inattention absents himself, it is a contempt" (2); but to acquire such a summary punishment, it should appear, that the witness was shewn at the time of service the original *subpoena*; that he was personally served (3); that he was called three times in open court (4); and that his reasonable expenses were paid or tendered at the time of the service of the *subpoena*. (5)

Where a witness resided twenty-four miles from the assize town, and his expenses were not tendered to him until the evening before the trial, the court will not grant an attachment (6); in fact, whenever an attachment is applied for, it must be shewn affirmatively to the court, that every thing was done to secure the attendance of the witness. (7)

In order to bring a party into contempt for not attending as a witness at a trial at the sittings in obedience to a *subpoena*, the writ must specify the place at which the cause is to be tried, viz. Westminster Hall or Guildhall. (8)

It is a sufficient excuse, if the witness state, that he was too ill to attend. (9)

Where a defendant's attorney had been subpoenaed by the plaintiff in a cause which was fixed for trial on the 6th of June, on which day he attended, and the cause was afterwards postponed till the 18th, when the witness did not attend, as the *subpoena* did not require him "so to continue in attendance from day to day;" the court refused a rule *nisi*, upon motion for an attachment against the witness. (10)

If it appear by the notes of the judge of the trial, or from affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. (11)

An attachment will not be issued against a witness, if he have a reasonable ground for believing, that he will not be wanted (12); and the court refused an attachment against a witness, who, being subpoenaed without particular notice when the cause would come on, in the course of his third day's attendance left the court to attend to urgent business of his trade, although the cause was tried in his absence, and the plaintiff nonsuited, which his evidence would have prevented. (13)

But on a motion for an attachment against a witness for not obeying a *subpoena*, it was held no excuse that the witness would have been in time if a previous cause on the list had not unexpectedly gone off. (14)

A motion for an attachment against a person subpoenaed as a witness for not attending a trial, must be made within the term succeeding the trial. (15)

Since stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 4. it is no objection to an

Time within
which a motion
for an attach-
ment must be
made.

- (1) 5 Taunt. 261.
(2) Ibid. 260. *Horne v. Smith*, 6 ibid. 9.
1 Marsh. 410. *Barrow v. Humphreys*, 3 B.
& A. 598. *Wyat v. Wingford*, 2 Ld. Raym.
1528. *Hammond v. Stewart*, Str. 510. 810.
Smalt v. Whitmill, 1054.
(3) *Garden v. Creswell*, 2 M. & W. 319.
Smalt v. Whitmill, Str. 1054.
(4) *Rex v. Stretch*, 3 Dowl. P. C. 368.
Dixon v. Lee, ibid. 259. In re *Jacobs*, 1 H.
& W. 133.
(5) *Ashton v. Haigh*, 2 Chitt. 201. *Bowles*
v. Johnson, 1 W. Black. 36. *Fuller v. Prentice*,
1 Hen. Black. 49.

- (6) *Horne v. Smith*, 6 Taunt. 10.
(7) *Garden v. Creswell*, 2 M. & W. 319.
(8) *Milson v. Day*, 3 M. & P. 333.
(9) In re *Jacobs*, 1 H. & W. 123.
(10) *Vaughton v. Brine*, 4 Jur. 1061.
(11) *Dicas v. Lawson*, 1 C. M. & R. 934.
(12) *Rex v. Sloman*, 1 Dowl. P. C. 618.
(13) *Blandford v. De Tastet*, 5 Taunt. 260.
1 Marsh. 42.
(14) *Rex v. Fenn*, 3 Dowl. P. C. 546. 1
H. & W. 200.
(15) *Thorpe v. Gisbourne*, 11 Moore, 55.

affidavit to ground an attachment against a witness for contempt, that it is sworn before a judge of a different court from that, to which the contempt was shewn. (1)

PROOF BY
WITNESSES.

VII. *Privilege from Arrest.*

PRIVILEGE
FROM ARREST.

To whom the
privilege ex-
tends.

Witnesses, as well as the parties in a suit, are privileged from arrest during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and in returning from the place (2); and in making the allowance of time the courts act liberally (3); but, if there be "any stay upon the road for a purpose entirely different from, and unconnected with, the progress home," the privilege is lost (4); but going into a house on the way home to take refreshment, is not a deviation that will destroy the privilege. (5)

This privilege from arrest extends to a bankrupt attending a meeting of commissioners in pursuance of a notice (6), to witnesses attending upon a summons, or on an arbitration under an order of Nisi Prius (7), or on the execution of a writ of inquiry (8), or the Insolvent Debtors' court (9), or at quarter sessions to prosecute for the crown (10), and by the Mutiny Act, witnesses during their necessary attendance on courts-martial are also privileged.

And Lord Kenyon in *Arding v. Flower* (11) stated, "It is not necessary to the protection of a witness in ordinary cases, that he should have been compelled to give his attendance by being served with a *subpoena*, if, upon application to him, he were willing to attend without one."

Voluntary at-
tendance of
witness.

A witness is not privileged from being arrested by his bail: the bail may take him after he has finished his evidence, for the purpose of surrendering him (12); in fact, this is not an arrest, but a retaking. Where a witness who had come to Dublin on *subpoena* to attend a trial in the Exchequer in Dublin, returned to Roscommon before the trial was over, and immediately on his arrival there, was arrested on a *ca. sa.* out of the Common Pleas; the Chief Baron at Nisi Prius refused to order the witness to be discharged, but granted a *habeas corpus ad testificandum*. (13)

VIII. *Form and Administration of an Oath.*

FORM AND
ADMINISTRA-
TION OF AN
OATH.

An examination upon oath implies, that the witness should go through a ceremony of a particular import; and also that he should acknowledge the

Oath defined.

- (1) *Phillips v. Drake*, 2 Dowl. P. C. 45. c. 16. s. 117. *Arding v. Flower*, 8 T. R. 534.
(2) 2 Rol. Abr. Privilege (B.), 272. *Miller v. Seare*, 2 W. Black. 1142. *Kinder v. Williams*, 4 T. R. 377. *Exp. Byne*, 1 Ves. & B. 316 1 Tidd, 199.
(3) *Lightfoot v. Cameron*, 2 W. Black. 1113. *Meekins v. Smith*, 1 Hen. Black. 636. *Randall v. Gurney*, 3 B. & A. 252. (7) *Spence v. Stuart (Bart.)*, 3 East, 89.
(4) *Lightfoot v. Cameron*, 1 W. Black. 1113. *Randall v. Gurney*, 3 B. & A. 252.
(5) *Hutch v. Blisset*, Gilb. Cas. 308. cit. Str. 986. (8) *Walters v. Rees*, 4 Moore, 34.
(6) *Hallet v. Mears*, 13 East, 16. n. (a.) *Willingham v. Matthews*, 2 Marsh. 57. *Randall v. Gurney*, 3 B. & A. 252. Tidd, 195. (9) *Willingham v. Matthews*, 6 Taunt. 356.
(7) *Per Lord Abinger in Strong v. Dickenson*, 1 M. & W. 491. (10) *Graves v. McCarthy*, 1 Crawford & Dix (Irish), 127.
(8) *Att. Gen. v. Skinners (Comp. of)*, 1 C. P. Cooper, 1. (11) 8 T. R. 536.
(9) Stat. 5 Geo. 2. c. 30. s. 5. 6 Geo. 4. (12) *Exp. Lyne*, 3 Stark. 132.
(10) *Tilly v. Irwin*, 1 Armstrong & Macartney (Irish), 170.

**PROOF BY
WITNESSES.**

Universal obligation to take an oath in courts of justice.

Stat. 3 & 4 Will. 4. c. 49. and 1 & 2 Vict. c. 77.

Stat. 3 & 4 Will. 4. c. 82.
Form of oath.

Scotch covenant.

Methodist.

Jews.

MODE OF ADMINISTRATION.
Mahometans.
Gentoos.

efficacy of that ceremony, as an obligation to speak the truth; in fact, it is an appeal made to the Almighty, calling upon him to witness what we say, and invoking his vengeance if what we say be false: — “*Forma jurisjurandi verbis differt, re convenit; hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo, Deus testis sit, aut Deus sit vindex, quæ duo in idem recidunt.*” (1)

All witnesses who are examined upon any trial, civil or criminal, must be under the sanction of an oath; and this rule is so inflexible, that it applies equally to the sovereign upon her throne, as to the meanest of her subjects. (2)

But exceptions have been created by several statutes to the foregoing principle: thus, by stat. 3 & 4 Will. 4. c. 49. and by stat. 1 & 2 Vict. c. 77, every Quaker and Moravian may make a solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever, where an oath is required either by the common law or by any act of parliament; which affirmation or declaration is to have the same force and effect, as an oath taken in the usual form; and the penalty of perjury attaches.

By stat. 3 & 4 Will. 4. c. 82. separatists may make an affirmation.

Upon the principles of the common law, no particular form of oath is essential to be taken by a witness, so that it bind his conscience (3); and all persons can be sworn according to the ceremonies of the peculiar religion they profess at the time. (4)

A Scotch covenanter may be sworn according to the custom of his sect, without kissing the book. (5)

A witness who declines swearing on the New Testament, although he professes Christianity, but states himself to be a Methodist, may be allowed to swear on the Old Testament. (6)

Where a witness is sworn on the New Testament, who admits that he was born a Jew, but the tenets of which religion he had never formally abjured, and was never baptized or admitted into the Christian church, he is an admissible witness, though the oath has been so taken by him, on his asserting, that he then considered himself as a member of the established religion, and bound by its precepts. (7)

Where a witness was sworn on the Gospels at the trial, and it was afterwards discovered, that he was a Jew, and had been sworn in a false name: — It was held, that any objection as to his testimony was too late after verdict, and that the oath, as taken by the witness, was binding on him, as it would subject him to the penalties of perjury, if he had sworn falsely. (8)

An oath or affirmation is administered in the mode which is considered by the swearer as the most binding: thus, a Mahometan may be sworn on the Alcoran (9); Gentoos by touching with their hands the foot of a Brah-

(1) Grotius, l. ii. c. 13. s. 10.

(2) 2 Rol. Abr. Triall (1.), 686. *Omichund v. Barker*, Willes, 550., sed vide, respecting the crown, *Abignye v. Clifton*, Hob. 213.; as to peers, *Shaftsbury (Lord) v. Digby (Lord)*, 3 Keb. 631. *Rex v. Preston (Lord)*, 1 Salk. 278.; as to judges, 5 Howard, St. Tr. 1181. n. 7 *ibid.* 874. 1458. 11 *ibid.* 459.

(3) *Atcheson v. Everitt*, Cowp. 389.

(4) *Omichund v. Barker*, 1 Atk. 21. *Col v. Dutton*, 2 Sid. 6.

(5) *Rex v. Mildrone*, Leach, C. C. 459. *Mee v. Reid*, Peake's N. P. C. 23.

(6) *Edmonds v. Rowe*, R. & M. 77.

(7) *Rex v. Gillham*, 1 Esp. N. P. C. 285. 6 T. R. 265.

(8) *Sells v. Hoare*, 7 Moore, 36. 3 B. & B. 232.

(9) *Rex v. Morgan*, Leach, C. C. 64.

min (1); Jews by swearing on the Pentateuch, with their heads covered (2); and the Chinese by dashing a saucer on the ground, after they have concluded their oath. (3)

PROOF BY
WITNESSES.

Jews.
Chinese.

IX. Infamy.

INFAMY.

1. Generally.

GENERALLY.

Legal infamy arises not from the nature of the punishment, but from the nature of the offence, the maxim being, *ex delicto non ex supplicio emergit infamia*. (4)

Legal infamy arises not from the nature of the punishment, but from the nature of the offence.

There is a distinction between the *infamia juris* and the *infamia facti*, as the former absolutely disqualifies persons from giving evidence in courts of justice on account of the infamy of their characters; but if a man be stigmatised by public fame, it only affects the credit of his testimony, and does not affect his admission to the formal character of a witness. (5)

This rule of disqualification has arisen upon the assumption, that the testimony of persons convicted of infamous crimes is devoid of all presumption of credit, and would, therefore, be more likely to mislead than to assist in the investigation of truth: in fact, the law considers the commission of a crime of this nature to imply such a dereliction of moral principle on the part of the witness, as carries with it the conclusion, that he would entirely disregard the obligation of an oath (6); and "the producing such a witness is perfectly ineffectual, because the credit of his oath, is overbalanced by the stain of his iniquity." (7)

When a person becomes incompetent from infamy, he is in many instances considered as *civiliter mortuus*. Thus, if he have been an attesting witness to any written instrument before conviction, proof may be given of his handwriting (8); he cannot be a witness; cannot make an affidavit in *any* suit or proceeding (9); and if an affidavit be made by a convicted felon, the court will grant a rule to take it off the file, if it be shewn by affidavit, that his competency has not been restored (10);—but his affidavit is receivable for the purposes of personal exculpation or defence. (11)

Effect of disqualification.

2. Crimes that are infamous.

CRIMES THAT
ARE INFAMOUS.
Crimes which
disqualify.

Persons convicted of treason, felony, piracy, *præmunire* (12), forgery (13), perjury, subornation of perjury, attaind of false verdict (14), bribery of a

(1) *Omichund v. Barker*, 1 Atk. 21.

(2) *Ibid.* Willes, 543. *Atcheson v. Everitt*, Cowp. 389.

(3) *Rex v. Alsley*, cit. Bull. N. P. 292. (a.) n. (c.)

(4) *Rex v. Ford*, 2 Salk. 690. *Pendock v. Mackender*, Willes, 666. 2 Wils. 18. Fort. 209. *Rex v. Priddle*, Leach, C. C. 496. *Rex v. Davis*, 5 Mod. 75. Bull. N. P. 292.

(5) *Villa de Varsovie's case*, 2 Dods. 188.

(6) *Ibid.*

(7) Gilb. Ev. 126. *Pendock v. Mackender*, Willes, 667.

(8) *Jones v. Mason*, Str. 833. Com. Dig. Testmoigne (B. 3.).

(9) *Davis and Carter's case*, 2 Salk. 461. *Walker v. Kearney*, Str. 1148.

(10) *Holmes v. Grant*, 1 Gale, 59.

(11) *Davis and Carter's case*, 2 Salk. 461. *Charlesworth's case*, cit. *Walker v. Kearney*, Str. 1148.

(12) Co. Litt. 6. (b.) Com. Dig. Testmoigne (A. 5.). 2 Hale's P. C. 277. Fort. 209. *Jones v. Mason*, Str. 833. *Walker v. Kearney*, *ibid.* 1148. Phillipps' Ev. 17.

(13) 2 Hale's P. C. 277. Com. Dig. Testmoigne (A. 5.). Co. Litt. 6. (b.) Bull. N. P. 291.

(14) Phillipps' Ev. 17.

**PROOF BY
WITNESSES.**

Crimes which
do not dis-
qualify.

person to withhold his evidence (1), conspiring to procure the absence of a person summoned as a witness on an information against the revenue law (2), conspiring to accuse another of a capital offence (3), or a person convicted on an indictment for any other species of conspiracy (4), bribery (5), winning above 10*l.* by fraud or ill practice at gambling (6), and persons outlawed for treason and felony (7) are considered infamous.

It is not every species of falsehood or fraud that will create an incompetency in the actor, although impairing the credibility of his testimony: thus, the following offences do not render the guilty parties infamous:—outlawry in a personal action (8); keeping a public gaming-house (9); convicted of perjury, but before judgment (10); convicted under an indictment for conspiring to raise the price of the public funds, by spreading false rumours concerning them. (11)

A witness admitting to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is a competent witness against him on an indictment for a conspiracy (12);—and a party in prison on a charge of forgery of a bill of exchange, is admissible to prove payment of it, in an action brought to recover the amount. (13)

**PROOF OF IN-
FAMY.**

Infamy of a
witness must
be proved by
the record of
conviction.

3. Proof of Infamy.

A conviction makes the witness incompetent; but incompetency does not, abstractedly, arise from the conviction, for that may have been quashed on motion in arrest of judgment. Consequently the infamy of a witness must be proved by the record of conviction (14), and judgment thereupon (15); whether it be that of an English (16) or foreign court (17), as neither the conviction (18) without the judgment, nor the admission (19) of the witness, will be sufficient to render him inadmissible, however it may affect his credit, unless the judgment which is the best evidence of infamy be produced, from which it will be ascertained, whether the judgment had been legally and regularly acquired. Thus, a record of a conviction of felony without a caption, is not admissible in evidence to incapacitate a witness. (20)

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|---------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (1) <i>Clancey's case</i> , Fort. 208. | (12) <i>Rex v. Teal</i> , 11 East, 309., et vide <i>Heward v. Shipley</i> , 4 East, 180. |
| (2) <i>Bushel v. Barrett</i> , R. & M. 434. | (13) <i>Barber v. Gingell</i> , 3 Esp. N.P.C. 62. |
| (3) 2 Hale's P. C. 277. <i>Bagg's case</i> , 11 Co. 99. (a.) Hawk. P. C. b. i. c. 72. s. 9. Com. Dig. Testmoigne (A. 5.). | (14) <i>Rex v. Castell Careinion</i> , 8 East, 78. |
| (4) <i>Rex v. Priddle</i> , Leach, C. C. 496. | (15) <i>Lee v. Gansel</i> , Cowp. 8. |
| (5) <i>Rex v. Ford</i> , 2 Salk. 690. Bull. N. P. 292. | (16) <i>Wicks v. Smallbrooke</i> , 1 Sid. 51. |
| (6) Stat. 9 Anne, c. 14. s. 5. Co. Litt. 6. (b.) Fort. 208. | (17) <i>Cooke v. Maxwell</i> , 2 Stark. 183. |
| (7) <i>Celier's case</i> , Sir T. Raym. 369. 3 Inst. 212. Hawk. P. C. b. ii. c. 48. s. 22. | (18) <i>Lee v. Gansel</i> , Cowp. 8. |
| (8) Co. Litt. 6. (b.) Com. Dig. Testmoigne (A. 5.). Hawk. P. C. b. ii. c. 48. s. 22. | (19) <i>Rex v. Castell Careinion</i> , 8 East, 78. |
| (9) <i>Rex v. Grant</i> , R. & M. 270. | (20) <i>Cooke v. Maxwell</i> , 2 Stark. 183. In a prosecution upon stat. 12 Geo. 1. c. 3. s. 1. (Irish), against a degraded clergyman for marrying two protestants, it was held, that the entry of the sentence of degradation in the book of acts of the consistorial court, was sufficient proof of the fact of the degradation of the prisoner. <i>Sandy's case</i> , Irish Circuit Cases, 10. |
| (10) <i>Lee v. Gansel</i> , Cowp. 3. Lofft, 376. | |
| (11) <i>Crowther v. Hopwood</i> , 3 Stark. 21. D. & R. N. P. C. 5. <i>Ville de Varsovie's case</i> , 2 Dodds. 174. | |

PROOF BY
WITNESSES.4. *Restoration to Competency.*

Restoration to competency is acquired from the reversal of the judgment or outlawry, or from endurance of the punishment awarded to the offence, or from the grant of a pardon either by act of parliament or under the great seal.

RESTORATION
TO COMPE-
TENCY.

The reversal of the judgment or outlawry must be proved by the record. (1)

Reversal of
judgment of
outlawry.

By stat. 9 Geo. 4. c. 32. s. 3. the endurance by the convicted of the punishment awarded to his offence, will operate in all cases of felonies not capital, as a complete restoration to competency. (2)

ENDURANCE OF
THE PUNISH-
MENT AWARDED
TO THE OF-
FENCE.

The competency of a person is restored by proof, that he has received a pardon, which is granted either under the great seal, or by statute (3); the former is proved by inspection, and will not only take off every part of the punishment, but also clear the party from the legal disabilities of infamy resulting from his offence. (4) But although a pardon will restore competency in all cases, where the infamy is only a *consequence* of the judgment, as in perjury at common law (5), yet, if *infamy* be a part of the punishment, as in perjury under the stat. 5 Eliz. c. 9., a pardon, except by the legislature, will not restore competency.

GRANT OF PAR-
DON, EITHER
FROM ACT OF
PARLIAMENT
OR UNDER THE
GREAT SEAL.

Stat. 5 Eliz.
c. 9.

If a pardon be conditional, it must be shewn, that the condition has been performed. (6)

By stat. 7 & 8 Geo. 4. c. 28. s. 13., when a warrant is granted under the sign manual, countersigned by a principal secretary of state, for a free or conditional pardon of a person convicted of felony, his discharge from custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, will have the same effect as a pardon under the great seal in regard to the felony for which the pardon is granted. (7)

Stat. 7 & 8
Geo. 4. c. 28.
s. 13.

A pardon, if pleaded, must be averred to be under the great seal (8); but

(1) *Lee v. Gansel*, Cowp. 8., vide etiam *Lord Lovat's case*, 18 Howell's St. Tr. 1004. 1011.

(2) The stat. 9 Geo. 4. c. 32. s. 3., after reciting that it was expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who had undergone the punishment to which they had been adjudged, enacted, that "where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

The 4th sect., after reciting that there were certain misdemeanors, which rendered the parties convicted thereof incompetent witnesses, and that it was expedient to restore the competency of such parties after they

had undergone their punishments, enacted, "that where any offender hath been or shall be convicted of any such misdemeanor (except perjury or subornation of perjury), and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not, after the punishment so endured, be deemed to be by reason of such misdemeanor an incompetent witness in any court or proceeding, civil or criminal."

With respect to "endurance of punishment," *Badcock's case* (R. & R. C. C. 248.) affords an illustration.

(3) *Rex v. Crosby*, 1 Ld. Raym. 39.

(4) *Cuddington v. Wilkins*, Hob. 67. 81. *Rookwood's case*, R. T. H. 685. 4 St. Tr. 682. fol. ed. 13 Howell's St. Tr. 185. *Rex v. Crosby*, 1 Ld. Raym. 39. *Rex v. Castlemain*, Sir T. Raym. 379. 2 Hale's P. C. 278. Com. Dig. Testmoigne (A. 5.). *Reilly's case*, Leach, C. C. 510. *Lord Warwick's case*, 13 Howell's St. Tr. 1003.

(5) Bull. N. P. 291. (a.), 292. (a.)

(6) Hawk. b. ii. c. 37. s. 45. *Burridge's case*, 3 P. Wms. 485. *Badcock's case*, R. & P. C. C. 248.

(7) *Phillipps' Ev.* 22.

(8) *Bull v. Tilt*, 1 B. & P. 199.

**PROOF BY
WITNESSES.**

a sign manual, promising a pardon to a convict, will not restore him to his competency as a witness. (1)

**DEFECT OF,
RELIGIOUS
PRINCIPLE.**

X. Defect of religious Principle.

A person who has no notion of eternity, or of a future state of reward and punishment, cannot be examined as a witness (2); because, without such a belief, one sanction, which the law regards as a material security for the truth of evidence, that of the fear of divine punishment invoked by the witness upon himself, is wanting. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. (3)

Infidels (4); persons who profess no religion (5), and have no belief that they are answerable to God, are inadmissible as witnesses from a defect of religious principle; but those (6) who have no belief in the christian dispensation, as Jews (7), Mahometans (8), Gentoos (9), and other pagans (10), yet believing in God the avenger of falsehood, and the obligation of an oath, are admissible as witnesses in civil and criminal cases (11), and may be sworn in the manner they consider most binding upon their consciences (12); and by stat. 53 Geo. 3. c. 127. excommunicated persons are likewise good witnesses.

It also seems, that "an infidel who believes a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath." (13)

Cross-examination of witnesses with reference to their religious opinions.

The examination of a witness relative to his religious principles should be had previously to his being sworn; but if the question have been inadvertently omitted, it may be subsequently asked. (14)

The proper question to be put to a witness, in order to ground an objection to his competency, is not whether he believes in Jesus Christ or the holy gospels, but whether he believes in God and a future state. (15)

It may likewise be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience; and if in answer the witness state, that he considers the oath binding, he cannot further be asked, whether there be any other mode of swearing more binding on his conscience than that, which has been used. For the witness, in stating "that he considers the oath as binding upon his conscience, he does in effect affirm, that, in taking that oath, he has called his God to witness, that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head, if what he shall afterward say is false; and, having done that, it is perfectly unnecessary and irrelevant to ask any further questions." (16)

(1) *Rex v. Gully*, Leach, C. C. 115.

(2) *Rex v. White*, *ibid.* 482.

(3) *Rex v. Ruston*, *ibid.* 455.

(4) Bull. N. P. 292.

(5) *Omichund v. Barker*, Willes, 549.

(6) *Ibid.* 538.

(7) *Wells v. Williams*, 1 *Ld. Raym.* 282.

(8) *Omichund v. Barker*, 1 *Wils.* 84.

(9) *Ibid.* 1 *Atk.* 19.

(10) *Ibid.* Willes, 550.

(11) *Rex v. Morgan*, Leach, C. C. 64.

(12) *Omichund v. Barker*, 1 *Atk.* 81.

(13) *Per* Willes C. B. in *Omichund v. Barker*, Willes, 550.

(14) Resolution of the judges in the *Queen's case*, 2 *B. & B.* 284.

(15) *Rex v. Taylor*, Peake's N. P. C. 14.

(16) *Per* Lord Tenterden in 2 *B. & B.* 284.

XI. *Deficiency of Reason.*

Idiots, lunatics, except in their lucid intervals, persons of non-sane memory, and children so young, as not to comprehend the nature of an oath, are disqualified from being witnesses. DEFICIENCY OF REASON.

An idiot is one who, from his nativity, is by a perpetual infirmity *non compos mentis*. (1) But a witness, though deaf and dumb, may be sworn and examined, if intelligence can be conveyed to and received by him by means of signs and tokens (2); yet, when witnesses can write, it seems that they should write their answers, as being evidence of a more certain character. (3) Idiots.

Persons whose intellects have become permanently and perpetually deranged, are incompetent; but lunatics, and other persons who are afflicted with occasional fits of insanity, although incompetent while under the influence of their malady, may yet be witnesses in their lucid intervals, if it be satisfactorily shewn, that they have sufficiently recovered the use of their understandings. (4) Disordered intellect.

If children have correct religious principles, their testimonies as to matters of fact, are as much entitled to credit as adults, and the immaturity of their intellectual faculties is oftentimes compensated from the absence of motives to deceive. CHILDREN.

Children of any age can be examined upon oath in criminal and civil cases, if capable of distinguishing between good and evil, and possessed of sufficient knowledge of the nature and consequences of an oath, but they cannot be examined except under its sanction. (5)

It is no objection to the evidence of an infant witness, that she has been instructed in religious knowledge subsequently to the commission of the offence, or with a view to giving evidence. (6)

The inquiry is usually confined to the fact, whether the child has a conception of divine punishment being a consequence of falsehood; and, as observed by Mr. Justice Patteson in *Rex v. Williams* (7), "The effect of the oath upon the conscience of the child, should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated for the purposes of the trial;" and where it appeared, that up to the 3d of April, 1836, the trial being on the succeeding 23rd of July, a girl aged eight years was totally ignorant of religion, but between such periods had had some religious instruction given to her, with a view to her being examined, but at the trial shewed, that she had no real understanding on the subject of religion or a future state, Mr. Justice Patteson would not allow her to be examined. (8)

When a child from defect of understanding or instruction is unfit to be sworn, any account which the child may have given to others of the transaction, ought not to be received on the oath of the person to whom it was

(1) Co. Litt. 247. (a.)

(2) *Rex v. Ruston*, Leach, C.C. 455.

(3) *Morrison v. Lennard*, 3 C. & P. 127.

(4) Com. Dig. Testmoigne (A. 1.).
Phillipps' Ev. 4, 5.

(5) *Rex v. White*, Leach, C. C. 482. 1

East, P. C. 443. Bull. N.P. 293. 4 Black.
Com. 214.

(6) *Milton's case*, 1 Irish Circuit Cases, 16.

(7) 7 C. & P. 320.

(8) *Ibid.*, vide etiam *Rex v. Wade*, R. &

M. C. C. 86.

**PROOF BY
WITNESSES.**

communicated (1); and where a child of five years old was not examined upon a charge of rape committed upon her, but evidence was given of her account of the transaction about three weeks afterwards to her mother, and the prisoner was convicted, the judges thought the evidence clearly inadmissible. (2)

**INTERESTED
WITNESS.
GENERALLY.**

XII. Interested Witness.

1. Generally.

Principles upon which an interested witness is considered incompetent

It is a general principle, that those who have a direct interest in the event of a suit are incompetent as witnesses (3), it being presumed, that such an interest would induce them to give false and partial evidence. Thus, Chief Baron Gilbert observes (4), "Where a man who is interested in the matter in question, would also prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so short-sighted, as to look at their own private benefit, which is near to them, rather than to the good of the world that is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it."

Judgment of Chief Justice Best in *Hovill v. Stephenson*.

In *Hovill v. Stephenson* (5) Chief Justice Best is reported to have stated, "A learned writer has said, that interest should only operate against the credit, and not be an objection to the competency of a witness. This doctrine is, however, contrary to our law; for, according to that law, a direct interest to the smallest amount in any person, will prevent such person from being examined as a witness.

"This rule does not stand upon the principle that Mr. Starkie supposes, viz. that the law can make no distinction between the degrees of interest; but upon this, that if the party declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him, and therefore cannot be trusted as a witness in a suit instituted for the recovery of it. A feeling of interest will, in spite of the utmost efforts of the most conscientious man, often so warp his memory, as to prevent him giving an accurate account of any transaction in which he is concerned.

"Considering the interest of parties, and that which is of still more importance, the interests of the public and of religion, which require that every possible means should be used to prevent false evidence, the law cannot be too strict in excluding the testimony of interested witnesses. It is true that prejudices will often influence the mind of a witness as much as interest; but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it with all the defects that the infirmities of those who give it may occasion. We may require a witness to release his interest, but we cannot compel him to release himself from

(1) *Rex v. Brazier*, Leach, C. C. 237.
1 East, P. C. 443.

(2) *Rex v. Tucker*, cit. Phillipps' Ev. 6.

(3) It may perhaps be requisite to observe, that evidence applicable to the competency of

witnesses is occasionally discussed under the other titles of this treatise.

(4) Ev. 106.

(5) 5 Bing. 497.

his prejudices. Because we cannot do all we wish, we should not fail to do all we can to get at truth."

A party to a suit cannot be compelled to give evidence against himself.

In the case of several plaintiffs or defendants, the privilege is personal to each plaintiff and defendant. Where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, it has been held, that, with the consent of the adverse party, he may be admitted, though at the same time he defeats the claim of those, who jointly sue with him. (1)

Where an objection is made to the competency of an interested witness, the *onus probandi* the existence and validity of such interest is cast upon the objector. Incompetency will not be presumed until the contrary be established; and in cases of doubt the testimony of the witness will be received.

A witness cannot be rejected unless he have a direct and immediate interest in the result of the case, for which he is called to give evidence, nor unless the verdict in that case, can be given in evidence for him in another suit. (2) But this rule is qualified by *Walton v. Shelley* (3), in which it was held, that a person is not a competent witness to impeach a security which he has given, though he be not interested in the event of the suit.

"The old cases on the competency of witnesses," says Lord Mansfield (4), "have gone upon very subtle grounds; but, of late years, the courts have endeavoured as far as possible, consistently with those authorities, to let the objection go to the *credit*, rather than the *competency* of a witness."

The law considers a witness as being interested, "if there be a certain benefit or disadvantage to the witness attending the consequence of the cause one way." (5): "this benefit may arise to the witness in two cases,—first, where he has a direct and immediate benefit from the event of the suit itself; and secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action." (6)

The interest must be a legal existing interest: if it exist merely in the imagination, or belief, or expectation of the witness, he will not be incompetent, however strongly the objection may be urged with respect to his credibility (7); and upon the other hand, if a witness be legally interested, though he believe otherwise, such a belief will not render him competent. (8)

But if it appear that the witness be directly interested in the event of the particular suit, the amount of interest, be it never so inconsiderable, is unimportant (9); because, if interest be allowed to disqualify in any case, it must in all, as it is impossible by any scale to measure the different effects which it may have on different minds. Thus, the garnishee under a foreign

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Party to a suit cannot be compelled to give evidence against himself.

Competency presumed until contrary be shewn.

TO CREATE DISQUALIFICATION THERE MUST BE A DIRECT AND IMMEDIATE INTEREST.

IF THERE BE A DIRECT INTEREST, ITS EXACT AMOUNT IMMATERIAL.

(1) *Norden v. Williamson*, 1 Taunt. 378., et vide *Worrall v. Jones*, 7 Bing. 395.

(2) *Ralston v. Rowat*, 1 C. & F. 424.

(3) 1 T. R. 296.

(4) Ibid. 300. cit. per Lord Kenyon in *Walton v. Shelley*, 3 ibid. 32., et vide *Rex v. Bray*, C. T. H. 360.

(5) Gilb. Ev. 106, 107.

(6) Per Tindal C. J. in *Doe d. Teyham (Lord) v. Tyler*, 6 Bing. 394., vide etiam *Bent v. Baker*, 3 T. R. 27. *Smith v. Prager*, 7 ibid. 62. *Rex v. Boston*, 4 East, 581.

(7) Phillipps' Ev. 81, 82.

(8) *Doe d. Scales v. Bragg*, R. & M. 87.

(9) *Burton v. Hinde*, 5 T. R. 174. *Dodswell v. Nott*, 2 Vern. 317.

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attachment, who has received the money, is not an admissible witness to prove the regularity of the proceedings, or the justice of his demand. (1)

The custody from which a document offered in evidence is taken, cannot be proved by interested persons. (2)

A witness who has a power of attorney from the plaintiff to sue for money due to him, and who expects to pay his own debt out of money to be recovered in the action in which he is a witness, is incompetent. (3)

A person liable to be contributory to the defendant for damages recovered, is an incompetent witness for him. (4)

WITNESS BELIEVING HIMSELF INTERESTED.

Authorities exist, that a witness who believes himself *legally* interested is incompetent. (5) But a witness will not be disqualified, because through a mistaken view he believes himself to be interested; although, if a witness believe himself to be interested, the impression on his mind, and his bias in favour of the party calling him, may be as strong as if he were legally incompetent.

The course uniformly taken under such circumstances is to inquire, not into the state of the witness's belief on the subject, but to ascertain whether or not, as a matter of fact, he has any existing legal interest in the event of the suit (6); because the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and unless the objection to the witness be founded on a strictly legal interest, he will be admitted to give evidence.

WISHES OF EXPECTED BENEFIT.

A witness is not rendered incompetent, because he has wishes or a strong bias on the subject-matter of the suit, or that he hopes to obtain some benefit from the result of the trial. Such circumstances may influence his mind and affect his credibility; they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can place on his testimony, but they are insufficient to render him incompetent. (7)

Thus, an honorary obligation, which will be affected by the event of the cause, is not an objection to the competency of a witness (8); and a person who admits that he conceives himself bound in honour, though not legally bound, to contribute to the expenses of a party suit, is a competent witness for that party. (9)

Witness in same situation as the party for whom he is called.

A witness who stands in the same situation, as the party for whom he is called to give evidence, is under a strong bias, and may have strong wishes on the subject; but unless he will gain or lose by the event of the particular suit, he will not be disqualified.

Thus, in an action in which a question arises concerning the validity of a deed, the attorney who prepared the deed is a competent witness to prove that the deed is valid, notwithstanding that there is another action pending against him, in which he must fail if the deed be invalid. (10)

INFLUENCE OF VERDICT.

A witness who has no actual interest in the event of a suit is not incom-

- (1) *Barrymore (Lord) v. Taylor*, 1 Esp. N. P. C. 327. 145. *Rex v. Rudd*, Leach, C. C. 133. *Case of the Amitie Villeneuve*, 5 Rob. 344. n.
- (2) *Carrington v. Jones*, 2 S. & S. 135. (6) *Phillipps' Ev.* 121, 122.
- (3) *Powell v. Gordon*, 2 Esp. N. P. C. 735. (7) *Ibid.* 114.
- (4) *French v. Backhouse*, 5 Burr. 2727. (8) *Pederson v. Stoffles*, 1 Camp. 144.
- (5) *Trelawney v. Thomas*, 1 Hen. Black. 307. *Chapman's case*, cit. in *Fotheringham v. Greenwood*, Str. 129. *Rex v. Walker*, 1 Fort. (9) *Parker v. Whitby*, 1 T. & R. 366.
- (10) *Hudson v. Revett*, 5 Bing. 368.

petent, because the verdict may afterwards come to the knowledge of a jury in an action brought by the witness himself, and so have an influence on their decision, though not adduced as evidence before them; neither can the judge hear of a verdict except it come before him judicially. (1)

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WITNESSES.

Thus, in *Rex v. Boston* (2) it was held, that a witness was competent to give evidence for the prosecution upon an indictment for perjury, although a civil action was pending between himself and the party indicted, where the same question would arise as upon the indictment, and which was coming on for trial at the same assizes. (3)

To constitute an incompetent witness, the interest must be certain in its nature. Thus, in *Rex v. Cole* (4) an informer under stat. 17 Geo. 2. c. 40. and 9 & 10 Will. 3. c. 41. was held to be a competent witness, Lord Kenyon observing, "That since the decision in *Rex v. Blackman* (5), he had considered of the objection to the competency of the informer's being a witness, on the ground of interest; that the statute having given the court a power to inflict at their discretion, either a corporal punishment, or to impose a fine in case of conviction; and as it was only in case a fine was imposed, that the witness could expect to derive any benefit, and that was uncertain, as depending upon the judgment of the court; that he was now of opinion, that the objection went to the credit, not to the competency of the witness, and that therefore his evidence was admissible;" and he accordingly received his testimony.

UNCERTAIN
INTEREST.

Judgment of
Lord Kenyon
in *Rex v. Cole*.

Where the witness is so situated, that he is interested on both sides, his competency will depend upon the equality or inequality of the adverse interest. If they should be exactly equal, one will counterbalance the other, and the witness will be competent; but if there should be any excess of interest on either side, the witness will be incompetent to give evidence on the side, where there is a preponderancy of interest; it is obvious, that he is interested, to the amount of the excess, in procuring a verdict on that side. (6)

BALANCE OF
INTEREST.

Thus, an heir apparent is a good witness concerning the title to the land, for his interest is a mere contingency. (7)

The borrower is a competent witness for the plaintiff in an action for penalties under the Statute of Usury, against the lender of the money; and it is unimportant, whether he has or has not repaid the money lent. (8)

USURERS.
Borrower in
case of usury.

In an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and defendant admitted, had demised the premises first to the plaintiff or to another person, A. B. was considered a competent witness for the defendant to prove the fact; the court saying, "That it was a matter of indifference to the witness, whether he had one person or the other for his tenant; and though he might feel inclined to prefer one tenant to another, this objection would go to his credit only, and

Landlord com-
petent in a
question re-
specting the
person whom
he considered
to be his
tenant.

(1) *Rex v. Bray*, R. T. H. 358.

(2) 4 East, 572.

(3) Vide etiam *Rex v. Bray*, R. T. H. 358., sed vide contra, *Rex v. Whiting*, 1 Salk. 283. *Rex v. Nunez*, Str. 1043.

(4) 1 Esp. N. P. C. 169.

(5) Ibid. 95.

(6) Phillipps' Ev. 82, 83.

(7) *Smith v. Blackham*, 1 Salk. 283.

(8) *Smith, q. t. v. Prager*, 7 T. R. 60. *Abrahams, q. t. v. Bunn*, 4 Burr. 2251. *Masters, q. t. v. Drayton*, 2 T. R. 496.

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not to his competency, because the verdict could not be given in evidence in any action to be brought by or against him. (1)

In *Fancourt v. Bull* (2) it appeared, that H. F., being employed by the plaintiff to procure a bill to be discounted for him, placed it in the hands of the defendant for that purpose (without notice); the defendant detained the bill as a set-off against a debt due to him from H. F. and another:—upon which it was held, that H. F., having an equal interest in the event of the suit either way, was a competent witness to prove these facts in an action of trover brought by the plaintiff for the bill.

Judgment of
Mr. Baron
Parke in *Giles
v. Smith*.

So also in trover by a bankrupt against his assignees, the official assignee was held to be a competent witness for the defendant to sustain the bankruptcy; Mr. Baron Parke observing, “The objection only goes to his credit, because *non constat* that the commissioners will allow the official assignee any thing. In order to make a witness incompetent, the necessary and legal result must be some loss or gain.” (3)

Surety for a
bankrupt

In an action by the assignee of a bankrupt, a person who had become security for the bankrupt before he was a trader, is not admissible as evidence. (4)

Party named in
declaration as
a trespasser,
but not made
defendant.

In tort a person will be a competent witness, although named in the declaration, as having been engaged in committing the alleged injury, but who has not been made a defendant in the suit (5): but it seems, that if the plaintiff can prove a party named in the *simul cum* in trespass guilty, and shew, that he was made a party by producing the original or process against him, and that an ineffectual endeavour had been made to arrest or serve him, he will not be a competent witness for the defendant. (6)

2. Time of acquiring Interest.

TIME OF AC-
QUIRING IN-
TEREST.

In *Bent v. Baker* (7) Mr. Justice Grose laid it down as a general principle, deducible from the case of *Barlow v. Vowell* (8), that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he cannot by this, deprive the plaintiff or defendant of his testimony. (9)

Interest ac-
quired since
cause of action.

This proposition is seemingly too large and general, because the incompetency of a witness, on account of interest, must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the *voire dire* is, whether he is interested at the time of his examination? If he be directly interested at that time, he is not a competent witness in general without a release; and it seems to be no answer to such an inquiry,

(1) *Bell v. Harwood*, 3 T. R. 308., vide etiam *Evans v. Williams*, 7 ibid. 481. n. (c.) *Rocher v. Busher*, 1 Stark. 27.

(2) 1 Bing. N. C. 681. Scott, 645.

(3) Vide etiam *Ilderton v. Atkinson*, 7 T. R. 480. *Lockart v. Graham*, Str. 35. *York v. Blott*, 5 M. & S. 71. *Blackett v. Weir*, 5 B. & C. 385. *Hall v. Curzon*, 9 ibid. 646. *Hudson v. Robinson*, 4 M. & S. 476. *Cossham v. Goldney*, 2 Stark. 414.

(4) *Hudson v. M'Allen*, 1 Irish Circuit Cases, 64.

(5) *Page v. Crook*, Sty. 401. *Poplet v. James*, Bull. N. P. 286.

(6) *Reason v. Ewbank*, Bull. N. P. 286., vide etiam per Lord Hardwicke in *Lloyd v. Williams*, R. T. H. 123.

(7) 3 T. R. 27.

(8) Skin. 586.

(9) Vide etiam *Rescous v. Williams*, 3 Lev. 152. *Da Costa v. Jones*, Cowp. 736.

that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact, which he is called to prove. (1)

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WITNESSES.

In *Forrester v. Pigou* (2) Lord Ellenborough said, "If a person who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule."

Judgment of
Lord Ellenbo-
rough in *For-
rester v. Pigou*.

A wager laid by a witness on the subject-matter in dispute, will not render his evidence inadmissible. (3)

Wager laid by
witness.

In *Rex v. Fox* (4) Lord Raymond admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant; and the principle seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness, by any such gratuitous act, to exclude himself from giving evidence. Besides which, the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore as directly prejudicial to the administration of justice. (5)

3. *Objection to Witness when to be taken.*

If during any part of a witness's examination, or even after his cross-examination, it be ascertained, that he is interested, his evidence will be erased upon an objection being taken. (6)

OBJECTION TO
WITNESS WHEN
TO BE TAKEN.

In *Stone v. Blackburn* (7) Lord Kenyon held, that an objection to the competency of a witness may be taken at any stage of the cause; but, in *Beeching v. Gower* (8) Chief Justice Gibbs ruled, that where the examination of a witness had been completed, and he had left the box, but was recalled by the judge for the purpose of asking him a question, that it was too late then to object to his competency.

The foregoing case has been confirmed by *Fellingham v. Sparrow* (9), in which a witness who had been examined, and had left the witness box, was recalled and examined, not as to the merits and facts of the case, but as to his interest in the event of the suit; when it appeared that he was interested; and upon an objection being then taken to his competency, it was held to be too late.

In equity, an objection to competency is not waved by cross-examination, nor unless known or presumed to be known to the examining party. (10)

A new trial will not be granted, in consequence of the competency of a witness being discovered, after the trial was concluded. (11)

(1) *Forrester v. Pigou*, 1 M. & S. 9.

(2) *Ibid.*

(3) *De Costa v. Jones*, Cowp. 736.

(4) Str. 652.

(5) *Ibid.*

(6) *Stone v. Blackburn*, 1 Esp. N. P. C. 37.
Turner v. Peart, 1 T. R. 720. Per Lord
Ellenborough in *Howell v. Lock*, 2 Camp. 14.

(7) 1 Esp. N. P. C. 37.

(8) Holt's N. P. C. 314.

(9) 4 Jur. 1036.

(10) *Moorhouse v. De Passon*, 19 Ves. 493
Vaughan v. Worrall, 2 Swanst. 495.

(11) *Turner v. Peart*, 1 T. R. 720.

**PROOF BY
WITNESSES.**

**Examination
on *voire dire*.**

A party at the trial cannot shew, by cross-examination and subsequent evidence, that a witness, who has been examined in chief by his adversary, is the real party to the suit; because, if such be the fact, the proper course is to object to the competency of the witness in the first instance. (1)

The party against whom a witness is called, may examine him respecting his interest on the *voire dire* (2), or may call another witness, and produce other evidence in support of the objection. If the fact of interest be satisfactorily proved by other evidence, the witness will be rejected, though he may have ventured to deny it on the *voire dire*.

If a witness on the *voire dire* be asked, whether he is liable to pay the attorney, and he say that he is not, a letter written by him may be put into his hands, and after he has looked at it, the question may be put again. (3)

**Objection re-
moved on *voire
dire*.**

Where an objection to the competency of a witness arises out of his answer to a question on his *voire dire*, he can by parol be allowed to restore himself to competency; though, had the objection to his competency arisen by any other means, the best evidence would have been required to have restored him to competency, and parol evidence would have been insufficient (4): thus, upon appeal against an order of removal, the appellant township having produced one of its inhabitants as a witness, who being examined upon the *voire dire* stated, that he was the occupier of a cottage there of the annual value of 25s., but that he was not rated to, nor paid any public rate or tax, such answer must be taken to be true for the purpose; and it cannot be objected to his examination in chief, that the best evidence of the fact was not given by the production of the rate itself. (5)

But if a corporator state on the *voire dire* that he has been disfranchised, he may be questioned, and books referred to by him, may be inspected to impeach the regularity of the disfranchisement. (6)

**Competency of
a witness waved
by cross-exami-
nation.**

At law the objection to the competency of a witness is waved by pursuing his cross-examination after his interest appears, which formerly could only be inquired into on the *voire dire*. (7) But cross-examining a witness in equity, is no waiver of an objection on the ground of interest. (8)

**LIABILITY
OVER.**

**Immediate
interest.**

4. Liability over.

A witness for the plaintiff or defendant is considered to be directly interested, if a verdict in such cause would release him from a liability to a subsequent action against himself. (9)

Previous to stat. 3 & 4 Will. 4. c. 42., (10), a witness was incompetent to give evidence in any suit, when the record of the proceedings in that suit

(1) *Dawdney v. Palmer*, 3 Jur. 74. 4 M. & W. 664. 7 Dowl. P. C. 177.

(2) *Vide post*, 1769, 1770.

(3) *Homan v. Thompson*, 6 C. & P. 717.

(4) *Botham v. Swingle*, 1 Esp. N. P. C. 164. Peake's N. P. C. 285.

(5) *Rex v. Gisburn (Inhab. of)*, 15 East, 57. *Butchers' Comp. v. Jones*, 1 Esp. N. P. C. 161., *vide etiam Ingram v. Dade*, Lond. Sitt. after M. T. 1817, cit. Phillipps' Ev. 150.

(6) *Godmanchester (Bailiffs of) v. Phillips*, 4 A. & E. 550.

(7) *Moorhouse v. De Passon*, Coop. C. C. 300. 19 Ves. 433. *Harrison v. Courtald*,

1 Russ. & M. 429.

(8) *Ibid*.

(9) *Lewis v. Peake*, 7 Taunt. 153. *Neak v. Wyllie*, 3 B. & C. 533.

(10) *Vide post*, 1754. EFFECT OF STAT. 3 & 4 WILL. 4. c. 42. ss. 26 & 27.

would be evidence for or against himself in a subsequent action against him.

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WITNESSES.

In an action against a master for the negligence of his servant, the latter is not a competent witness to disprove the negligence without a release. (1)

Negligence of
servants.

Thus, in the case of *Green v. New River Company* (2), which was an action to recover damages sustained by the plaintiff through the alleged misconduct of a servant of the defendants, the servant was held to be an incompetent witness for the defendants to disprove his own negligence, because the verdict might be given in evidence in an action by the defendant against the witness; for although a tradesman's servant be permitted to prove the delivery of goods on behalf of his master, this is an exception to the general rule, proceeding merely from necessity; and this exception would not extend to actions arising from the misconduct of coastmen and sailors, in which cases the verdict against the proprietor might be given in evidence in a subsequent action by the latter against the servant, respecting the *quantum of damages*, though not as to the fact of the injury.

So, likewise, in an action on the case against stage-coach proprietors for an injury done by the mismanagement of the coach, whereby a person was struck by the luggage on the coach, the guard of the coach is not a competent witness for the defendants without a release (3); but a release given one of the defendants is sufficient.

Coach guard.

In an action against the captain and owner of a steam-vessel, for an injury resulting from the improper management of the vessel, if it appear, that a pilot had the control, he is not a witness for the defendant without a release, although the defendant himself was on board at the time. (4)

Pilot.

In an action brought against a principal for negligence and misconduct in the course of his employment in the purchase of certain bales of tobacco, the broker who made the contract for him cannot be called to prove, that there was no negligence or misconduct in the execution, without a release from his principal. (5) And in an action for an excessive distress, the broker who made the distress is incompetent to prove, that it was not excessive (6), unless released.

Broker.

In trover against a sheriff, the officer who made the levy is not a competent witness for the defendant, though indemnified by the execution creditor. (7)

Sheriff's
officer.

In an action against a sheriff for a false return, the sheriff's officer, who has given security for the due execution of process (and is consequently liable over to the sheriff in case of misconduct), is likewise an incompetent witness to prove the correctness of the return. (8) But in an action against a sheriff for negligently executing a writ, an assistant employed by the sheriff's officer to execute the writ, is a competent witness; because, in order to exclude a person called as a witness, the verdict must

(1) *Green v. New River Comp.* 4 T. R. 589.

(2) *Ibid.*

(3) *Whitmore v. Waterhouse*, 4 C. & P. 383.

(4) *Hawkins v. Finlayson*, 3 *ibid.* 305.

(5) *Gevers v. Mainwaring*, Holt's N. P. C. 139.

(6) *Field v. Mitchell*, 6 Esp. N. P. C. 71.

(7) *Whitehouse v. Atkinson*, 3 C. & P. 344.

(8) *Powell v. Hord*, 2 Ld. Raym. 1411. Str. 650.

**PROOF BY
WITNESSES.**

Landlord receiving rent from sheriff.

be evidence for or against him, and an interest beyond this is too remote to establish incompetency (1); but the officer himself is incompetent for the sheriff, although he may be indemnified by the execution creditor; because, if there be a verdict against the sheriff, the liability of the officer would be certain, and he might never get paid on his indemnity. (2)

In an action against the sheriff for a false return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, the landlord is incompetent to prove the rent due; for if the action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which the judgment in the former action would be evidence of special damage. (3) This rejection is upon the principle, that there would be a legal liability over to the sheriff arising from the alleged misconduct of the witness in claiming rent, which, it was contended, was not really due; and, in a subsequent action by the sheriff against the witness, the record of the verdict would be admissible in evidence to enforce such liability.

Directors of a zoological society.

A butcher sued three of the directors of a zoological society for goods supplied for the animals. For the defence, a witness was called to prove, that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants:—It was held, that the witness was not competent, without being released by the three defendants; but that he would be so, if released by them without being released by the other shareholders. (4)

Incompetency of plaintiff's servant or agent.

In several cases the plaintiff's servant or agent is as incompetent a witness on behalf of the plaintiff, as the defendant's servant or agent is, to give evidence on behalf of the defendant.

Carter.

Thus, in *Miller v. Falconer* (5), which was an action for running against plaintiff's cart with a dray, the servant who was driving the cart when the accident happened, was held not to be a competent witness for the plaintiff without a release.

Waggoner.

So, likewise, in an action on the case for negligently driving a mail-coach against a waggon horse of the plaintiff, whereby it died:—It was held, that his waggoner was not a competent witness to prove the circumstances under which the accident happened, without being previously released, because he had a direct interest in the event of the suit; for if the plaintiff obtained a verdict, the witness was placed in a state of security. (6)

Shipowner.

A witness is incompetent not only in cases where the verdict would be evidence for or against him in another suit, but also where he is directly interested in the event of the particular suit; consequently, an owner of a ship is not a competent witness in an action on an insurance of goods put on board that ship, to prove her seaworthy, until released by the plaintiff. (7)

(1) *Clark v. Lucas*, R. & M. 32. Taunt. 457. 2 Moore, 508. *De Symonds v. De La Cour*, 2 N. R. 374. *Wake v. Lock*, 5 C. & P. 454. *Sherman v. Barnes*, 1 M. & Rob. 69.
(2) *Whitehouse v. Atkinson*, 3 C. & P. 344.
(3) *Keightley v. Birch*, 3 Camp. 521.
(4) *Betts v. Jones*, 9 C. & P. 199.
(5) 1 Camp. 251.
(6) *Rotheroe v. Elton*, Peake's N. P. C. 117., vide etiam *For v. Lushington*, *ibid.* 117. Per Gibbs C. J. in *Morish v. Foote*, 8 118. n.
(7) *Rotheroe v. Elton*, Peake's N. P. C. 117., vide etiam *For v. Lushington*, *ibid.* 118. n.

In an action for an injury done to a stage-coach by a cart, the coachman is not a competent witness for the plaintiff without a release. (1)

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And in case for negligently driving against the plaintiff's horse, the plaintiff's servant, in whose charge the horse was, is also incompetent for the plaintiff. (2)

Driver of a
stage-coach.

In an action between the vendor and purchaser of an estate, in which the title to the estate comes in question, a person who had previously sold the estate, and is liable to the vendor, if the title should prove defective, is incompetent to give evidence in support of the title. (3) But if the former vendor sold the estate without any covenant for good title or warranty, he will be competent (4), because the witness is under no liability.

Sale of land
with warranty.

An insolvent debtor is not a competent witness for the plaintiff in an action brought by his assignee, because his future property is liable to the payment of the debts in his schedule, and therefore he is interested in procuring the recovery of as much money as possible. (5) So likewise in *Crerer v. Sodo* (6) it was held, that if a party having failed, and assigned his property to trustees for the benefit of his creditors, be sued for work done, a creditor of such party is not a competent witness in his favour, if he have not received 20s. in the pound on his debt, and swear that it is doubtful, whether the estate will produce so much.

Insolvent.

In an action of tort for a libel against a person who was secretary to a society (the members of which had agreed to contribute towards all law expenses), it seems, that a member of the society is competent for the defendant without a release, on the ground, that a contract between parties for bearing each other harmless in doing wrong was void, and consequently, that there was no legal liability to affect the witness. But, if a party be liable for a share of the expenses in the event of a judgment passing against defendant, he is incompetent. (7)

Liability arising from illegal contract.

Where a party has an interest in a civil suit, either in the question at issue of the cause, or in the question of costs, he is incompetent from giving evidence; in fact, as previously stated, any interest in the event of the suit, however minute, will render a witness incompetent (8); and a liability for costs will even render a witness incompetent under stat. 2 & 3 Will. 4. c. 42. (9)

LIABILITY FOR
Costs.
Witness interested in the issue of the cause, or payment of costs.

The incompetency of the parties to the record to give evidence, arises from their positive interest in the result of the verdict; and it is a corollary to be deduced from this rule, that "the plaintiff or defendant cannot be a witness in his own cause, for these are the persons who have a most immediate interest, and it is not to be presumed, that a man who complains without cause, or defends without justice, should have honesty enough to confess it." (10)

Parties to the record.

In *Worrall v. Jones* (11) Chief Justice Tindal said, "No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit. On the contrary,

Judgment of Chief Justice Tindal in *Worrall v. Jones*.

(1) *Kerrison v. Coatsworth*, 1 C. & P. 645.

(2) *Sherman v. Barnes*, 1 M. & Rob. 69.

(3) 2 Rol. Abr. Triall (G.), 685.

(4) *Busby v. Greenslate*, Str. 445.

(5) *Delafield v. Freeman*, 4 C. & P. 67.

(6) 3 *ibid.* 10.

(7) *Humphreys v. Miller*, 4 *ibid.* 7.

(8) Bull. N. P. 290. (b.) *Doe d. Stafford (Mayor of) v. Tooth*, 3 Y. & J. 19.

Burton v. Hinde, 5 T. R. 174.

(9) *Jesus College v. Gibbs*, 1 Y. & C. 145.

(10) Gilb. Ev. 116. *Per* Lord Hardwicke in *Barret v. Gore*, 3 Atk. 401.

(11) 7 Bing. 398, 399.

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many have been brought forward, in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not; and the admission or rejection of the witness has depended on the result of this inquiry."

**Responsibility
as agent.**

Where a witness stated on the *voire dire* that "he had, as agent, employed the original attorney for the plaintiff, that the attorney was dead, that he was not released, that no demand was made upon him, and that he did not state, that the attorney was to look to the plaintiff and not to himself;" and nothing further appeared to shew, that the witness had any interest in the suit, or had made himself liable to the new attorney:—It was held, that he was competent. (1)

**Rateable in-
habitants.**

Where on the *voire dire* it is attempted to disqualify a rateable inhabitant from being a witness, by making it appear, that he has agreed to contribute to the costs of the action, his personal liability must be distinctly brought out by the objecting party. The judge at the trial may best decide the question, but his decision is subject to review in the court above. (2)

In an action of trespass (3) by A. B. against C. D. &c. the churchwardens of a certain parish, for personally removing him from a church pew, it appeared, that E. F. and other parishioners had entered into and signed a resolution at a vestry meeting, that the conduct of C. D. &c. ought to be protected, and that all the parishioners ought to contribute towards the expenses of the defence in the same *ratio* as the poor's rates. E. F. appeared as a witness, and was objected to, as being responsible for the costs of the action under the foregoing resolution, but Mr. Baron Rolfe held the witness to be competent. (4)

Persons appointed governors and directors of the poor of a parish under an act of parliament, which authorises them to assess rates on the inhabitants, but, in case of appeal, makes them liable for costs, to be indemnified out of the parochial funds, are not competent witnesses on the trial of such appeal, being individually liable to costs in the first instance. (5) Where parochial trustees were empowered by statute to sue in the name of their treasurer or clerk, and the act contained a provision for reimbursing such treasurer or clerk his costs out of the rates, Lord Tenterden appears to have considered, that in an action brought in the name of the treasurer, a trustee was an incompetent witness for the plaintiff, although the trustees took no benefit under the statute, and rated parishioners are thereby made competent witnesses. (6)

Corporators.

A member of a corporation was held, previously to stat. 5 & 6 Will. 4. c. 76., not to be a competent witness to sustain the claim of the corporation, even though he released his interest in the subject-matter of the suit, because he was interested in the general funds of the corporation, which would be increased or lessened by the amount of the costs (7); this ob-

(1) *Shipton v. Thornton*, 1 P. & D. 216.

(2) *Doe d. Norton v. Webster*, 4 Jur. 1810.

(3) *Reynolds v. Munchton*, MS. Bridge-water Sum. Ass. 1841, vide etiam *Wright v. Masterton*, 1 C. P. Cooper, 497.

(4) Vide *Yates v. Lance*, 6 Esp. N. P. C. 132.

(5) *Rex v. St. Mary Magdalen, Bermondsey*, 3 East, 7.

(6) *Whitmore v. Wilks*, M. & M. 214.

(7) 1 Stephens' Corporation Acts, 2d ed. 429. *Doe d. Stafford (Mayor of) v. Tott*, 3 Y. & J. 19.

jection *quoad* "burgesses" does not now exist, but it would seemingly apply to "freemen" in suits respecting their reserved rights.

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When the party to an action has no interest in the question in dispute, but is suing as a mere trustee for another person, he will nevertheless, in general, be incompetent on the ground of liability for costs. (1)

Trustees.

A *prochein ami*, or a guardian suing for an infant, is incompetent upon this ground. (2)

Prochein ami.

In an action on a joint and several bond against one of the obligors, who was surety for another, that other obligor (the principal) is not competent for the defendant to prove a payment of money by himself in discharge of the bond; for he has an interest in favour of his surety to the extent of the costs of the action. (3)

CO-OBLIGOR OF
A BOND.

If a witness be incompetent on the ground, that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to render him competent (4): and it is not necessary he should have a release from the defendant. (5)

In an action for goods sold, a witness cannot be called for the defence to prove, that the defendant has paid the amount to him (either as agent for the plaintiff or in his own right), if it appear, that he obtained the payment under such circumstances, that, in the event of the plaintiff's recovering, the witness would be liable to the defendant, not only for the sum so recovered, but also for the costs of the cause, as damages resulting from the witness's deceit: thus, in *Larbalestier v. Clark* (6) Mr. Justice Littledale said, "It is now well established, that a person who has received money due from a defendant to a plaintiff is not a competent witness for the defendant to prove that he received the money as agent for the plaintiff, or in his own right, if his conduct has been such, that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant, not only the money received but the costs of that action in which the plaintiff should recover; since, in such a case, he has an interest in defeating the action. I regret that such a rule has been established, because in many cases it is extremely difficult to ascertain, whether a party so situated will be liable to answer for the costs. The facts proved in this case, however, do not shew that Faircloth had made any such misrepresentation, as would render him liable for the costs of the action."

WITNESS TO
PROVE PAY-
MENT TO HIM-
SELF WHEN
COMPETENT FOR
DEFENDANT.

Judgment of
Mr. Justice
Littledale in
Larbalestier v.
Clark.

5. Parties to the Record when not incompetent.

It has been previously stated as a general principle, that parties to a record are incompetent as witnesses.

PARTIES TO THE
RECORD WHEN
NOT INCOM-
PETENT.

As the objection to the competency of a party to the suit is founded, not upon the abstract ground of being a party, but upon the ground of being

Party having

(1) *Phillips v. Buckingham (Duke of)*, 1 Vern. 230. *Dodswell v. Nott*, 2 Vern. 317. *Davis v. Morgan*, 1 Tyrw. 457. 1 C. & J. 587. *Bauermann v. Rüdénis*, 7 T. R. 668. (2) *Clutterbuck v. Huntingtower (Lord)*, Str. 506. *James v. Hatfeild*, *ibid.* 548. *Hopkins v. Neal*, *ibid.* 1026. *Gilb. Ev.* 107. (3) *Townend v. Downing*, 14 East, 565., vide etiam *Trelawney v. Thomas*, 1 Hen. Black. 306. (4) *Doe d. Dully v. Allbutt*, 6 C. & P. 131. (5) *York v. Gribble*, 1 Esp. N. P. C. 319., vide etiam *Lees v. Smith*, 1 M. & Rob. 329. (6) 1 B. & Ad. 899.

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no interest in
the event of a
suit.

Plaintiff or de-
fendant con-
senting to the
examination of
a witness.

Defendant in
whom a legal
estate is vested
as a trustee.

Effect of a
separate verdict
at the trial.

Separate ver-
dict taken.

Judgment of
Mr. Justice
Parke in *Child*
v. *Chamberlain*.

interested, it follows, that if a person, tendered as a witness, have no interest whatever in the event of the suit, he will be competent, although he be a party to the record. Thus, in an action against parties in a corporate capacity, who had no individual interest in the question in dispute, and were not personally liable to costs, Lord Kenyon admitted several of the defendants as witnesses against the claim of the plaintiff (1); and in proceedings against parishes, even rateable inhabitants are not incompetent, if not actually rated. (2) So, likewise, where the mayor and commonalty of London were plaintiffs, and the question was, whether the corporation were entitled to certain tolls : — It was held, that freemen, members of the corporation, might be called in support of the claim, because the tolls were received for the benefit of the whole corporate body. (3)

If a plaintiff and a defendant are both willing, that the plaintiff shall give evidence in the cause, he is an admissible witness on his oath (4), although he comes to defeat the claim of another plaintiff suing jointly with himself. (5)

A defendant, in whom a legal estate is vested as a trustee, and who has permitted his name to be used by his co-defendants in an action of ejectment, and also in a bill filed in another court, and who joined in the same answer with the other defendants, has not such an interest as to preclude him from being examined for the other defendants in certain issues directed by the court. (6)

“ If any person,” observes Mr. Justice Buller (7), “ be arbitrarily made a defendant to prevent his testimony, the plaintiff shall not prevail by that artifice, but the defendant against whom nothing is proved shall be sworn notwithstanding ; for he does not swear in his own justification, but in justification of another,” with whom he was unnecessarily joined ; and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and thus be enabled to prove what he pleased without contest.

But this rule only applies “ where there is no manner of evidence against the defendant ; for if there be, his guilt or innocence must await the event of the verdict,” although the evidence against him may not be enough to convict him in the judge’s opinion, because the jury are judges of the fact. (8)

To render a party a competent witness when unnecessarily sued, the jury are directed to find a separate verdict in his favour, and the cause being then at an end with respect to him, he may be called as a witness on behalf of a co-defendant. (9)

In *Child v. Chamberlain* (10) Mr. Justice Parke said, “ It has been settled by the unanimous opinion of the judges, that, if there is no evidence against

(1) *Weller v. Foundling Hospital (Governors of)*, Peake’s N. P. C. 206., *vide* 3 Atk. 401. Phillips’ Ev. 49.

(2) *Marsden v. Stansfield*, 7 B. & C. 818.

(3) *Rex v. London (Mayor of)*, 2 Lev. 231. 1 Vent. 351. *Sutton Coldfield (Corporation of) v. Wilson*, 1 Vern. 254. It seems there is no general rule as to the exclusion of corporators, but they are admissible or not according to their interest. Bull. N.P. 290., *et vide* *Burton v. Hinde*, 5 T. R. 174. *Davies v. Morgan*, 1 C. & J. 587. *Doe d. Stafford (Mayor of) v. Tooth*, 3 Y. & J. 19., *vide etiam* *Godmanchester (Bailiffs of) v. Phillips*, 4 A. & E. 550.

(4) *Strange v. Dashwood*, 1 C. P. Cooper, 497.

(5) *Norden v. Williamson*, 1 Taunt. 378.

(6) *Fletcher v. Clegg*, 1 Younge, 345. By an order directing a party to be examined as a witness on the trial of an issue, no objection is waved except that which arises from his being a party in the cause. *Rogerson v. Whittington*, 1 Swanst. 39.

(7) Bull. N. P. 285.

(8) *Ibid.* Gilb. Ev. 118.

(9) In *Davis v. Living* (Holt’s N. P. C. 275.) it was held to be discretionary with the judge.

(10) 6 C & P. 215. 3 N. & M. 520.

any one defendant, at the conclusion of the case on the part of the plaintiff, such defendant is to be acquitted; so that all defendants not fixed by the plaintiff's evidence are to be acquitted before any part of the defence is gone into. This was the unanimous opinion of all the judges, before that, there was a discrepancy in the practice." (1)

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In *Bate v. Russell* (2), where one defendant had pleaded bankruptcy, and the other to the merits of the action, and it was proposed that, on proof of the bankrupt's certificate, a verdict should be taken for him, in order, that he might appear as a witness for his co-defendants, Mr. Justice Parke permitted this course to be adopted; and upon the cases of *Raven v. Dunning* (3), *Currie v. Child* (4), and *Emmet v. Butler* (5), being cited as authorities against the admissibility of the witness, that learned judge observed, that they were no longer in point in consequence of the altered state of the bankrupt laws, but that he would give no opinion on the competency of the witness, but would admit him, giving leave to move.

If a material witness for the plaintiff be by mistake made a defendant, the court will, on motion, erase his name from the record, even after issue joined, if it respect his competency as a witness (6); or, in the case of an information, the attorney-general may enter a *nolle prosequi* as to one of the defendants, and so make him a witness. (7)

WITNESS MADE
A PARTY TO A
SUIT BY MIS-
TAKE.

Party witness
for plaintiff
made defendant
by mistake.
Ejectment.

But if a material witness for a defendant in ejectment be made a co-defendant through mistake, it seems that, after plea, the court will not upon motion strike out his name. (8) And Mr. Justice Buller observes (9), with reference to the case of a tenant in possession of part of the premises, "If he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason, why he should not be a witness for another defendant."

6. Where interested Parties are competent.

Exceptions exist to that general rule, which requires that all persons who gain or lose by the event of a cause are incompetent to give evidence; some of these exceptions depend upon statutes, others arise from necessity, or a principle of public policy.

WHERE IN-
TERESTED
PARTIES ARE
COMPETENT.

"Where a statute could receive no execution, unless a party interested were a witness, there he must be allowed, for the statute must not be rendered ineffectual by the impossibility of proof." (10)

GENERALLY.

In *Rex v. Williams* (11) Mr. Justice Bayley said, "Where it is plain, that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent" (12); because

Persons en-
titled to re-
wards.

(1) *Huxley v. Berg*, 1 Stark. 98. *Wright v. Paulin*, R. & M. 128. *Wynne v. Anderson*, 3 C. & P. 596. *Davis v. Living*, Holt's N. P. C. 275.

(2) M. & M. 332.

(3) 3 Esp. N. P. C. 25.

(4) 3 Camp. 283.

(5) 7 Taunt. 599. 1 Moore, 332.

(6) *Jones v. Tresilian*, 1 Sid. 441. Bull. N. P. 285.

(7) *Runnington d. Dormer v. Parkhurst*, R. T. H. 163. Bull. N. P. 285.

(8) Bull. N. P. 285. cit. *Dormer v. Fortescue*, Willes, 343. n. *Doe d. Harrop v. Green*, 4 Esp. N. P. C. 198.

(9) Bull. N. P. 285.

(10) Gilb. Ev. 114.

(11) 9 B. & C. 560.

(12) *Rudd's case*, Leach, C. C. 135. 853. n. 2 Hawk. P. C. c. 46. s. 135.

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Stat. 2 Geo. 2.
c. 24.

the exclusion of their testimony would be *inconsistent with the policy and spirit of the statutes giving the rewards*, for the object of the legislature being to stir up greater vigilance in the apprehension and prosecution of criminals, the intention would be defeated, if the expectation of a reward were to disqualify a witness, who would otherwise have been competent.

Thus, in actions or prosecutions for bribery, it is no objection to a witness that he has been guilty of bribery himself, and will be entitled to an indemnity under the discovery clause of stat. 2 Geo. 2. c. 24. (1), in case of the conviction of the defendant, against whom he is called as a witness. (2)

Stat. 7 & 8
Geo. 4. c. 29.
s. 57.
Owner of stolen
goods entitled
to restitution.

By stat. 7 & 8 Geo. 4. c. 29. s. 57., in order to encourage the prosecution of offenders, if any person guilty of any felony or misdemeanor mentioned in the statute, in stealing, taking, obtaining, converting, or knowingly receiving any property, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative; and a summary power is given to the court to award restitution. Under this enactment, the party entitled to restitution has a direct interest in procuring a conviction; but, notwithstanding this interest, he is a competent witness.

Stat. 21 Geo. 3.
c. 37. s. 1.

So, likewise, on an indictment under stat. 21 Geo. 3. c. 37. s. 1. for exporting machinery, an informer who was entitled to the penalties imposed by the statute, was held to be a competent witness, although there was no express provision in the act for admitting his evidence (3); under

Stat. 23 Geo. 2.
c. 13. s. 1.

stat. 23 Geo. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor was held competent, notwithstanding he was entitled to a moiety of the penalty (4); and in a prosecution under stat. 9 Anne, c. 14 s. 5. the loser of money at cards was held competent to prove his loss. (5)

Stat. 9 Anne,
c. 14. s. 5.

REVENUE
SEIZURES, &c.
Stat. 6 Geo. 4.
c. 108. s. 105.

Upon proceedings relative to seizures and penalties under stat. 6 Geo. 4. c. 108., it is enacted by sect. 105., that officers and persons acting in their aid and assistance, shall be deemed competent witnesses in the trial of any suit or information on account of any seizure or penalty mentioned in the act, notwithstanding that such officer or other person may be entitled to the whole or any part of such penalty.

Stat. 3 & 4
Will. 4. c. 53.
s. 118.

By stat. 3 & 4 Will. 4. c. 53. s. 118. any officer of the army, navy, or marines, being duly authorised and on full pay, or officer of customs or excise, and any person acting in their aid and assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty.

PARISHIONERS
— INHABITANTS
— RATE-
PAYERS.

A parishioner is a competent witness to charge his own parish. (6)

A person may be convicted under a statute giving part of the penalty for the offence to the parish where it is committed, on the oath of a witness residing within the parish, provided he be not a ratepayer. (7) And it is no objection, that the witness is liable to be rated, if he be not rated in fact. (8)

(1) *Bush v. Ralling*, Sayer, 289. *Phillips v. Fowler*, cit. *ibid.* 291. *Heward v. Shipley*, 4 East, 180. *Mead v. Robinson*, Willes, 425. *Sutton v. Bishop*, 4 Burr. 2283.

(2) *Vide* 1 Stephens on Elections, 235—551. tit. BRIBERY AND TREATING.

(3) *Rex v. Teasdale*, 3 Esp. N. P. C. 68.

(4) *Rex v. Johnson*, Willes, 425. n. (c).

(5) *Rex v. Luckup*, *ibid.*

(6) *Rex v. St. Lawrence*, Burr. S. C. 538.

(7) *Rex v. Cottrell*, 2 Chitt. 487. *Cald.*

(8) *Ibid.*

Stat. 3 & 4 Vict. c. 26., after reciting that "it is expedient to remove all doubt, whether persons are by law competent to give evidence in cases where they have been formerly held to be disqualified by the liability to pay parochial rates," ENACTS, "that no person, called as a witness on any trial in any court whatever, may and shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed, or liable to be rated or assessed to the relief of the poor, or for and towards the maintenance of church, chapel, or highways, or for any other purpose whatever."

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Stat. 3 & 4
Vict. c. 26. s. 1.

Persons not
disqualified
from giving
evidence on ac-
count of being
assessed to pa-
rochial rates.

"That no churchwarden, overseer, or other officer in and for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, appeal, or other proceeding, and *shall be only liable to contribute to such costs in common with other the rate-payers* of such parish, township, or union." (1)

Sect. 2.
Nominal
parties on any
trial not dis-
abled from giv-
ing evidence.

Various statutes were passed previously to the foregoing statute, by which, in certain cases, parishioners and rate-payers were under certain qualifications rendered competent witnesses.

Thus, by stat. 3 Will. & M. c. 11. s. 12. (2), in actions against churchwardens or overseers of a parish for mis-spending money collected by them on behalf of the poor, parishioners who do not receive alms or other gifts out of the parochial funds, are made competent witnesses.

Stat. 3 Will. &
M. c. 11. s. 12.

By stat. 1 Anne, c. 18. s. 13. (3), on an indictment for not repairing a public bridge, or the highway adjoining, the inhabitants of the county, town, riding, &c., in which such bridge, &c., is situated, are rendered competent witnesses.

Stat. 1 Anne,
c. 18. s. 13.

By stat. 8 Geo. 2. c. 16. s. 15., in an action against the hundred on the *Statute of Winton*, by a party who had been robbed, the inhabitants of the hundred are rendered competent witnesses for the defence.

Stat. 8 Geo. 2.
c. 16. s. 15.

By stat. 54 Geo. 3. c. 170. s. 9., "no inhabitant or person rated, or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, *in any matter relating to such rates or cesses*; or to the boundary between such district, parish, township, or hamlet, and any adjoining district, &c.; or to any order of removal to or from such district, &c.; or the settlement of any pauper in such district, &c.; or touching any bastards chargeable or likely to become chargeable to such district, &c.; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or

Stat. 54 Geo. 3.
c. 170. s. 9.

(1) *Vide* stat. 4 & 5 Will. 4. c. 76. s. 82 by which overseers are rendered, in case an appeal be decided against them, individually and primarily liable for the costs. In *Regina v. Bath* (Recorder of) (9 A. & E. 715.), Mr. Justice Littledale observed, in reference to the foregoing statute, "It might depend on circumstances, whether they [the over-

seers] would be allowed the costs in their account."

(2) Parishioners, when competent under stat. 5 Geo. 4. c. 170. s. 9., *vide* Doe d. *Boulbes v. Adderley*, 8 A. & E. 502.

(3) *Vide etiam* *Rex v. Carpenter*, 2 Show. 47. *Case of the City of London*, 1 Vent. 351. *Gilb. Ev.* 113.

**PROOF BY
WITNESSES.**

**CONSTRUCTION
OF STAT. 54
GEO. 3. c. 170.**

appointment of any officer or officers; or the allowance of the accounts of any officer or officers of any such district," &c.

Stat. 54 Geo. 3. c. 170. occasioned many questions respecting its construction.

In *Meredith v. Gilpin* (1), which was an action of trespass against the overseers of a township, in which the question was, whether certain lands were vested in the overseers under a local act of parliament, the court of Exchequer decided, that a rated inhabitant of the township was not an incompetent witness on the part of the defendants, although the lands in question, if vested in the defendants, would be vested in trust for the township, and in aid of the poor rates; Mr. Baron Graham observing, "The matter in issue in this cause had relation to rates and cesses; because it was, if recovered, to go in aid of the parish rates. It would be otherwise an absurd construction; because, if these premises had been omitted, it would have been a ground of appeal, and the effect would be to make interested parties evidence against the parish in charging them with the omission, while they would be excluded in favour of the overseers, if they should endeavour to recover the property."

Upon an issue to ascertain, whether a certain messuage was situated within a chapelry, a person occupying a rateable property within the chapelry, was held to be competent to prove, that it was so situated. (2)

In action of debt by a surveyor of highways against his predecessor in office, to recover the penalty imposed by the Highway Act for not accounting, inhabitants of the parish were held to be competent witnesses for the plaintiff, although their evidence would tend to increase the funds in relief of the rates (3); and, in *Rex v. Hayman* (4), it was adjudged, that such inhabitants were rendered competent by the statute, upon an indictment for the non repair of a bridge and highway within the parish, which it was alleged the defendant was bound to repair *ratione tenuræ*.

The case of *Oxenden v. Palmer (Bart.)* (5) may be considered as having been overruled by *Doe d. Boulbee v. Adderley* (6), in which Lord Denman observed, "We content ourselves with saying, that the case of *Meredith v. Gilpin* (7) appears to us to be well decided; and that, on consideration, we cannot agree with *Oxenden v. Palmer*, and the decisions to which it has given birth."

On the trial of an ejectment by parish officers to recover a parish house, it was held, that an occupier of rateable property within the parish was a competent witness on behalf of the lessors of the plaintiff; Mr. Baron Alderson observing, that "The statute says, that the party shall not be incompetent in any matter relating to rates or cesses. Now the only way in which his interest can be affected, is by his evidence tending to recover property, the proceeds of which will diminish the rates and cesses." (8)

Stat. 55 Geo. 3.
c. 51. s. 22.

By stat. 55 Geo. 3. c. 51. s. 22. no person is an incompetent witness in

(1) 6 Price, 146.

(2) *Rex v. Kirdford (Inhab. of)*, 2 East, 559. *Marsden v. Stansfield*, 7 B. & C. 815.

(3) *Hendebourck v. Langston*, M. & M. 402. n.

(4) *Ibid.* 401.

(5) 2 B. & Ad. 236., vide etiam. *Rex v. Auckland (Bishop)*, 1 A. & E. 744. 1 M. & Rob. 286, 287. n. *Tothill v. Hooper*, 1 M. & Rob. 392.

(6) 8 A. & E. 508.

(7) 6 Price, 146.

(8) *Doe d. Higgs v. Cockell*, 6 C. & P. 527. S. C. nom. *Doe d. Hobbs v. Cockell*, 4 A. & E. 478. The witness in this case being merely rateable, and not actually rated, appears to have been competent at common law upon the authority of *Rex v. Kirdford (Inhab. of)* (2 East, 559.), recognised by Bayley J. in *Marsden v. Stansfield*, (7 B. & C. 818.)

matters relating to county rates, by reason of his being liable to contribute to poor rates, or county rates.

PROOF BY
WITNESSES.

By stat. 3 Geo. 4. c. 126. s. 137. (General Turnpike Act), the inhabitants of any parish, township, or place, in which any offence shall be committed contrary to that act, are not to be deemed incompetent witnesses by reason of their being such inhabitants. And by stat. 4 Geo. 4. c. 95. s. 84. no person is incompetent to give evidence in any action or other proceeding at law or equity, or before any justice, under or by virtue of any act for making or maintaining any turnpike road, or under that act, or the act of 3 Geo. 4., by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a farmer, lessee, or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act."

Stat. 3 Geo. 4.
c. 126. s. 137.
Turnpike acts.
Stat. 4 Geo. 4.
c. 95. s. 84.

By stat. 7 & 8 Geo. 4. c. 31. s. 5. relative to actions against the hundred for injuries arising from riotous assemblies, "if in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county, of a city or town, or of any such liberty, franchise, city, town, or place, as is therein mentioned, no inhabitant thereof, shall by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants."

Stat. 7 & 8
Geo. 4. c. 31.
s. 5.
Riotous assem-
blies.

In cases where pecuniary penalties imposed on any offence are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, inhabitants are rendered competent witnesses on the trial of the offender by stat. 27 Geo. 3. c. 29. (1), provided the penalty does not exceed 20*l*. And in the case of summary convictions under the provisions of the stat. 7 & 8 Geo. 4. c. 29. s. 64. the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence, may be payable to the general rate of such county, riding, or division. (2)

Stat. 27 Geo. 3.
c. 29.

Summary con-
victions for
penalties under
stat. 7 & 8
Geo. 4. c. 29.
s. 64.

By the Watching and Lighting Act (11 Geo. 4. & 1 Will. 4. c. 27. s. 53.), parishioners are competent witnesses in proceedings under that act.

Stat. 11 Geo. 4.
& 1 Will. 4.
c. 27. s. 53.

By the general rule of law, the rated inhabitants of a parish, indicted for not repairing a highway, are not competent to give evidence for the parish. (3)

But by stat. 5 & 6 Will. 4. c. 50. s. 100. for consolidating the laws relating to highways, "no person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceeding to be brought or had in any court of law

Stat. 5 & 6
Will. 4. c. 50.
s. 100.

It was also argued in support of the competency of the witness, that if the matter did relate to the rates or cesses, he was rendered competent by the statute, and if it did not, that he had no interest whatever. It may perhaps be noticed as an inconvenience resulting from the decision in *Oxenden v. Palmer*, and the subsequent cases in accordance with it, that the effect of the construction adopted in those decisions is to admit the testimony of the witnesses, where the interest is plain and immediate, i. e. in cases

where the question "strictly and properly relates to the rates or cesses," and to reject their testimony, where the interest is more indirect and remote. *Phillipps' Ev.* 138. *n*.

(1) Vide *Rex v. Davis*, 6 T. R. 177.

(2) Overseers of a parish, on a parochial appeal, are not competent witnesses. *Regina v. Bath (Recorder of)*, 1 P. & D. 469. 9 A. & E. 714.

(3) Vide *Rex v. Terrington (Inhab. of)*, 15 East, 474. *Per* Lord Ellenborough in *Rex v. Wandsworth (Inhab. of)*, 1 B. & A. 66.

PROOF BY
WITNESSES.

HIGHWAYS.

or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of that act." (1)

If a right of way be pleaded for the inhabitant householders of M. to fetch water, an inhabitant householder of M. may be examined as a witness in support of this plea, under the stat. 3 & 4 Will. 4. c. 42. s. 26. (2)

MERE TRUS-
TEES COMPE-
TENT.

If a creditor have assigned his debt, though only by parol, his competency will be restored; because, having no beneficial interest, he is then a mere naked trustee. (3) It may, indeed, be laid down as a general rule, that mere trustees and executors in trust are not rendered incompetent by an interest, which is, as far as they are concerned, only nominal. (4) If a trustee have a beneficial interest, or is exposed to any immediate liability in respect of costs, that may be another ground of objection; but without such interest or liability, trustees and executors are competent witnesses. (5)

A person who is a mere trustee to elect to any particular office, is an admissible witness to prove any fact respecting the mode of election. (6)

So, mere trustees of public charities are good witnesses in an action brought against themselves in their corporate capacity. (7)

Trustees being empowered by act of parliament (50 Geo. 3. c. cxlix.) to sue and be sued in the name of their treasurer for the time being, a trustee is not a competent witness for the plaintiff in an action so brought. (8)

PURCHASERS.

In an action on a contract, in order to recover damages for the loss of some copies of a work, which loss was alleged to have been occasioned through a breach of defendant's contract to insure them from fire:—It was held, that a witness who had purchased a number of the copies from the plaintiff, but was not privy to the contract with the defendant, was competent on the part of the plaintiff to prove the contract. (9) For infringing a patent, a purchaser of a license to use the patent, is a competent witness for the plaintiff. (10) And for falsely representing the circumstances of a person who was insolvent, that person is competent on the plaintiff's part to prove his insolvency. (11)

Mortgagor and
mortgagee.

There being first and second mortgages, in taking an account of what was due on the first, the evidence of the surety of the mortgagor to the second mortgagee for payment of his mortgage debt, to the fact of payment by the surety of sums for mortgagor in reduction of the original mortgage debt, was held to be admissible. (12)

In an action of ejectment by the first mortgagee against the mortgagor,

(1) Vide *Rex v. Terrington*. (Inhab. of), 15 East, 474. Per Lord Ellenborough in *Rex v. Wandsworth* (Inhab. of), 1 B. & A. 66.

(2) *Knight v. Woore*, 7 C. & P. 258.

(3) *Heath v. Hall*, 4 Taunt. 326. *Granger v. Furlong*, 2 W. Black. 1273.

(4) *Fountain v. Coke*, 1 Mod. 107. *Goss v. Tracy*, 1 P. Wms. 287. *Gilb. Ev.* 123. *Lowe v. Jolliffe*, 1 W. Black. 366.

(5) *Goodtill v. Welford*, Doug. 140. *Bettison v. Bromley* (Bart.), 12 East, 250. Per Mansfield C.J. in *Heath v. Hall*, 4 Taunt. 328. *Phipps v. Pitcher*, 6 *ibid.* 220., vide

1 Ball & Beatty (Irish), 100. 414., and cases there cited as to the rule in equity.

(6) *Withnell (Clerk) v. Gartham (Clerk)*, 1 Esp. N. P. C. 324. S. C. not S. P. 6 T. R. 388.

(7) *Weller v. Foundling Hospital*, Peake's N. P. C. 206.

(8) *Whitmore v. Wilks*, M. & M. 214. 3 C. & P. 364.

(9) *Mawman v. Gillett*, 2 Taunt. 325. s.

(10) *Derosne v. Fairlie*, 1 M. & Rob. 457.

(11) *Smith v. Harris*, 2 Stark. 47.

(12) *Wormald v. Mackintosh*, 4 Jur. 1078.

to which the defence was, that the mortgage was fraudulent; the second mortgagee, who was called to prove the fraud, was rejected as incompetent. (1)

PROOF BY
WITNESSES.

If no other testimony can be expected, an interested party will be admitted as evidence (2); as where the right claimed is a *public* right.

Questions of
public right.

The evidence of agents, servants(3), and factors is admitted for the sake of trade and the common usage of business. The general principle respecting the criterion of competency is, whether a witness can derive any immediate gain or loss from the event of the cause. The evidence of agents, servants, and factors, for the purpose of proving contracts made by them on behalf of their employers, would, probably, in the great majority of cases, be admissible under the general rule, and not by way of exception; but in the abstract, the evidence of agents employed in ordinary transactions of commerce is admissible *ex necessitate*(4), notwithstanding they may be interested; and cases sometimes arise, in which the reception of their evidence could only be warranted on such a principle.

AGENTS, SERVANTS, &C. IN THE COURSE OF THEIR EMPLOYMENT.

A person can prove his own acts of dishonesty, leaving his credit to the jury; therefore a clerk who had laid out his master's money in illegal lottery insurances, was held admissible in an action against the parties, with whom he had laid out the money, upon being himself released as well as his securities.(5)

Agents and servants can prove their own misconduct.

A factor having pledged goods to several persons, is a competent witness in an action of trover against the parties, who are in the possession of the goods(6);—and a servant who had embezzled his master's goods and pawned them, was held to be a good witness in trover against the pawnbroker.(7)

But letters forged by the defendant's confidential clerk, purporting to contain an authority to indorse bills of exchange, were held not to be admissible in evidence to shew, that he had no authority to make the indorsement on which the plaintiff sued.(8)

The interest of an auctioneer from his commission, does not defeat his evidence.(9)

FACTORS AND BROKERS.

Factors and brokers can prove sales in the course of their employments(10), notwithstanding they may have an interest arising from the commissions or proceeds.(11) This exception is not confined to mere agents and brokers, but every man who makes a contract for another comes within the description; but Lord Tenterden seems to have considered, that the principle of the exception did not apply, where the only agency or connection between the parties arose out of the particular transaction in question.(12)

In case against a broker for negligently delivering goods without payment, the plaintiffs called their servant whose duty it was to deliver under the orders of the defendant, and who had delivered without such orders:—

Broker's servant when incompetent.

(1) *Doe d. Cuthbert v. Bamford*, 3 P. & D. 498.

(7) *Anon.* Bull. N. P. 290.

(2) *Lancum v. Lovell*, 9 Bing. 465.

(8) *Prescott v. Flinn*, 9 Bing. 19. 2 M. & Sc. 18.

(3) *Boorman v. Brown*, 9 A. & E. 487. 1 P. & D. 364.

(9) *Buckmaster v. Harrop*, 13 Ves. 474.

(4) *Per* Lord Tenterden in *Edmonds v. Lowe*, 8 B. & C. 408. *Per* Parke J. in *Hunter v. Leathley*, 10 *ibid.* 864.

(10) *Dixon v. Cooper*, 3 Wils. 40. *Snee v. Prescott*, 1 Atk. 248. *Benjamin v. Porteus*, 2 Hen. Black. 590. *Rex v. Phipps*, Bull. N. P. 289. (b.)

(5) *Clark v. Johnson*, Loft, 756.

(11) *Hunter v. Leathley*, 10 B. & C. 858.

(6) *Greenway v. Fisher*, 1 C. & P. 190.

(12) *Edmonds v. Lowe*, 8 *ibid.* 408.

**PROOF BY
WITNESSES.**

Son of vendor.

It was held, that he was an interested witness, and therefore was not competent to prove, that the defendant was informed of such delivery in time to stop the goods and prevent loss to the plaintiffs, and that he neglected to do so. (1)

In an action by a tradesman for goods sold, his son is a competent witness for him, if, as between father and son, the son have no interest in the trade, although the trade be carried on in their joint names, and although, in a bill of parcels written by the son, and delivered with the goods, the defendant be made debtor to the father and son jointly. (2)

In an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master may be a witness for him upon being released. (3)

In an action against the owner, for not safely carrying corn put on board his vessel, the captain is a good witness for the plaintiff. (4)

Servants and carriers can prove payment and delivery, for their principals.
Steward of manor.

Upon the principle of necessity, servants and carriers can prove the payment of a receipt of money, or the delivery of goods, on behalf of their master or principal. (5) Thus, if money have been overpaid by a servant, or paid by mistake, he is a competent witness in an action to recover it back. (6) And where the question was, whether, by the custom of a manor, a fine was due to the lord during his minority, on the tenant's admission, the steward of the manor was allowed to give evidence for the lord, though it was objected, that he would be entitled to a fee on admission, which he would lose if the tenants were not admitted. (7)

Agents incompetent to disprove negligence.

But agents and brokers are not competent to prove, that a contract has been properly executed in an action against the principal for misconduct or negligence. (8) And if a person enter into a contract for the purchase of goods in his own name, he is not a competent witness in an action for goods sold and delivered, to prove that he purchased them as the agent for the defendant. (9)

Agents exceeding their authority.

If the act of the servant has been out of the ordinary course of his employment and a mere breach of duty, the principle does not apply; and the servant is incompetent without a release.

Director of a company.

Where a local act empowered the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk; it was held, in an action for goods supplied to the directors, that a person who was one of the directors at the time when the goods were supplied, was a competent witness for the defendant. (10)

Issue from court of equity.

Upon issues sent from a court of equity, it is not an unusual thing to direct, that the parties to the suit shall be examined at the trial as witnesses. And it has been said in a case in the court of Chancery upon this subject, that upon an order of this nature no objection is waved, except that, which arises from the party being plaintiff or defendant in the cause. (11)

(1) *Boorman v. Brown*, 9 A. & E. 487. 1 P. & D. 364.

(2) *Barker v. Stubbs*, 1 Man. & G. 44. 1 Scott, N. R. 131.

(3) *Spitty v. Bowens*, Peake's N. P. C. 74.

(4) *Lay v. Holock*, *ibid.* 137.

(5) *Tybbald v. Tregott*, 11 Mod. 262. Bull. N. P. 289. (a.) *Green v. New River Comp.* 4 T. R. 589, 590. *Matthews v. Haydon*, 2 Esp. N. P. C. 509. *Spencer v. Goulding*, Peake's N. P. C. 176. *Adams v. Davis*, 3 Esp. N. P. C. 48. *Boorman v. Brown*, 9 A. & E. 487. *Thompson v. Harkan*, 1 Armstrong & Macartney (Irish), 188.

(6) *Martin v. Horrel*, Str. 647. *Barker v. Macrae*, 3 Camp. 144.

(7) *Champion v. Atkinson*, 3 Keb. 90. *Re v. Bray*, R. T. H. 360.

(8) *Gevers v. Mainwaring*, Holt's N. P. C. 139.

(9) *M^r Brain v. Fortune*, 3 Camp. 317.

(10) *Fletcher v. Greenwell*, 1 C. M. & R. 754. 5 Tyrw. 316.

(11) *Rogerson v. Whittington*, 1 Swanst. 39. *vide etiam per Tindal C. J. in Worrall v. Jones*, 7 Bng. 398. *antè*, 1735., *et post*, 1753.

Where a witness is interested in the result of a suit in equity, in consequence of the decree in the suit being evidence for or against his own claims on a subsequent occasion, he is not made competent upon the trial of an issue directed in such suit by the stat. 3 & 4 Will. 4. c. 42. ss. 26 & 27., the language of which, only applies to cases where the objection is "on the ground that the *verdict* or *judgment* in the *action*" would be admissible for or against the witness.(1)

PROOF BY
WITNESSES.

It is also an exception from necessity to the rule of incompetency from interest, that in an action for a malicious prosecution, the evidence which the defendant gave before the grand jury, in support of the indictment, is under special circumstances admissible on his behalf at the trial of the action. In *Johnson v. Browning* (2) the evidence given on that occasion by the defendant's wife, who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be a witness, was admitted by Holt C. J. on the ground, "that otherwise one that should be robbed would be under an intolerable mischief; for if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." (3)

MALICIOUS
PROSECUTION.

Upon the special ground of the policy and intention of a statute to discourage the removal of indictments, an exception occurs in the case of a person interested in the costs of a criminal prosecution, as upon the trial of an indictment which the defendant removes by *certiorari*.(4)

INTEREST IN
COSTS UNDER
WRIT OF CER-
TIORARI.

Upon an indictment for the non repair of a road, power by stat. 13 Geo. 3. c. 78. s. 64. was given to award costs against the prosecutor, if the prosecution appeared to be vexatious: but this provision does not affect the prosecutor's competency (5), and the evidence of the prosecutor is receivable according to the general rule; besides which, the interest is uncertain, for the power of awarding costs is discretionary.(6)

Stat. 13 Geo. 3.
c. 78. s. 64.

7. Interest in Actions relative to real Property.

In an action of ejectment, a tenant in possession is incompetent for the defendant, by reason of an immediate interest in the event of the suit (7); for the verdict and judgment in the action would have the effect of turning him out of possession immediately.

INTEREST IN
ACTIONS RELA-
TIVE TO REAL
PROPERTY.
Tenant in pos-
session in eject-
ment.

The mother of a defendant in ejectment, who claimed to retain possession of premises as heir-at-law to his father, is a competent witness for defendant, although the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower.(8).

(1) *Stewart v. Barnes*, 1 M. & Rob. 472.

(2) *Cit. Phillipps' Ev.* 143.

(3) *Cobb v. Car*, cit. Bull. N. P. 14.

(4) *Regina v. Muscot*, 10 Mod. 193.

(5) *Rex v. Hammersmith (Inhab. of)*, 1 Stark. 357.

(6) Vide *Rex v. Cole*, 1 Esp. N. P. C. 169. *antè*, 1729.

(7) *Doe d. Jones v. Wilde*, 5 Taunt. 183.

Doe d. Lewis v. Bingham, 4 B. & A. 672.

Doe d. Foster v. Williams, Cowp. 621. *Doe v. Preece*, 1 Tyrw. 410. *Bourne v. Turner*, Str. 632. *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 394.

(8) *Doe d. Nightingale v. Maisey*, 1 B. & Ad. 439. In an ejectment on the title, defendant who declines going into his defence on the trial, cannot be examined on the part of his co-defendant, their defences having been consolidated. The 51st sect. of the

**PROOF BY
WITNESSES.**

Obstructing a private way.
Title of assignee.

In an action by a reversioner for obstructing a private way beneficial to the tenant, the tenant is a competent witness. (1)

In covenant against an assignee of a term, for rent accruing whilst she was assignee, issue was taken upon the fact of the defendant's being assignee. A witness for the plaintiff proved that he had received, on account of the plaintiff, rent from one W., who had occupied the premises about the time when the rent in question accrued. The plaintiff then called W., who proved, that he was tenant to the defendant under an agreement, which did not amount to an assignment: — It was held, that W. was not an incompetent witness on the ground of interest, but that the objection to his competency should have been taken on the *voire dire*, inasmuch as his position was shewn to be equivocal by the statement of the first witness. (2)

Agreement for lease.

"If a man promise a witness, that, if he recover the lands, he shall have a lease of them for so many years, this excludes the evidence, for here the witness would have a fixed and certain advantage by the event of the verdict." (3) So, likewise, when it was agreed, that if the plaintiff failed in the action, he was to repay a sum of money in his hands belonging to the plaintiff, but was not to repay any part of it, if the plaintiff succeeded, he was considered incompetent. (4)

REMAINDER-MAN.

In an action by a landlord, who is a tenant for life, against a tenant from year to year, for waste, the remainder-man in tail is a competent witness for the plaintiff. (5)

But a remainder-man after a tenant in tail is not a competent witness for the tenant in tail in ejectment for the entailed property (6); for by recovering in the ejectment, the tenant in tail would be in, as of his former right, and the witness would thereupon acquire a vested interest in the remainder in tail. As the effect, therefore, of the verdict would be to re-vest the remainder in the witness, he has a direct and immediate interest which renders him incompetent. (7) So, also, in a *quare impedit* respecting the right of presentation to an advowson, which was claimed by the defendant through his mother, it was held, that the father of the defendant, who was tenant by the curtesy of the mother's property, was an incompetent witness on the defendant's behalf, because, he had a direct interest in the result of the cause. (8)

TENANT BY CURTESY.

Injury done to the inheritance.

In an action by a reversioner, the tenant in possession is a competent witness to prove an injury done to the inheritance by a stranger. (9) In an

Proof of title.
Sanity of testator.

action between a vendor and the purchaser of lands, a former vendor who has sold without warranty is capable of proving the title. (10) An executor who takes a pecuniary interest, is also competent to prove the sanity of

3 & 4 Vict. c. 105. does not apply unless "the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him." *Coots (Sir Charles) v. O'Fallon*, 1 Irish Circuit Cases, 87.

(1) *Adeane v. Mortlock*, 3 Jur. 105. 5 Bing. N. C. 236.

(2) *Hartshorne v. Watson*, 7 Scott, 494. 5 Bing. N. C. 477.

(3) *Gilb. Ev.* 108.

(4) *Smith v. Blackham*, 1 Salk. 283. *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 390.

Commins v. Oakhampton (Mayor of), Sayer, 45.

(5) *Leach v. Thomas*, 7 C. & P. 328.

(6) *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 390. 4 M. & P. 29.

(7) *Doe d. Teynham (Lord) v. Tyler*, 6 Bing. 390. *Smith v. Blackham*, 1 Salk. 283, et vide per Lee C. J. in *Commins v. Oakhampton (Mayor of)*, Sayer, 45.

(8) *Gully v. Exeter (Bishop of)*, 5 Bing. 171.

(9) *Doddington v. Hudson*, 1 Bing. 257.

(10) *Busby v. Greenslate*, Str. 445.

the testator in an action of ejectment concerning his real property. (1) In none of these cases does the witness gain or lose directly by the event of the suit, and as the verdict could not have been evidence for or against him in any subsequent action, he was not incompetent upon this ground, even before the latter species of disability was removed by the late statute.

PROOF BY
WITNESSES.

In *Simpson v. Pickering* (2) it appeared, that a person named Peacock having conveyed a close to the plaintiff, who built a house thereon, conveyed it again to the defendant, who pulled down the house and then mortgaged the property to Peacock as a security for the purchase money. The plaintiff having sued the defendant for trespass to the close: — It was held, that, as only a possibility appeared that Peacock might be a party interested, he was a competent witness for the defendant.

Possibility of
interest.

In an action for mismanagement of a farm, the sub-lessee of the defendant is competent to prove its proper cultivation. (3)

Sub-lessee.

8. Bail.

Bail for the defendant are incompetent witnesses for him, being directly interested in the event of the suit; “for if a verdict be given against the principal, the bail become immediately answerable,” and they are immediately relieved from this liability by the effect of a verdict in his favour. (4)

BAIL.

Bail cannot give evidence for their principal (5); and the wife of the bail is incompetent to give evidence for the defendant, on whose behalf the husband is bound. (6)

Husband and
wife.

Where an attachment has been granted against the sheriff for not putting in bail, but which has been afterwards set aside on terms, one of which is, that the attachment shall stand as a security, the bail to the sheriff are not, under such circumstances, admissible witnesses for the defendant. (7);

Bail to the
sheriff.

A witness who had voluntarily paid into the hands of the sheriff a sum of money on behalf of a defendant in lieu of bail, without any inducement from the latter, was rejected on the *voire dire* as being interested. (8)

A witness called for the defendant stated, on the *voire dire*, that he was bail to the sheriff in the action, but did not justify, and that he had not done any thing to get the recognisance he had entered into discharged; he added, that other bail justified, but it appeared that he did not see them do so: — It was held, that he was not a competent witness. (9)

The defendant's bail may be restored by applying to the court to strike out his name from the bail-piece, or by depositing a sum of money in court at the trial of the cause, as a security for the debt and costs. (10) So a

(1) *Doe d. Wood v. Teage*, 5 B. & C. 335.

(2) 1 C. M. & R. 527. 5 Tyrw. 143.

(3) *Wishaw v. Barnes*, 1 Camp. 341.

Quære, as to any liability over in this case.

(4) *Per* Buller J. in *Carter v. Pearce*, 1 T. R. 164. *Piesley v. Von Esch*, 2 Esp. N. P. C. 605.

(5) *Carter v. Pearce*, 1 T. R. 164.

(6) *Cornish v. Pugh*, 8 D. & R. 65.

(7) *Piesley v. Von Esch*, 2 Esp. N. P. C. 605., vide *Brown v. Neave*, Wightw. 406.

(8) *Lacon v. Higgins*, D. & R. N. P. C. 46.

3 Stark. 184.

(9) *Hawkins v. Inwood*, 4 C. & P. 148.

(10) *Baillie v. Hole*, M. & M. 290., et vide *Pearcy v. Fleming*, 5 C. & P. 503. The amount deposited must be the sum sworn to, and a further sum for costs. *Baillie v. Hole*, 3 C. & P. 560. M. & M. 289. In *Pearcy v. Fleming* (5 C. & P. 503.), one of the bail was called as a witness for the defendants, and objected to; but on a sum equal to double the amount sworn to being

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witness called for a plaintiff, who is liable to the defendant on a bond for the costs of the action, will be allowed to deposit the amount of the penalty of the bond with the officer of the court, and his evidence will then be received. (1)

If one of the bail in an action be a material witness in the cause, to make him admissible, there must be a motion for a rule to shew cause, why his name should not be struck out of the bail-piece, on adding and justifying another in his stead, which the court will order on an affidavit of service, if no sufficient cause be shewn to the contrary. (2)

9. Competency how restored.

COMPETENCY
HOW RESTORED.

A general release in the common form discharges the releasee from all actions in respect of any thing that has happened before the date of the release, although the cause of action was not then complete (3); and if an interested witness be rendered competent by a release, the release must either be produced in court, or evidence must be given of its having been destroyed. (4)

Proof of re-
lease.

Effect of re-
lease.

If an interested person previously to his being sworn, divest himself of such interest, he renders himself a competent witness.

It is said "to have been solemnly agreed by the judges, that where a person had a legacy given, and did release it, he was a good witness to prove the will." (5) So a release from the drawer of a bill of exchange to an acceptor, will render the latter a competent witness. (6)

When the objection to the competency of a witness (such as an accommodation drawer of a bill) appears on the record, his competency is restored by his statement that he has a release, without producing it. (7)

If a witness offer to release his interest, or if a party on whose side the witness be interested propose to remove his interest, the competency of the witness will be restored.

If the witness offer to release or surrender his interests and executes a release accordingly, his competency is restored, though the other party refuse to accept the release. (8) And if the party on whose side the witness be interested, make an offer to remove his interest and the witness refuse, that will not deprive the party of his testimony. (9)

But in an action by an administrator, where a witness called for the plaintiff was entitled to a distributive share of the intestate's estate, it was held, that his competency was not restored by giving a release to the admi-

deposited with the marshal of the Lord Chief Baron, his lordship struck the witness's name out of the bail-piece, and he was examined.

(1) *Lees v. Smith*, 1 M. & Rob. 329.

(2) *Whatley v. Fearnley*, Tidd, 259. *Anon*, 2 Chitt. 103.

(3) *Scott v. Lifford*, 1 Camp. 249. 9 East, 347.

(4) *Corking v. Jarrard*, 1 Camp. 37. If a witness has given a promissory note jointly with others by way of a collateral security, to indemnify the defendant in an action, and his name has been erased from the note by the consent of all the parties to it, his competency is thereby restored, and he may be examined as a witness for the defendant without a release. *Sewell v. Stubbs*, 1 C. & P. 73.

(5) 12 Vin. Abr. Evidence, 14. [F. 53.] cit. per Lord Mansfield in *Windham v. Chetwynd*, 1 Burr. 423., vide etiam *Clarke v. Gannon*, R. & M. 31. *Sewell v. Stubbs*, 1 C. & P. 73. post, 1825. tit. EXECUTORS AND ADMINISTRATORS.

(6) *Scott v. Lifford*, 1 Camp. 249.

(7) *Lunnis v. Row*, 2 P. & D. 538. 3 Jur. 604.

(8) *Bent v. Baker*, 3 T. R. 35. *Goodtitle v. Welford*, Doug. 139.

(9) *Cartwright v. Williams*, 2 Stark. 342., vide etiam *Scott v. Lifford*, 1 Camp. 249. *Wilson v. Hirst*, 4 B. & Ad. 760. Per Best C. J. in *Radburn v. Morris*, 4 Bing. 652.

nistrator of all causes of action from the beginning of the world up to the time of executing the release; because, as observed by Mr. Baron Garrow, "his right depending upon the proceeds of this action, is not a claim existing at that time; it is not extinguished by the release." (1)

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WITNESSES.

In *Duke v. Pownall* (2) it appeared, that several persons had agreed equally to bear the expenses of a joint undertaking, and an action was brought against one of them:—It was held, that another of the contractors was rendered a competent witness for the defendant, if released by him, though the rest did not join in the release.

Contractors
and partners.

In *Wilson v. Hirst* (3) it was held, that a partner or part-owner, not a party to the action, can be rendered competent by a release, or by mutual releases. (4)

In an action against one of the several joint contractors, another joint contractor is, after a release, a competent witness for the defendant to prove, that the plaintiff has no right of action. (5)

In *Jones v. Pritchard* (6) it was held, in an action for work done to a vessel brought against one part-owner, that another part-owner is a competent witness for the defendant after a release, and a release from the witness was not considered necessary.

Part-owners.

If a witness be objected to as a corporator, whose interests are in question, his competency may be restored, either by resignation (7), or by a *bond fide* disfranchisement. (8) But a release to the corporation is ineffectual (9); and a witness who has subscribed the original deed of a company as a member, is not admissible for them in an action by the trustees, on merely proving a parol agreement to give up his share, and to accept a salary as secretary in lieu of it, nor by executing a release of his salary (10); because he retained an interest to enlarge the funds.

Corporators.

In an action by a minor, a release from a guardian is inoperative. (11)

Guardians.

A release of a bond debt by one of several obligees will enure as a release by all (12); and a release to one of several obligors will have the same effect as to all the others, whether the bond be joint or joint and several. (13)

Obligors.

Where a defendant suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff obtained a verdict, it is no ground for a new trial, that the release was not given, but the witness has a remedy on the undertaking. (14)

Omitting to
release a wit-
ness, after un-
dertaking to
execute a re-
lease.

A creditor of a bankrupt's estate, who has sold his debt, is a competent witness in support of the fiat. (15)

Creditor of a
bankrupt's
estate.

(1) *Mathews v. Smith*, 2 Y. & J. 426.

(2) M. & M. 430.

(3) 4 B. & Ad. 760.

(4) Vide *Jones v. Pritchard*, 2 M. & W. 199. *Lampel's case*, 10 Co. 50. (b.), sed vide contra, *Cheyne v. Koops*, 4 Esp. N. P. C. 112. *Simons v. Smith*, R. & M. 29.

(5) *Beckett v. Wood*, 4 Jur. 745.

(6) 2 M. & W. 199., vide *Goodacre v. Breame*, Peake's N. P. C. 232. *Moody v. King*, 2 B. & C. 558. *Young v. Bairner*, 1 Esp. N. P. C. 103. *Jennings v. Griffiths*, R. & M. 42.

(7) *Rex v. Rippon* (Mayor of), 2 Salk. 432. Com. Dig. Franchise (F. 30.).

(8) *Brown v. London* (Corporation of), 11 Mod. 225.

(9) *Godmanchester* (Bailiffs of) v. *Phillips*, 4 A. & E. 550.

(10) *Rigby v. Walthew*, 5 Dowl. P. C. 527.

(11) *Fraser v. Marsh*, 2 Stark. 41.

(12) *Bayley v. Lloyd*, 7 Mod. 250.

(13) Co. Litt. 232. (a.) 2 Rol. Abr. Releas. (G.), 412. *Cheetham v. Ward*, 1 B. & P. 630.

(14) *Hemming v. English*, 1 C. M. & R. 568. 3 Dowl. P. C. 155. 6 C. & P. 542.

(15) *Pulling v. Meredith*, 8 C. & P. 763.

PROOF BY
WITNESSES.

Bankrupt expecting a surplus.

And where a certificated bankrupt, being examined on the *voir dire*, stated, that he had a large landed property, from which he expected a considerable surplus, but had executed a deed of assignment of such surplus to one of his children: — It was held, that this rendered the bankrupt a competent witness, as it was a valid instrument, and transferred a legal right to the surplus, inasmuch as the Bankrupt Act did not provide for a reconveyance of land to the bankrupt. (1)

EFFECT OF A
NOLLE PROSE-
QUI.

Bankrupt co-defendant competent for co-defendant after *nolle prosequi*.

If one of several defendants in an action on a joint contract plead bankruptcy and certificate, and the plaintiff, instead of denying the plea, admit it, and enters a *nolle prosequi* as to the defendant pleading it, such defendant will be a competent witness for a co-defendant who has pleaded to the merits. (2)

Judgment of Chief Justice Tindal in *Aflalo v. Fourdrinier*.

In *Aflalo v. Fourdrinier* (3) the defendants A. and B. were sued on a bill of exchange accepted by them while in partnership. B. pleaded bankruptcy and certificate, and the plaintiff entered a *nolle prosequi* as to him. Having released his surplus effects, he was held to be a competent witness for A. Chief Justice Tindal observing, "The only question in this case is, whether Fourdrinier, upon payment of the whole debt, would be entitled to sue Moses Almosninos, his partner, for contribution, either in law or equity; for if Fourdrinier had this right, he could not call his partner as a witness, it being his direct interest to defeat the action. Before the stat. 49 Geo. 3. c. 121. s. 8. it is clear that the solvent partner, who paid a partnership debt after the date of a commission of bankrupt issued against his partner, might recover the proportion of such debt by an action at law against the bankrupt, and that his certificate would be no bar to such an action. (4) The only question is, whether, since that statute, the solvent partner after payment of the partnership debt, though subsequently to the commission, becomes entitled to prove? for if he can prove, he is obliged to prove; the certificate will be a bar to any action for contribution; and the bankrupt partner is an admissible witness.

"And upon consideration of that act, and of the cases decided thereon, we think Fourdrinier, after payment of this joint debt, would be allowed to prove the share paid by him for his bankrupt partner, and that the bankrupt having obtained his certificate, and released his right to any surplus was, consequently, an admissible witness for the defendant.

"The solvent partner, if not properly a surety for his partner's share, because each is originally liable for the whole, yet may, with strict propriety, be called as to the share belonging to his partner, a person liable for the debt of another, and in that character, would be entitled to prove under the commission." (5)

Nolle prosequi terminates the proceedings in the action, as far as the particular defendant is concerned.

It seems, that the effect of the *nolle prosequi* is entirely to put an end to the proceedings in the action, as far as the particular defendant is concerned; and that consequently, although he was originally one of the parties to the suit, he cannot be considered as a party at the time of trial.

At all events, upon the *nolle prosequi* being entered as to him, he ceases

(1) *Turner v. Preston*, 4 Jur. 584.

(2) *Per Park J. in Emmet v. Butler*, 7 Taunt. 607., vide etiam *Moody v. King*, 2 B. & C. 558. *M'Iver v. Humble*, 16 East, 171. (3) 6 Bing. 306.

(4) *Wright v. Hunter*, 1 East, 20.

(5) As to the effect of stat. 49 Geo. 3. c. 121. s. 8. in restoring competency, vide *Moody v. King*, 2 B. & C. 558. *Exp. Young*, 2 Rose, 40. *Wood v. Dodgson*, 2 M. & S. 195.

to have any immediate interest in the action, and the question of interest in the event, could only arise in respect of a liability over to the other defendant for whom he is called as a witness. Where no *nolle prosequi* is entered as to the witness, his situation is obviously different.

PROOF BY
WITNESSES.

In an action upon a joint contract against two, one who has suffered judgment by default, is not admissible as a witness against the other, to prove that he joined in the contract; because, if the plaintiff succeed in the action, the witness would obtain by means of his own testimony, contribution against the other. (1)

EFFECT OF A
JUDGMENT BY
DEFAULT.

And such a defendant is not competent for the plaintiff, because, if the plaintiff succeed in the action, the witness will be entitled to contribution from his co-defendant; but if the plaintiff fail, the witness will himself be liable for the whole demand, for although, the judgment by default in that particular action would become inoperative by the failure of the plaintiff on the trial, yet the plaintiff might proceed against the witness for the recovery of the whole demand in another action, and the witness would relieve himself from this liability to a new action by establishing the joint liability of his co-defendant. (2)

Joint contracts.

In *Mant v. Mainwaring* (3), a witness similarly situated with the witnesses in the two preceding cases, was considered incompetent for the plaintiff, although he had been released by the plaintiff, as to all actions except the action under trial.

If, however, a defendant who has suffered judgment by default be so situated, that he cannot claim contribution from his co-defendants, he will be a competent witness against them. Thus, in *Worrall v. Jones* (4) Chief Justice Tindal said, "Where the party to the suit who has suffered judgment by default, waves the objection, and consents to be examined, and is called against his own interests, there is no ground, either on principle or authority, for rejecting him."

Defendant
sometimes
competent for
plaintiff.

A co-defendant, suffering judgment by default, may be subpoenaed by the other defendants, his partners, to produce the partnership deed. (5)

In *Ward v. Haydon* (6) it was held by Lord Kenyon, that the defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendant who had pleaded not guilty; because, by reason of the judgment by default, the cause was at an end with regard to the witness, who was not liable to the costs of the issue tried against the other defendant, and was not himself released, whatever might be the event of that issue. (7)

When co-de-
fendant is com-
petent for co-
defendant.

In Buller's *Nisi Prius* (8) it is written, "If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default; but if he plead, and by that means admit himself to be tenant in possession, the court will not afterwards, upon motion, strike out his name. But in such a case, if he consent to let a

(1) *Brown v. Brown*, 4 Taunt. 752. *Green v. Sutton*, 2 M. & Rob. 269.

(2) Phillipps' Ev. 51. *Brown v. Brown*, 4 Taunt. 752.

(3) 8 Taunt. 139. 2 Moore, 9.

(4) 7 Bing. 395. *antè*, 1735., et vide *Norden v. Williamson*, 1 Taunt. 378.

(5) *Colley v. Smith*, 4 Bing. N. C. 285.

(6) 2 Esp. N. P. C. 553. *Ward v. Ventom*, Peake's Add. Cas. 126.

(7) Vide etiam *Anon.* 2 Camp. 233. *n.*, 334. *n.*

(8) 285. (c.)

**PROOF BY
WITNESSES.****Defendant in
trespass.**

verdict be given against him, for as much, as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant." (1)

A defendant who has suffered judgment by default has an immediate interest in reducing the amount of damages; and therefore, seemingly, cannot be called for such a purpose. In *Mash v. Smith* (2) it was held that a defendant in trespass, who had suffered judgment to go by default, was not a competent witness for the other defendants in the same action who have pleaded, if the jury have to assess the damages against him as well as to try the issue as to the other defendants; because it might give such a complexion to the case, as to operate in reduction of the damages against himself. (3)

In trespass, a plaintiff cannot call a co-defendant, who has let judgment go by default, to inculcate his co-defendant. (4)

**Defendant in a
joint ejectment.**

In a joint ejectment, one defendant who has let judgment go by default is a good witness to prove the other in possession (5), because, as observed by Lord Ellenborough, a verdict for the plaintiff would not prevent him from suing the witness for mesne profits, and the only interest of the witness would be, the possibility, that the plaintiff would sue the other defendant alone, which would be too remote an interest to render him incompetent.

**EFFECT OF
STAT 3 & 4
C. 42. ss. 26
& 27.**

Witnesses interested solely on account of the verdict to be admissible.

By stat. 3 & 4 Will. 4. c. 42. s. 26., in order to render the rejection of witnesses on the ground of interest less frequent, it was enacted, "That if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless, be examined; but in that case, a verdict or judgment in the action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him, or any one claiming under him."

Sect. 27.

Direction to indorse the name of the witness on the record.

And by sect. 27. it was further enacted, "That the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence, that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

GENERALLY.

It may be stated generally that stat. 3 & 4 Will. 4. c. 42. s. 26. does not render a man who was sworn before the act, a competent witness afterwards. (6)

(1) Bull. N. P. 286. cit. *Dormer v. Fortescue*, M. T. 9 Geo. 2. Willes, 343. n.

(2) 1 C. & P. 577.

(3) Vide etiam *Webber v. Budd*, Exeter Sum. Ass. 1826, cit. Roscoe's Ev. 119.

(4) *Chapman v. Graves*, 2 Camp. 333. n. sed vide *Worrall v. Jones*, ante, 1735. 1733.

(5) *Doe d. Harrop v. Green*, 4 Esp. N. P. C. 198.

(6) *Barnes v. Stuart*, 1 Y. & C. 119.

PROOF BY
WITNESSES.

Since this statute it is requisite to consider, in all cases of this nature, "whether the witness has a direct and immediate interest in the event of the suit. For if, before the statute, the objection of an indirect interest in the record, was the only objection that could be raised against the admissibility of any particular witness, the competency of such witness will be now restored through the effect of the statute, which removes this indirect interest. But if, before the statute, the witness was open to the objection of a direct interest in the particular suit, as well as that of an indirect interest in the record, the statute appears to have no effect in restoring his competency; for although it removes the latter species of interest, the former still remains behind, and will consequently produce disqualification." (1)

The person under whom a defendant justifies in trespass, may be rendered a competent witness for the defendant by indorsement on the record under stat. 3 & 4 Will. 4. c. 42. (2)

Person under whom a defendant justifies in trespass. Executor.

In an action against the specific legatee of a chattel, which the plaintiff asserted to belong to him, and to have been left with the testator only on trial, the executor of the latter is rendered a competent witness for the plaintiff, for his only interest in the event is, that if the plaintiff obtain the value from the defendant, he cannot afterwards sue the witness for it. (3)

In *Yeomans v. Legh* (4), which was an action for the negligent driving of the defendant's servant, it was held, that since stat. 3 & 4 Will. 4. c. 42. the servant was a competent witness for the defendant without a release, his name being indorsed on the record; Mr. Baron Parke observing, "I have no doubt in this case, that the rule ought to be made absolute, as I think the witness was competent without a release. The effect of the clause in the statute is to make the witness competent, where the only interest is, that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of the damages recovered. I am clearly of opinion, that the effect of the act is to take away the objection to the admissibility of the witness in cases of this sort, and that its operation is not restricted to cases, in which it was before impossible to make the witness competent by a release. The point was similarly decided by the court of Common Pleas a few days ago in the case of *Bowman v. Willis*." (5)

Competency of servant.

Judgment of Mr. Baron Parke in *Yeomans v. Legh*.

In an action for a tailor's bill for clothes supplied to the defendant's servant, the servant is a competent witness for the plaintiff, if his name be indorsed on the record. (6)

The plaintiff and defendant are, in most cases, disqualified on the ground of interest, and that where they have no beneficial interest in the subject-matter of the action, they are, in general, disqualified on the ground of liability to costs.

Plaintiff and defendant.

In *Stanley v. Jobson* (7), which was an action by the payee against the maker of a promissory note, a witness was called for the defendant, who on the *voire dire* admitted, that he was a joint maker with the defendant of the promissory note, the defendant having signed it as his surety. Upon an

Joint maker of a promissory note.

(1) Phillipps' Ev. 79.
(2) *Creevey v. Bowman*, 1 M. & Rob. 496.,
sed vide post, *Stanley v. Jobson*, 2 ibid. 103.
Green v. Warburton, ibid. 105.
(3) *Bowman v. Willis*, 3 Bing. N. C. 669.
(4) 2 M. & W. 419.
(5) 3 Bing. N. C. 669.
(6) *Robinson v. Ferreday*, 8 C. & P. 752.
(7) 2 M. & Rob. 103., vide etiam *Green v. Warburton*, ibid. 105.

PROOF BY
WITNESSES.

Judgment of
Mr. Justice
Patteson in
Stanley v. Job-
son.

Witness in-
terested in the
result of a suit
in equity.

Judgment of
Mr. Baron
Alderson in
Stewart v.
Barnes.

When witness
not rendered
competent by
stat. 3 & 4
Will. 4. c. 42.
s. 26.

Definite in-
terest indepen-
dent of the use
that may be
made of the
verdict.

Joint owner in
fee.

Witness's
liability for
costs.

Drawer of an

objection being made respecting the competency of such witness, Mr. Justice Patteson said, "It is true the witness may not necessarily be liable to the costs of this action, in the event of the verdict passing against the defendant; but the question is, whether there is not a presumption of his being so liable? I think the witness is *prima facie* liable to indemnify his surety against the costs, and that is, I think, sufficient to render him incompetent. Then does the statute get rid of the objection? I think it does not. If the objection were only, that the verdict could be used in evidence, I could indorse the *postea*, and so remove the objection. But the witness is under a liability quite independent of this verdict. He may be liable to repay the defendant, not only the damages and costs to be recovered against the present defendant by the verdict and judgment in this case, but also the defendant's *own* costs. I do not see how my indorsing the *postea* can get rid of that objection."

In *Stewart v. Barnes* (1) it was held, that a witness interested in the result of a suit in equity is not made competent on an issue directed in such suit by stat. 3 & 4 Will. 4. c. 42. ss. 26, 27.; and on an issue to try the validity of a modus within a certain district, an occupier of lands within the district was incompetent to prove such modus, Mr. Baron Alderson observing, "The act of parliament only removes the objection where the witness is incompetent, 'on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him.' Here, it is not a verdict or judgment which would be used in evidence for the witness. It is the decree of a court of equity which might be so used. Neither is this an action, but an issue. I think the statute does not apply, and I have spoken to the other judges of the court of Exchequer, and they are of the same opinion. I am also inclined to think, that the second objection is a valid one, the witness having a direct interest in procuring the modus to be established."

Stat. 3 & 4 Will. 4. c. 42. s. 26. does not apply where the witness has a definite interest independent of the use that may be made of the verdict. Thus, in an action by a corporation to establish an exclusive right of common, a corporator is not rendered competent for the plaintiff; disfranchisement can alone make him competent. (2)

A plaintiff claimed, as occupier of a house, to be entitled to the use of water from a certain watering place. Her sister, who was called as a witness in support of the right, stated on the *voire dire*, that she had been a joint owner in fee with the plaintiff of the house in respect of which the right was claimed, and had conveyed her share to the plaintiff with the usual covenant for title:—It was held, that she was not a competent witness, and that indorsing her name on the record under stat. 3 & 4 Will. 4. c. 42. s. 27. would not render her competent. (3)

Where a witness was objected to in an action on a guarantie, on the ground of his liability for costs, he being the party primarily liable:—It was held, that the case was not within the statute. (4)

Stat. 3 & 4 Will. 4. c. 42. s. 26. does not make the drawer of an accom-

(1) 1 M. & Rob. 472.

(2) *Godmanchester (Bailiffs of) v. Phillips*,
4 A. & E. 550., vide etiam *Walker v. Mas-*
terson, 1 Armstrong & Macartney (Irish), 36.

(3) *Steers v. Carwardine*, 8 C. & P. 570.

(4) *Braithwait v. Coleman*, MS. Hertford
Spring Ass. 1834, cit. *Harrison's Index*,
1047.

modation bill a competent witness for the defendant in an action by the indorsee against the acceptor—the defendant, therefore, cannot examine him without a release.(1)

PROOF BY
WITNESSES.

accommodation
bill.

The acceptor of a bill of exchange is not a competent witness for the defendant, where the defence is, that the goods for the price of which the action is brought, were sent by plaintiff to defendant as payment of witness's acceptance, and he cannot be rendered competent by indorsing his name on the record.(2)

Acceptor of a
bill of exchange.

In an action by the assignees of a bankrupt, for money had and received against a sheriff, who has sold the goods of the bankrupt under an execution, and paid over the proceeds after notice of an alleged act of bankruptcy, the sheriff's officer who acted in the execution (if he had given the usual indemnity bond to the sheriff) is not a competent witness for the defendant, under stat. 3 & 4 Will. 4. c. 42. s. 26.(3)

Sheriff's officer.

In a suit by the assignee under the Insolvent Debtors' Act, to recover some property for the benefit of the estate, a creditor of the insolvent is not a competent witness on behalf of the plaintiff, and he is not rendered competent by stat. 3 & 4 Will. 4. c. 42. ss. 26 & 27.(4)

Creditor of an
insolvent.

In an action on the case for injuring the plaintiff's wall by digging a cellar near it, the workman who dug it, is not made a competent witness for the defendant by stat. 3 & 4 Will. 4. c. 42. s. 26., and therefore must be released by the defendant before he can be examined.(5)

Workmen in
actions of tort.

And in an action against a carrier for negligence in carrying a parcel, the carrier's servant is not made a competent witness for the defendant by stat. 3 & 4 Will. 4. c. 42. s. 26., and cannot be examined without a release.(6)

Carrier's ser-
vant.

In an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, was held not to be a competent witness for the plaintiff without a release; and that stat. 3 & 4 Will. 4. c. 42. s. 26. had made no alteration in the law on this point, because the statute only rendered competent those persons for or against whom the verdict or judgment would be evidence; but if the witness state, what he was expected to state, and should be believed, there never could be any action against him.(7)

Where wit-
nesses liable over
to the plaintiff
will be rejected.

In an action by A. against B. for use and occupation, C., who was called as a witness for the plaintiff, stated that A. had let the premises to him, and that his (C.'s) tenancy was still undetermined. It was proposed on the part of the plaintiff to ask C. whether he had not let the defendant into possession:—But it was held, that this could not be asked unless C. were released by A., and that stat. 3 & 4 Will. 4. c. 42. ss. 26, 27. did not apply to the case, because the witness had a direct interest in the event of the suit; for, as observed by Lord Denman, "if the plaintiffs succeed in getting the amount they now claim from the defendant, that will put an end to their claim for rent for the time they now seek to recover for.

(1) *Burgess v. Cuttill*, 6 C. & P. 282. 1 M. & Rob. 315.

(2) *Sullivan v. Stephens*, 1 Armstrong & Macartney (Irish), 75.

(3) *Groom v. Bradley*, 8 C. & P. 500.

(4) *Holden v. Hearn*, 1 Beav. 445.

(5) *Mitchell v. Hunt*, 6 C. & P. 351.

(6) *Harrington v. Caswell*, *ibid.* 352.

(7) *Harding v. Copley*, *ibid.* 664.

**PROOF BY
WITNESSES.**

The witness, therefore, has a direct interest that, the money should be obtained from the defendant. (1)

**PRIVILEGED
COMMUNICA-
TIONS.****HUSBAND AND
WIFE.**

Cannot be
witness for each
other.

XIII. Privileged Communications.**1. Husband and Wife.**

Mr. Justice Buller (2) states, "That husband and wife (3) cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage." (4)

"It has been resolved," says Lord Coke, "that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carne unâ*, as it might be a cause of implacable discord and dissension between them;" in fact, the risk of an occasional failure of justice has been regarded as outweighed by the necessity of protecting the confidence of domestic life. (5) Thus, in an action brought by a woman as a *feme sole*, the defendant cannot call the plaintiff's husband to prove her married, and thereby to nonsuit her. (6)

A wife is an incompetent witness against her husband, although the marriage took place after the wife was served with a *subpoena* to give evidence in the suit. (7)

The interest to
disqualify must
be vested and
certain.

The same rule prevails in civil as in criminal proceedings, viz. that the interest of the husband must, in order to disqualify the wife, be vested and certain; the mere expectation and hope on her part of benefiting her husband, when she gives evidence against an accomplice of the husband (the latter having been convicted), will not destroy her competency. (8)

**REPUTED
WIFE.**

It is a legal principle, "that parties being in a state of illicit intercourse cannot avail themselves of the benefits and protection which result from a lawful marriage; consequently, a woman is not incompetent from giving evidence in any legal proceeding for a party to whom she is unmarried, but by whom she has always been held out to the world as his wife; because it would be improper to exclude competent testimony in consequence of the misrepresentation of an individual (9), for nothing but a 'legal marriage' can constitute the relation of husband and wife." Thus, a man who has been married may be a witness to prove such marriage illegal. (10)

Persons who cohabit as man and wife after a marriage *de facto*, supposed by both to be a good marriage in law, may, after the marriage is

(1) *Hodson v. Marshall*, 7 C. & P. 16.

(2) N. P. 286. (a.)

(3) *Vide antè*, 709. tit. **BARON AND FEME.**

(4) *Vide etiam Sedgwick v. Watkins*, 1 Ves. jun. 49. *Rex v. Cliviger (Inhab. of)*, 2 T. R. 263. *Davis v. Dinwoody*, 4 T. R. 678. *Rex v. Serjeant*, R. & M. 352.

(5) Co. Litt. 6.(b.), *et vide per Lord Eldon* in *Rex v. Luffe*, 8 East, 202.

(6) *Bentley v. Cook*, cit. *Rex v. Cliviger (Inhab. of)*, 2 T. R. 265. 269., *vide etiam Colvin v. Fraser*, 2 Hagg. 277. *Jourdain v.*

Lefevre, 1 Esp. N. P. C. 667. *Dale v. Johnson*, Str. 568. *Per Lord Eldon* in *Le Turc v. Anspach (Margravine of)*, 15 Ves. 165.

(7) *Pedley v. Wellesley*, 3 C. & P. 558.

(8) *Rex v. Rudd, Leach*, C. C. 135.

(9) *Batthews v. Galindo*, 4 Bing. 610. 5 C. & P. 238. 1 M. & P. 465. *Rex v. Aley Leach*, C. C. 245. *Mace v. Cadell*, Comp. 233., *sed vide Campbell v. Twemlow*, 1 Price, 81.

(10) *Standen v. Standen*, Peake's N. P. C. 45. *Rex v. Bramley (Inhab. of)*, 6 T. R. 331. n.

found to be a nullity, give in evidence, in a court of justice, statements made by each other during the cohabitation. (1)

PROOF BY
WITNESSES.

Therefore a woman who was married to a man, but whose marriage to him is void by reason of her having a former husband living, who had been supposed dead, may be examined against him to prove any declarations he made, while she lived with him as his wife. (2) So, likewise, on an appeal against the removal of a woman as the widow of A. B. deceased, *prima facie* evidence of the marriage having been produced on the part of the respondents, the court of King's Bench determined, that the woman was a competent witness on the part of the appellants, to disprove the marriage. (3)

A husband is incompetent to give evidence in support of the interest of his wife, who takes a reversion in fee, in the property in dispute. (4) The wife of the bail of a defendant, is an incompetent witness for the defendant (5); the wife of a bankrupt cannot be examined to prove his bankruptcy (6); and this principle equally applies, when the wife is substantially the plaintiff in the suit: thus, in an action brought by the executrix of a surviving trustee under a marriage settlement, to recover back the value of certain goods, which had been sold by the defendant as sheriff, under an execution against the husband of the *cestuique trust*, the husband was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife, for the wife was substantially the plaintiff in the suit. (7)

Incompetency of husband to give evidence in support of the interest of his wife.

"It is a rule founded in decency, morality, and policy, that husband and wife shall not be allowed to say, after marriage, that they have had no connection, and therefore, that the offspring is spurious, more especially the mother, who is the offending party." The incompetency of married people to prove non access (8), has occasionally been rested on the grounds of necessity or of interest, which grounds, however, will not support all the authorities. The wife seems to be competent to prove access, where no question of interest is involved; and it would seem, that, in such a case, her statements as to non access might be used to contradict her. (9)

Sexual intercourse.

Where a man or wife are divorced by act of parliament, a wife is not competent to prove a contract made by her husband previous to the divorce, because, the confidence between a man and wife should be kept for ever inviolable (10); and, in *Scholey v. Goodman* (11) it seems, the court of Common Pleas doubted, whether the declarations of a wife having a

Conversations between husband and wife. Man and wife divorced.

(1) *Wells v. Fletcher*, 5 C. & P. 12. S. C. nom. *Wells v. Fisher*, 1 M. & Rob. 99.

(2) *Ibid.*

(3) *Rex v. Bramley (Inhab. of)*, 6 T. R. 330. *Rex v. St. Peter's*, Burr. S. C. 25. *Phillipps' Ev.* 173. In one instance Lord Kenyon refused to admit a woman to be examined as a witness for a prisoner charged with forgery, who had himself in court represented her to be his wife, but denied the marriage on hearing the objection taken to her competency. 2 Stark. Ev. 403. cit. by Richards B. in *Campbell v. Twemlow*, 1 Price, 81.

(4) *Hatfield v. Thorp*, 5 B. & A. 589.

(5) *Cornish v. Pugh*, 8 D. & R. 65.

(6) *Exp. James*, 1 P. Wms. 611.

(7) *Davis v. Dinwoody*, 4 T. R. 678. *Holdfast d. Anstey v. Dowsing*, Str. 1253.

(8) *Rex v. Rook*, 1 Wils. 340.

(9) *Goodright d. Stevens v. Moss*, Cowp. 592. *Rex v. Luffe*, 8 East, 203. *Rex v. Rook*, 1 Wils. 340. *Rex v. Kea (Inhab. of)*, 11 East, 132. *Pendrell v. Pendrell*, Str. 925. Bull. N. P. 287. (a.) *Rex v. Serjeant*, R. & M. 354. *Rex v. Sourton (Inhab. of)*, 5 A. & E. 180. *Phillipps' Ev.* 169.

(10) *Per* Lord Alvanley in *Monroe v. Twisleton*, Peake's Add. Cas. 219. *Per* Lord Ellenborough in *Aveson v. Kinnaird (Lord)*, 6 East, 192., vide etiam *Scholey v. Goodman*, 1 Bing. 349. *Hodgkinson v. Fletcher*, 4 Camp. 70.

(11) 1 Bing. 349. 8 Moore, 350. 1 C. & P. 36.

**PROOF BY
WITNESSES.**

Widow of a
deceased
husband.

separate maintenance were admissible to shew, that she was living in adultery. (1)

But whether the widow of a deceased person is competent to prove for a defendant an admission by her husband in an action brought by her husband's executors, is a *veraxa questio*. In *Beveridge v. Minter* (2) Lord Tenterden received such evidence; but in *Doker v. Hasler* (3) Chief Justice Best rejected such evidence. (4)

Upon abstract principles of justice it seems, that the rule which excludes a violation of nuptial confidence ought not to be extended beyond these cases, in which the wife and husband were the only parties: in *Humphrey v. Boyce* (5) a wife's declarations during coverture were received in a suit brought by her administratrix against her husband.

Under excepted circumstances, the evidence of husband or wife is admissible against the other; and it is a general rule, that if the evidence of husband or wife be admissible against the other, it is likewise admissible in the other's favour. (6) Thus, where the defence is the adultery of the wife, a statement made by her confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband; and so are letters from different men found by him at that time in her writing-desk. (7)

Wife admissible as evidence with consent of husband.

It seems that a wife is admissible evidence against her husband, if he give his consent to her being examined as a witness, under the principle, that then there is no violation of confidence. Thus, in *Pedley v. Wellesley* (8) Chief Justice Best said, he would receive the evidence of the defendant's wife, if the defendant had consented, but the defendant refused his consent. But in *Barker v. Dixie* (*Sir Woolston*) (9) Lord Hardwicke would not suffer a woman to be a witness though her husband consented.

Collateral proceedings.

Mr. Phillipps observes (10), "Although the husband and wife are not allowed to be witnesses against each other, where either is interested in the event of a proceeding, whether civil or criminal, it seems, that in collateral proceedings, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate each other, and notwithstanding the testimony of the one, contradicts that of the other, or subjects the other to a legal demand;" because such evidence induces no breach of that confidence between married persons which ought to be held sacred.

Declarations in the nature of facts.

Declarations of the parties which are in the nature of facts are admissible, because in such cases the presumptions which are made are not founded on the *credit* of the party but of the fact; and the objection on the score of policy is out of the question. Thus, the declaration of the wife at the time of effecting a policy on her life, of the bad state of her health, is evidence against her husband. So a declaration by the wife at the time of leaving her husband's house, that she fled through fear of violence, is evidence

(1) Vide *Hodgkinson v. Fletcher*, 4 Camp. 70. Phillipps' Ev. 168.

(2) 1 C. & P. 364.

(3) R. & M. 198. 2 Bing. 479.

(4) Vide etiam *Aveson v. Kinnaird* (Lord), 6 East, 192.

(5) 1 M. & Rob. 140.

(6) Per Abbott C. J. in *Rex v. Serjeant*, R. & M. 354.

(7) *Walton v. Green*, 1 C. & P. 621. ant. 26.

(8) 3 ibid. 558.

(9) R. T. H. 264.

(10) Ev. 162., vide *Rex v. Bathrick* (hab. of), 2 B. & Ad. 639. *Heaman v. Dickson*, 5 Bing. 183. and cases therein cited.

against the husband. (1) The interest of the husband must, as previously observed, to disqualify the wife, be vested and certain; the mere expectation and hope on her part of benefiting her husband, will not cause incompetency; and the party to whom the testimony of the wife is essential, has a legal interest in her evidence.

PROOF BY
WITNESSES.

A wife may be a witness in an action between third persons, not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand; as, in an action between third persons for goods sold and delivered, to prove that the goods had been sold, not on the credit of the defendant, but on her husband's credit. (2)

Action between
third persons.

Though a husband will not in general be bound by any admissions made by his wife, even where he is suing *in jure uxoris* (3), yet, where a husband permits his wife to act for him in any department or business, her admissions or acknowledgments are evidence to charge the husband (4); although they may have the effect of taking a case out of the Statute of Limitations. (5) Admissions made by the defendant's wife, who served in her husband's shop, and conducted his business in his absence, may be given in evidence against her husband, on an application to pay for goods sold and delivered at the shop. (6)

Admissions by
wife as the
agent of the
husband.

The declarations of a married woman during coverture, of the non payment of money lent to her before marriage, are admissible in evidence for the plaintiff in an action brought against her husband as her administrator. (7)

ADMISSIONS
GENERALLY.

In an action brought by the husband and wife for a debt due to the wife *dum sola*, any admission respecting it made by the wife after marriage, is inadmissible as against her husband. (8)

2. Arbitrators.

ARBITRATORS.

An arbitrator cannot be compelled to give evidence in a cause relative to matters that occurred before him during the arbitration. (9)

Arbitrators
cannot be com-
pelled to give
evidence.

Where a cause has been referred, and the arbitrator, upon inspection of the plaintiff's books and examination of the parties, finds, in an action for malicious prosecution, that the plaintiff had no cause of action, the arbitrator cannot be called as a witness to establish such facts. (10)

An arbitrator may be called to prove, what matters were claimed before him on a reference. (11)

Arbitrator can
prove, what
matters were
claimed before
him on a re-
ference.

(1) *Aveson v. Kinnaird* (Lord), 6 East, 188. 2 Stark. Ev. 403., *vide antè*, 26.

(2) *Williams v. Johnson*, Str. 504. Bull. N. P. 287. (a.)

(3) *Alban v. Pritchett*, 6 T. R. 680. *Hall v. Hill*, Str. 1094. *Denn v. White*, 7 T. R. 112. *Anon.* Str. 527. *Wrottesley v. Bendish*, 3 P. Wms. 238.

(4) *Emerson v. Blonden*, 1 Esp. N. P. C. 142. *Anderson v. Sanderson*, 2 Stark. 204. Holt's N. P. C. 591., *vide etiam Hodgkinson v. Fletcher*, 4 Camp. 70. *Carey v. Adkins*, *ibid.* 92. *Petty v. Anderson*, 3 Bing. 170. *Barlow v. Bishop*, 1 East, 432. *Cotes v. Davis*, 1 Camp. 485. *Barker v. Wray*, 2 Russ. 70. Bull. N. P. 287. (a.) *Phillipps' Ev.* 408., *vide antè*, 709. tit. *BARON AND FEME.*

(5) *Paletthorp v. Furnish*, 2 Esp. N. P. C. 511. n. *Gregory v. Parker*, 1 Camp. 395.

(6) *Clifford v. Burton*, 8 Moore, 16. 1 Bing. 199., *vide antè*, 709., tit. *BARON AND FEME.*

(7) *Humphreys v. Boyce*, 1 M. & Rob. 140.

(8) *Kelly v. Small*, 2 Esp. N. P. C. 716. Respecting declarations of husband and wife in cases of pedigree, *vide antè*, 1596.

(9) *Johnson v. Durant*, 4 C. & P. 327. 2 B. & Ad. 925.

(10) *Habershon v. Troby*, 3 Esp. N. P. C. 38. *Peake's Add. Cas.* 181.

(11) *Martin v. Thornton*, 4 Esp. N. P. C. 181.

**PROOF BY
WITNESSES.**

Matters come
adversely be-
fore arbitrators.

Matters are as adverse before an arbitrator, as before any other tribunal (1): because, the essence of an offer of compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession; and Lord Kenyon in *Slack v. Buchanan* (2) said, he should receive such admissions before an arbitrator, as a party would be compelled to make by a bill of discovery.

COUNSEL.

Professional
communica-
tions to counsel
are privileged.

3. Counsel.

Communications made to counsel in their professional character, fall within the rules applicable to confidential communications: thus, a party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk, or otherwise. (3)

A barrister cannot be called as a witness to prove, what was stated by him on a motion before the court (4); but it is at the option of a counsel to relate, what was stated by him in making a motion before the court; seemingly, because it is not on the ground of confidence, but of protection to his situation. (5)

Counsel per-
mitted to take
a special oath.

In *Sparke v. Middleton (Sir Hugh)* (6) the counsel for the defendant was called by the plaintiff, and allowed to take a special oath; and in equity, a party has been obliged to produce cases submitted for the opinion of counsel, but not the opinions thereon. (7)

ATTORNEYS.

Privileged
communica-
tions.

4. Attorneys.

Communications made on the faith of that professional confidence, which a client reposes in his counsel, attorney, or solicitor, are not allowed to be revealed in a court of justice to the prejudice of the client, and they cannot be revealed at any time, or in any proceeding, and this, notwithstanding the relation of attorney and client has ceased.

This is the privilege of the client, and is founded on the policy of the law, which will not permit a person to betray a secret that the law has entrusted to him, because, to allow such an examination, would be a manifest hindrance to all society, commerce, and conversation. (8)

This privilege of professional confidence is not confined to cases in which a suit is in contemplation, but extends to all cases, where a communication is made to an attorney as such. (9)

If an attorney be desirous of betraying his trust, he will be restrained

(1) *Doe v. Evans*, 3 C. & P. 220. *Gregory v. Howard*, 3 Esp. N. P. C. 113.

(2) *Peake's* N. P. C. 7. *Gregory v. Howard*, 3 Esp. N. P. C. 113. *Thompson v. Austen*, 2 D. & R. 358.

(3) *Foots v. Hayne*, 1 C. & P. 545. R. & M. 165.

(4) *Curry v. Walter*, 1 Esp. N. P. C. 456. S. C. not S. P. 1 B. & P. 525.

(5) *Ellis v. Saltau*, cit. *Johnson v. Durant*, 4 C. & P. 327. *Habershon v. Troby*, 3 Esp. N. P. C. 38.

(6) 1 Keb. 505.

(7) *Preston v. Carr (Knight)*, 1 Y. & J. 175.

(8) *Vide antè*, 418. tit. ATTORNEY. Bull. N. P. 284. (a.) *Wilson v. Rastall*, 4 T. R. 759. *Sandford v. Kensington*, 2 Ves. jun. 189.

(9) *Per* Lord Chancellor Brougham in *Greenough v. Gaskell*, *antè*, 418. tit. ATTORNEY. *Clark v. Clark*, 1 M. & Rob. 5. *Per* Lord Ellenborough in *Gainsford v. Grammar*, 2 Camp. 10. *Cobden v. Kendrick*, 4 T. R. 431. *Wilson v. Rastall*, *ibid.* 753., et *vide Cuts v. Pickering*, 1 Vent. 197.

from such an act, by the court (1); and a court of equity has ordered such matter to be expunged (2)

PROOF BY
WITNESSES.

The protection afforded to professional confidence, applies not only to the professional advisers of the parties to a suit, but also to the professional advisers of strangers to the suit. (3)

Attorney of
stranger to
suit.

A person who acts as interpreter (4), or agent (5), as the organ of communication between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same condition of secrecy: an attorney's clerk cannot be called to prove a confidential communication. (6)

Verbal com-
munications.

An attorney cannot give parol evidence of deeds which have been entrusted to him; so neither can he furnish a copy; neither ought he to communicate to others what was deposited with him in confidence, whether it be a written or verbal communication. And if a deed, deposited confidentially with an attorney, have been obtained from him for the purpose of being produced in evidence by another witness, it cannot be received. (7)

Production of
deeds.

The attorney of a stranger to the cause cannot produce a case with the opinion of counsel, which he holds confidentially for his client. (8) The solicitor of one of the parties to a deed of composition, is not compellable to produce it in an action between strangers. (9) But where, by an order of the court of Chancery, made in a suit between a lessor and a lessee, a lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same:—It was held, in an action of ejectment brought by the lessee against the tenant in possession, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title. (10)

Opinion of
counsel.
Title-deeds.

An attorney is not compellable to state, whether a document shewn to him by his client in the course of a professional interview, was in the same state as when produced on the trial; as, for example, whether it was then stamped or not. (11)

If an attorney be called upon to produce deeds or papers belonging to his client, who is not a party to the suit, the court will inspect the documents, and decide upon their admissibility upon analogous principles to those, under which a witness objecting to the production of his own title-deeds is protected. (12)

Inspection of
deeds by the
judge.

(1) *Petrie's case*, cit. 4 T. R. 759. *Sandford v. Remington*, 2 Ves. jun. 189.

(2) *Ibid.*

(3) *Rex v. Withers*, 2 Camp. 578.

(4) *Du Barré v. Livette*, Peake's N. P. C. 108. recog. 4 T. R. 756.

(5) *Parkins v. Hawkshaw*, 2 Stark. 239. 381. As to executors of attorney, *Fenwick v. Reed*, 1 Meriv. 114.

(6) *Taylor v. Forster*, 2 C. & P. 195. *Rex v. Boddington (Upper)*, 8 D. & R. 732.

(7) *Per Bayley J. in Fisher v. Heming*, Leicester Lent Ass. 1809. *Brard v. Ackerman*, 5 Esp. N. P. C. 119. *Bate v. Kinsey*, 1 C. M. & R. 42. *Bothomley v. Osborne*, Peake's Add. Cas. 101. *Cook v. Hearn*, 1 M. & Rob. 201.

(8) *Rex v. Woodley*, 1 M. & Rob. 390., vide *Ditcher v. Kenrick*, 1 C. & P. 161.

(9) *Harris v. Hill*, 3 Stark. 140.

(10) *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

(11) *Wheatley v. Williams*, 1 M. & W. 533. It was said by Lord Abinger "that the case in Bull. N. P. 284. must apply to a case where the attorney has his knowledge independently of any communication from the client;" "and that if a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the communication."

(12) *Copeland v. Watts*, 1 Stark. 95. *Hawkins v. Howard*, R. & M. 64. *Laing v. Barclay*, 3 Stark. 38. *Bateson v. Hartsink*, 4 Esp. N. P. C. 43. *Pearson v. Fletcher*, 5 *ibid.* 90. *Corsen v. Dubois*, Holt's N. P. C. 239. *Cohen v. Templar*, 2 Stark. 260. *Nixon v. Mayoh*, 1 M. & Rob. 76., vide *antè*, 1713.

**PROOF BY
WITNESSES.**

Judgment of
Mr. Baron
Alderson in
Tarquand v.
Knight.

Attorney of
two persons.

CLIENT CAN
WAVE HIS PRI-
VILEGE.

COMMUNICA-
TIONS NOT PRI-
VILEGED.

Questions re-
lating to mat-
ters of fact.

Judgment of
Chief Justice
Abbott in
Bramwell v.
Lucas.

The result of the authorities respecting privileged communications seems to be embodied in the following judgment of Mr. Baron Alderson in *Tarquand v. Knight* (1), where the learned baron said, "The rule seems to be correlative with that, which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aithin* (2) that rule is laid down thus:—"Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction." So, where the communication made, relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure."

When a deed or other paper is entrusted to an attorney by two persons, the attorney must, as against strangers, keep it according to the nature of his original employment, and subject to persons by whom he is employed. If a draft be confidentially deposited with the vendor's attorney by the purchaser, as well as by the vendor, it cannot be produced at the trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (3) If an attorney employed by a borrower to raise money for him, peruse, on the part of the proposed lender, the abstracts of the borrower, he cannot give evidence concerning them against the borrower. (4) But communications made to an attorney acting as such, between two parties, are not privileged from disclosure against either party, each party having a right to such disclosure. (5)

The client can waive his privilege, and thus the competency of the attorney will be restored. And if a counsel or attorney be called as a witness by his client, he is not protected from cross-examination, as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not be extended to other points in the cause (6); and the rule applies, whether the question be asked upon an examination in chief, or upon cross-examination. (7)

Communications by an attorney to the opposite party or to strangers, and communications between a plaintiff and defendant in the presence of an attorney, are not privileged. (8)

"A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of

(1) 2 M. & W. 101.

(2) 4 B. & A. 49. *Exp. Yeatman*, 4 Dowl. P. C. 309.

(3) *Doe d. Strode v. Seaton*, 2 A. & E. 171.

(4) *Doe d. Peter v. Watkins*, 3 Bing. N. C. 421., et vide *Taylor v. Blacklow*, ibid. 235.

(5) *Cleve v. Powel*, 1 M. & Rob. 228. *Braugh v. Cradocke*, ibid. 182., vide *Robson v. Kemp*, 4 Esp. N. P. C. 235., where the assignees of one of two persons employing

an attorney to prepare a deed were not allowed to use the attorney's evidence against the other, alleging fraud.

(6) *Vaillant v. Dodemead*, 2 Atk. 524., vide etiam *Merle v. More*, R. & M. 390.

(7) *Waldron v. Ward*, Sty. 449.

(8) *Gainsford v. Grammar*, 2 Camp. 10., vide *Ripon v. Davies*, 2 N. & M. 310. *Griffith v. Davies*, 5 B. & Ad. 502. *Turner v. Railton*, 2 Esp. N. P. C. 474. *Meyer v. Sefton*, 2 Stark. 274.

fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and where the character and office of an attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded." (1)

PROOF BY
WITNESSES.

A person, though by profession an attorney, if he be not employed on the particular business which is the subject of inquiry, as where he is under-sheriff at the time, is not precluded from giving evidence, though he may have been consulted confidentially. (2)

And a person who is consulted confidentially, on the supposition of his being an attorney when in fact he was not one, is compellable to answer (3); and "if he were merely a licensed conveyancer, it would be difficult to say that he would be privileged." (4)

Person consulted confidentially on the supposition of his being an attorney.

Where a witness called on the defendant in the Marshalsea, and solicited him, if he intended to take the benefit of the Insolvent Act, to employ a certain attorney, but stated, as the fact was, that he was not the agent, nor then in the employment of the attorney, but that he expected to be :— It was held, that defendant's disclosures to this witness concerning the subject-matter of the action were not privileged. (5)

An attorney is not privileged from disclosing as a witness, a statement made by his client, relative to the subject-matter of a suit, if such statement was not necessary for the purpose of the proceedings on which the attorney was employed. (6)

COLLATERAL COMMUNICATIONS.

Thus, where a person (who had brought an action on a promissory note, which was afterwards compromised by the defendant) informed the attorney after the compromise, and in the interval between the time when a warrant of attorney was given, and that at which the money was to become due, that there never had been any consideration for the note, the court of King's Bench held, that the attorney was compellable to disclose that circumstance in an action brought to recover back the money; the court observing; the communication was not made in confidence, as instructions for conducting his cause, but as a mere *gratis dictum*; the purpose in view had been already obtained; and what was said by the client was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit. (7)

An attorney conducting a cause in court may be called as a witness by the opposite side, and asked the name of his employer, in order to shew the real party, and thus, make his declarations evidence. (8)

Attorney may be examined as to the person by whom employed.

Where an attorney sued for work and labour in issuing an execution against C., and the defence was, that he was employed by B., and not by the defendant :— It was held, that the plaintiff's agent, an attorney, might be asked, whether the plaintiff had not said, on introducing B. to him, that

(1) *Bramwell v. Lucas*, 2 B. & C. 744.

(2) *Wilson v. Rastall*, 4 T. R. 753., vide *Rex v. Brewer*, 6 C. & P. 363. *Hill v. Elliott*, 5 *ibid.* 436.

(3) *Fountain v. Young*, 6 Esp. N. P. C. 113.

(4) *Per Parke B. in Turquand v. Knight*, 2 M. & W. 100.

(5) *Harman v. Harman*, 1 Armstrong & Macartney (Irish), 89.

(6) *Gillard v. Bates*, 8 Dowl. P. C. 774. 6 M. & W. 547.

(7) *Cobden v. Kendrick*, 4 T. R. 432., vide etiam *Annesly v. Anglesey* (Lord), 17 Howell's St. Tr. 1221.

(8) *Levy v. Pope* (Sheriff), M. & M. 410.

**PROOF BY
WITNESSES.**

he, the plaintiff, had been employed by B. to issue execution against C, because, this was not a privileged communication. (1)

An attorney may be called to prove, the identity of the defendants to a suit, though he knows nothing of them, but from his intercourse with them professionally (2): he may prove, that his client is in the possession of a particular document, so as to let in secondary evidence of its contents (3); and he may prove his client's handwriting. (4)

Execution of deed.

Thus, if he be the subscribing witness to a deed, he may be examined concerning its execution. (5)

Erasure in a deed.

If there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state, unless his entire knowledge respecting such deed was acquired after his retainer. (6)

Answer in Chancery.

If an attorney were present, when his client was sworn to an answer in Chancery, he might be a witness, on an indictment for perjury, to prove the fact of taking the oath, which is not a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy. (7)

Written notice.

The attorney of one of the parties can be examined as to the contents of a written notice, which had been received by him in the course of the cause, requiring him to produce papers. (8) And on the same principle and with the like qualification, an attorney was admitted by Lord Kenyon, in an action of debt upon a bond, to prove that the bond had been given on an usurious consideration. (9)

PEERS, CLERGYMEN, MEDICAL MEN, FRIENDS, BANKERS, STEWARDS, CLERKS.

5. *Peers, Clergymen, Medical Men, Friends, Bankers, Stewards, Clerks.*

Correspondence to or from peers (10), confessions to "Protestant" clergymen or Popish priests (11), communications to medical advisers (12), friends (13), bankers (14), stewards (15), or to the clerk of a board of public commissioners, though under an oath of office not to disclose what he should officially learn as their clerk:—are unprivileged. (16)

**WITNESSES
RENDERED IN-
COMPETENT
FROM PUBLIC
POLICY.**

XIV. *Witnesses rendered incompetent from public Policy.*

If the public disclosure of facts would be inimical to the national interests or policy, such facts are inadmissible evidence.

Communications in official correspondence, relating to matters of state

(1) *Gillard v. Bates*, 8 Dowl. P. C. 774. 6 M. & W. 547.

(2) *Studdy v. Sanders*, 3 D. & R. 347. For other examples vide *Beckwith v. Benner*, 6 C. & P. 681. *Hurd v. Moring*, 1 ibid. 372. *Eicke v. Nokes*, M. & M. 303. *Rex v. Watkinson*, Str. 1122.

(3) *Bevan v. Waters*, M. & M. 235.

(4) 2 Hawk. P. C. c. 46. s. 89.

(5) *Doe d. Jupp v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. N. P. C. 235. 5 ibid. 53.

(6) Bull. N. P. 284. (a.) *Cutts v. Pickering*, 1 Vent. 197.

(7) Bull. N. P. 284. (a.)

(8) *Spenceley v. Schulenburgh*, 7 East, 357.

(9) *Duffin v. Smith*, Peake's N. P. C. 146.

(10) 11 Howell's St. Tr. 246.

(11) *Gilham's case*, R. & M. C. C. 196. *Rex v. Sparkes*, cit. in *Du Barré v. Livett*, Peake's N. P. C. 108. *Butler v. Moore*, Maccnally, 523.

(12) *Wilson v. Rastall*, 4 T. R. 759. *Rex v. Gibbons*, 1 C. & P. 97. *Duchess of Kingston's case*, 20 Howell's St. Tr. 613, 614.

(13) *Ratcliffe's case*, 18 Howell's St. Tr. 428. *Lord Russell's case*, 9 ibid. 593.

(14) *Loyd v. Freshfield*, 2 C. & P. 329.

(15) *Fulmouth (Earl of) v. Moss*, 11 Price 455. *Vaillant v. Dodemead*, 2 Atk. 594. Per Buller J. in *Wilson v. Rastall*, 4 T. R. 753.

(16) *Lee, q. t. v. Birrell*, 3 Camp. 357.

cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer, not only because such communications are confidential, but because their disclosure might betray secrets of state policy, which might be injurious to the interests of the country: thus, a clerk of the works in the ordnance department in the Tower of London was not permitted to prove the accuracy of a plan of the interior of the Tower. (1) Nor can an extract be admitted relating to the particular matter, because the whole must be read, or none. (2)

PROOF BY
WITNESSES.

Official communications between the governor and law officers of a colony (3); orders given by the governor of a colony to a military officer (4); correspondence between an agent of government and a secretary of state (5); the report of a military court of inquiry respecting an officer whose conduct the court had been appointed to examine (6); official correspondence between the commissioners and an officer of the customs (7); letters from a secretary of state to persons acting under his authority (8); and confidential communications at the council board (9): — are privileged communications from public policy.

Officers of
government.

A member of parliament cannot reveal the councils of the nation, and is incompetent as a witness to prove any particular expressions or arguments which have occurred, during the sittings of the house (10); but a member of parliament, or the speaker, may be required to give evidence of the fact of a member of parliament having taken part or spoken on a particular debate. (11)

Member of
parliament.

On the trial of Hardy for high treason, a man, who had been employed by an officer of the executive government to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature of the connection that had subsisted between himself and the officer. (12)

Communica-
tions of spies.

Upon the principle of convenience to public justice, questions, which tend to the discovery of the channels by whom disclosures are made to the officers of justice, cannot be asked. (13)

Agents of
government.

It is doubtful, whether a grand jurymen be privileged to disclose the evidence laid before the grand jury in the course of a criminal proceeding. (14)

Grand jury-
man.

On the trial of Watson for high treason, a witness was questioned respecting his production of a certain writing and reading it before the grand jury. Upon an objection being raised to such an examination, Lord Ellenborough said, "He had considerable doubt upon the subject; he remem-

(1) *Rez v. Watson*, 2 Stark. 148.
(2) *Anderson v. Hamilton* (Sir W.), 8 Price, 244. n. 4 Moore, 593. n. 2 B. & B. 156. n.
(3) *Wyatt v. Gore*, Holt's N. P. C. 299., et vide *Cooke v. Maxwell*, 2 Stark. 184.
(4) Ibid.
(5) *Anderson v. Hamilton* (Sir W.), 2 B. & B. 156. n. 8 Price, 244. n.
(6) *Home v. Bentinck* (Lord F. C.), ibid. 130., vide *Lee, q. t. v. Birrell*, 3 Camp. 337.
(7) *Black v. Holmes*, 2 Fox & Smith (Irish), 28.
(8) *Sayer's case*, cit. 6 T. R. 577.
(9) Ibid. 6 St. Tr. 288. fol. ed., sed vide *contra*, Roscoe's Crim. Ev. 149, 150.

(10) *Plunkett v. Cobbett*, 29 Howell's St. Tr. 71, 72. 5 Esp. N. P. C. 137.
(11) Ibid.
(12) *Hardy's case*, 24 Howell's St. Tr. 753. *Horne Tooke's case*, Gurney's Rep. 159., vide etiam 32 Howell's St. Tr. 100.
(13) *Hardy's case*, 24 Howell's St. Tr. 753. et seq.
(14) *Anon.* 4 Black. Com. 126. n. by Christian. *Sykes v. Dunbar*, 2 Stark. on Slander, 70. n., sed vide Tri. per Pais, 226. 12 Vin. Abr. Evidence, 38. [B. a.]. *Sir J. Fenwick's case*, 5 Harg. St. Tr. 72. 32 Howell's St. Tr. 107.

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WITNESSES.**

bered a case in which a witness was questioned as to what passed before the grand jury, and, though it was a matter of considerable importance, he was permitted to answer." The solicitor general observed, "That if such a case had not occurred, he should have thought that what passed before the grand jury could not properly be inquired into, as they are sworn to secrecy;" to which Lord Ellenborough observed, that "He had doubts, and that many very eminent men at the bar had entertained doubts upon the point; but he remembered the case perfectly." (1)

Private communications to official persons.

Communications, though made to official persons, are not privileged if not made in the discharge of a public duty. Thus, a letter written by a private individual to the secretary of the postmaster general, complaining of the conduct of the guard of a mail, has been held not to be within the principle of the rule justifying the exclusion of evidence as being privileged. (2)

Indecency of evidence.

The oath of secrecy taken by the clerk of the property tax commissioners, was held not to exempt him from giving evidence in court. (3)

Where the purposes of public justice require, that certain evidence should be given, which the court from regard to decency would be disposed to suppress (whether upon indictment for crimes, or on questions of private rights or private wrongs), the evidence, however inconvenient, must be disclosed (4); but the courts have refused to try wagers, whether an unmarried woman has had a child, on the ground of their leading to admission of indecent evidence, or as being an unnecessary injury to the feelings of third persons. (5)

**EXAMINATION
OF WITNESSES.****XV. Examination of Witnesses.****1. Witnesses ordered out of Court.**

WITNESSES ORDERED OUT OF COURT.

To obviate the danger of a concerted story, the witnesses in a case will, upon the application of either party, be ordered out of court, and recalled according to circumstances.

Witness coming into court, and hearing some of the evidence after having been ordered out.

It has been held, that if a witness come into court, and hear some of the evidence, after the witnesses have been ordered out of court, it is in the discretion of the judge (subject, however, to observation on his conduct in disobeying the order (6)), whether he shall be examined or not;—and this is so in the Exchequer as well as in other courts, the only difference in that court being confined to revenue cases, in which the rule is strict, that such witness cannot be examined. (7)

In *Beamon v. Ellice* (8) one of the witnesses, who had been ordered out of court came into court again, and heard the evidence of another witness. The witness who had so come back into court was allowed to be examined as to such facts only, as had not been spoken to by any other witness.

The case of *Cook v. Nethercote* (9) is seemingly at variance with the foregoing cases, in which it was held, that it was no ground for rejecting a

(1) 32 Howell's St. Tr. 107.

(2) *Blake v. Pilfold*, 1 M. & Rob. 198.

(3) *Lee, q. t. v. Birrell*, 3 Camp. 336.

(4) *Da Costa v. Jones*, Cowp. 733.

(5) *Ibid. Ditchburn v Goldsmith*, 4 Camp. 52.

(6) *Rex v. Colley*, M. & M. 329.

(7) *Att. Gen. v. Bulpit*, 9 Price, 4. *Thomas v. David*, 7 C. & P. 350. *Parker v. M^r William*, 6 Bing. 683. 4 M. & P. 480.

(8) 4 C. & P. 585.

(9) 6 *ibid.* 741.

witness's evidence, that he remained in court, after an order for all the witnesses to leave the court; Mr. Baron Alderson observing, "That would be no ground for rejecting his evidence. It would be only matter of observation respecting his testimony. In one case the judges granted a new trial, because a witness's evidence had been rejected by reason of his having remained in court after an order for witnesses to withdraw." (1)

In *Rex v. Colley* (2), where the witness remained from mistake, and from no undue motive, his testimony was received.

Where the witnesses in a cause are ordered out of court, the attorney in the cause may remain, and afterwards be called as a witness (3); thus in *Everett v. Lowdham* (4), the defendant's attorney, who had been subpoenaed on the part of the plaintiff remained in court, at the desire of his counsel, during the trial of the cause, although an order had been made for the witnesses on both sides to withdraw, was allowed to give his evidence. (5)

To account for the absence of a witness who was expected, a person who continued in court during the trial may be examined, notwithstanding an order for the witnesses on both sides to leave the court. (6)

PROOF BY
WITNESSES.

Judgment of
Mr. Baron
Alderson in
Cook v. Nether-
cote.

Remaining in
court from
mistake.

Attorneys per-
mitted to re-
main in court.

Person to ac-
count for the
absence of a
witness.

2. Examination of Witnesses on the Voire Dire.

Previous to a witness being sworn, it is competent for counsel to have him examined on the *voire dire*, in order to ascertain, whether he has any undue interest in the event of the cause, a mode of procedure not invariably pursued; because, if it be discovered in any stage of the trial, before the close of a witness's examination and before his dismissal, that he is interested, his evidence will be rejected. (7)

Yet it seems, that "a party who is cognisant of the interest of the witness at the time when he is called, is bound to make his objection in the first instance, for otherwise he might obtain an unfair advantage, by having it in his power to establish or destroy the evidence." (8)

Some questions may be asked upon the *voire dire*, which cannot be asked after the witness has entered upon the examination in chief. Thus, after an examination in chief, a witness cannot be cross-examined, as to the contents of a will not produced in court, under which it is suggested he takes

EXAMINATION
OF WITNESSES
ON THE VOIRE
DIRE.

Questions
which can be
asked on the
voire dire which
cannot be
asked after-
wards.

(1) The case referred to by the learned baron is that of *Doe d. Good v. Cox*, E. T. 30 Geo. 3. in K. B., cit. 1 Clifford's Southwark Election Cases, p. 114. In that case, Gould J. would not allow a witness for the defendant to be examined, because he had remained in court after the witnesses had been ordered to leave it. But the court of King's Bench were of opinion, that the witness ought to have been heard, and granted a new trial. However, as the defendant had been negligent in not keeping his witnesses out of court when ordered to do so, the court made him pay the costs of a new trial.

Upon this case Mr. Clifford adds the following note: — "This case is no where in print, but I was favoured with it by a learned friend, whose accuracy as a reporter is too

well established to need any commendation from me." 6 C. & P. 743. n.

(2) M. & M. 329.

(3) *Pomeroy v. Baddeley*, R. & M. 430.

(4) 5 C. & P. 91.

(5) In Scotland separate examination takes place in all criminal prosecutions (2 Hume's Com. on Crim. Law of Scotland, 365. Burnett's Treatise, 467.), and it is much to be desired that a similar practice prevailed in England, more especially in criminal cases.

(6) *Harman v. Harman*, 1 Armstrong & Macartney (Irish), 89.

(7) *Beeching v. Gower*, Holt's N. P. C. 313. *Stone v. Blackburn*, 1 Esp. N. P. C. 37. *Turner v. Pearte*, 1 T. R. 717. *Perigal v. Nicholson*, Wightw. 64. Phillipps' Ev. 885., *vide antè*, 1732.

(8) 1 Stark. Ev. 124.

**PROOF BY
WITNESSES.**

Witness may be examined respecting the contents of a written instrument not produced.

some interest, although such questions might be properly asked, in an examination on the *voire dire*. (1)

A witness on the *voire dire* may, with a view to shew, that he is wholly incompetent, be examined as to the contents of a written document produced; and the reason is, that it is not probable that the writing which creates his incompetency, would be in the possession or within the knowledge of the adversary; but if the witness have the instrument with him it must be produced. (2)

Where the party calling a witness, who has been objected to on the *voire dire*, attempts to remove the objection by other independent proof, and by a further examination of the witness on the *voire dire*, he will be subject to all the ordinary rules of evidence, and the best proof will be required according to the nature of the case. (3) Thus, if another witness be called to prove that the witness, who has been objected to on the ground of interest has been released, he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced. (4)

3. Generally.**GENERALLY.**

If the witness have been sworn, the party whose witness he is, examines him, after which he is cross-examined by the opponent counsel; and it is almost needless to remark, that the examination is conducted publicly.

Subjects to which a witness can depose.

A witness can depose to such facts only, as are within his own knowledge; but even in giving evidence in chief there is no rule, which requires a witness to depose to facts with an expression of certainty, that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not aver positively to the facts. (5)

If a witness decline to answer a question, no inference of the truth of the fact inquired into, may be drawn from that circumstance. Thus, in *Rose v. Blakemore* (6) Chief Justice Abbott said, "There was an end of the protection of a witness, if a demurrer to the question, were to be taken as an admission of the fact inquired into."

Privilege of witness not answering.

The privilege of refusing to answer, is the exclusive privilege of the witness, not of the litigant parties; and if questions be put to a witness of a criminary or degrading tendency, counsel have no right to object to the witness answering or not; but the objection must emanate from the witness. (7) Neither can counsel argue in support of the witness's objection:

(1) *Howell v. Lock*, 2 Camp. 14.

(2) *Butler v. Carver*, 1 Stark. Ev. 179.

If witnesses have been improperly examined on interrogatories, the objection should be taken by motion to suppress the interrogatories; it is too late to take it at the trial.

Ogle v. Paleski, Holt's N. P. C. 485. *Tidd*, 812. *Phillipps' Ev.* 885.

(3) *Goodhay v. Hendry*, M. & M. 319.

(4) *Corking v. Jarrard*, 1 Camp. 37., et vide dict. Lord Kenyon in *Botham v. Swin-*

gler, 1 Esp. N. P. C. 164., vide etiam *Carlisle v. Eady*, 1 C. & P. 284. *Wardlaw (Assignee) v. Cawthorne*, M. & M. 321. n.

(5) *Miller's case*, 3 Wils. 427. It has been decided that, for false evidence so given, a witness may be indicted for perjury. *Re v. Pedley*, Leach, C. C. 277.

(6) R. & M. 383.

(7) *Thomas v. Newton*, M. & M. 48. n. 2 C. & P. 606.

**PROOF BY
WITNESSES.**

because, as observed by Lord Tenterden in *Rex v. Adey* (1), "The privilege is that of the witness, not of the party; and I think, therefore, that counsel have no right to interfere for the purpose of excluding an examination, to which, as against their client, there is no objection."

If a witness wave the objection so far as partially to answer questions tending to subject him to an indictment or to forfeiture, he cannot shelter himself under his privilege, but is bound to reveal the whole truth (2), notwithstanding it may affect his life. (3)

If a witness be called merely for the purpose of producing a written instrument belonging to the party, which is to be proved by another witness, he need not be sworn, and if not sworn, he will not be subject to cross-examination (4), neither will a witness be liable to examination, if sworn by mistake. (5)

Witness producing papers and not sworn.

If a witness be called, and has only answered an immaterial question, when his examination is stopped by the judge, the opposite party have no right to cross-examine him. (6)

Witness called by mistake.

If the plaintiff's counsel call a witness by mistake, he cannot be cross-examined. (7)

But where a witness has been called by one party and sworn, the opposite party can cross-examine him, though no question have been asked him in chief (8); and this rule extends to witnesses, who may be called and sworn for mere formal proofs, and who may be substantially the real parties in the suit, and the party on the record a mere nominal party, as in the case of a sheriff's officer. (9)

Sworn and not examined in chief.

Sworn and examined for mere formal proofs.

It seems, that if a witness have been examined by a plaintiff, "the privilege of the defendant to cross-examine remains in every stage of the cause, and for every purpose," so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. (10)

Witness after cross-examination recalled by opposite party.

Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part; the judges allowed the short-hand writer of the court, who had taken down the answer, to be examined as a witness, to shew whether the words had been used or not. (11)

Short-hand writer's notes received, where witness denies having uttered particular words.

Where a witness prevaricated in the course of his examination, and swore both affirmatively and negatively, the judge refused to stop the cause, but left it to the jury to decide, what credit was due to the witness. (12)

Prevarication of witness not sufficient to stop the cause.

The jury cannot give credit to a part of the testimony of a single witness, where his testimony is neither supported nor contradicted by any other

Jury cannot partially reject the testimony of a witness.

(1) 1 M. & Rob. 94.

(2) Ibid.

(3) *Dixon v. Vale*, 1 C. & P. 278. *East v. Chapman*, M. & M. 47. 2 C. & P. 570.

(4) *Perry v. Gibson*, 1 A. & E. 48. *Rush v. Smith*, 1 C. M. & R. 94. *Summers v. Moseley*, 2 C. & M. 477. *Davis v. Dale*, M. & M. 514, 515. *Phillipps' Ev.* 908.

(5) *Clifford v. Hunter*, 3 C. & P. 16. *Rush v. Smith*, 1 C. M. & R. 94.

(6) *Creevy v. Carr*, 7 C. & P. 64.

(7) *Clifford v. Hunter*, 3 C. & P. 16. M. & M. 103.

(8) *Phillipps v. Middlesex (Sheriff of)*, 1 Esp. N. P. C. 357.

(9) *Morgan v. Brydges*, 2 Stark. 314. *Rex v. Brooke*, ibid. 472.

(10) Per Lord Kenyon in *Dickinson v. Shee*, 4 Esp. N.P.C. 67. *Phillipps' Ev.* 911.

(11) *Rex v. Slater*, 6 C. & P. 934.

(12) *Beauchamp v. Cash*, D. & R. N. P. C. 3.

**PROOF BY
WITNESSES.**

witness, and reject other parts of his testimony equally uncontradicted and supported. (1)

After a plaintiff has submitted to be nonsuited, the defendant's counsel cannot put further questions to any witness. (2)

A witness may be interrogated as to his examination of old records, and may state, that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject, however, to a full cross-examination. (3)

4. Leading Questions.**LEADING
QUESTIONS.**

Upon the assumption, that the witness is favourable to the litigant party who calls him, and adverse to the opposite party, such questions are not permitted, as directly suggest to the witness the answer which is required; neither those which embody a material fact, admitting of an answer by a negative or affirmative.

But where an omission as to the statement of a fact has evidently arisen from a want of memory, a suggestion, under the discretion of the judge, may be afforded the witness; as where a witness called to prove the partnership of the plaintiffs, is not able at that moment to specify the several names of the partners, a number of names, containing those of the partners among others, may be suggested to the witness for the assistance of his memory. (4)

A leading question may be put when it is necessary to contradict a witness on the other side, as to the contents of a paper which has been destroyed (5), for otherwise it would be impossible ever to come to a direct contradiction.

In order to identify a person in court with one, whom the witness has described, the attention of the witness may be directed to that person, and he may be asked, if that is the person of whom he has spoken. (6)

If a witness called by the plaintiff has been examined and cross-examined, and has quitted the witness box, and the defendant has afterwards occasion to recall the same witness to prove his case, the counsel for the defendant is not bound to examine in chief, but may put leading questions as in cross-examination. (7)

And where in a cross-examination, a witness being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove, that the witness had used such expressions, and read to him the particular words from his brief:—It was held by Chief Justice Abbott, that he might do so. (8)

**INTRODUCTORY
QUESTIONS.**

Questions which, whether answered affirmatively or negatively, would not be conclusive upon any points in the cause, are not leading questions. Thus, if a witness, called to prove that A. and B. are partners, be asked

(1) *Madge v. Fear*, 1 Smith, 409.

(2) *Jones v. Hall*, 2 Stark. 505.

(3) *Rowe v. Brenton*, 3 M. & R. 212. 8 B. & C. 765. ante, 1633—1711. tit. EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

(4) *Acerro v. Petroni*, 1 Stark. 100.

(5) *Courteen v. Touse*, 1 Camp. 43.

(6) *Rex v. Watson*, 2 Stark. 128. *Re*

De Berenger, 3 M. & S. 67.

(7) *Dickinson v. Shae*, 4 Esp. N.P.C. 67.

(8) *Edmonds v. Walter*, 3 Stark. 7.

whether A. has interfered in the business of B., this is not a leading question. (1)

PROOF BY
WITNESSES.

If a witness be evidently hostile to the party, by whom he has been tendered as a witness, the court can in its discretion, permit the examination in chief to be conducted as a cross-examination. Thus, on the trial of an issue from the court of Chancery, with power to the plaintiff to examine the defendant as a witness:—It was held, that, as a matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness, the defendant standing in a situation necessarily adverse. (2)

UNWILLING
WITNESS.

5. Cross-examination.

CROSS-EX-
AMINATION.

A leading question may be put to an unwilling witness on the examination in chief, at the discretion of the judge; but a leading question may be always put in cross-examination, whether a witness be unwilling or not. (3)

Leading ques-
tions may be
put to an
unwilling wit-
ness.

But this principle must be applied in a qualified sense; for "to put strong leading questions to a witness without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial" (4); in fact, as observed by Mr. Justice Buller (5), "you may lead a witness upon a cross-examination, to bring him directly to the point as to the answer, but not to go the length, of putting into the witness's mouth the very words which he is to echo back again."

Collateral questions, trying the truth of a material part of the witness's story, may be put. (6)

Questions on
collateral sub-
jects for the
purpose of con-
firmation.

The judge will allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, as relating to a third person, if the defendant's counsel undertake, that it shall be shewn by other evidence, that these facts are relevant to the issue. (7)

When an ex-
amination ap-
parently irrele-
vant will be
allowed.

If, on cross-examination, it be proposed to ascertain of a witness, whether he has made representations of any particular nature, immediately after being asked, whether he made any representation, he must be asked, whether he made the representation by parol, or in writing. (8)

If the defendant's counsel cross-examine as to certain misrepresentations made towards the defendant, and deceptions practised on him, this is to be considered as notice to the plaintiff's counsel of the line of defence; and therefore, if he have letters of the defendant tending to shew, that he knew the real state of the facts, the plaintiff's counsel ought to give them in evidence before the plaintiff's case is closed, and he will not be allowed to put them in, as evidence in reply. (9)

Examinations
respecting mis-
representations.

In an action for the negligent driving of the defendant's coach, whereby the plaintiff's goods were destroyed, the plaintiff gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this, was cross-examined with a view of shewing the goods to be the pro-

(1) *Nicholls v. Dowding*, 1 Stark. 81.

(2) *Clarke v. Saffery*, 1 R. & M. 126.

(3) *Parkin v. Moon*, 7 C. & P. 408.

(4) *Hardy's case*, 24 Howell's St. Tr. 659.
Phillipps' Ev. 912.

(5) *Hardy's case*, 24 Howell's St. Tr. 755.

(6) *Exp. Bardwell*, 1 Mont. & Ayr. 206.

(7) *Haigh v. Belcher*, 7 C. & P. 389.

(8) *Queen's case*, 2 B. & B. 292.

(9) *Wharton v. Lewis*, 1 C. & P. 529.

**PROOF BY
WITNESSES.**

General reputation.

Subjects upon which a witness cannot be examined.

perty of a person of the name of Phillips, and that they did not belong to the plaintiff;—the defendant was likewise permitted to call witnesses to prove that fact. (1)

In an action against the defendant, an occupier of a farm in the township of Down Holland, for not setting out tithes, he set up as a defence a *farm modus*; and the plaintiff shewed by surveys and terriers, that no *modus* within the township was mentioned in them; against which the defendant proved by witnesses an uniform payment of a sum certain in respect of his tenement for upwards of fifty years:—It was held, that the plaintiff might, on cross-examination, ask those witnesses whether other tenements in Down Holland did not pay a similar sum. (2)

Witnesses cannot be cross-examined as to facts not in issue, if such facts be injurious to the characters of persons not connected with the cause. (3)

What is opened by the counsel of one party as presumptive evidence in favour of his client against the other, cannot be examined into on cross-examination of his witnesses, if they have not been examined in chief, as to the facts so stated in his favour. (4)

**WRITTEN
STATEMENTS OF
WITNESS.**

Witness may admit a fact which is in writing.

When examination will not be permitted.

Letters.

6. Written Statements of Witness.

A witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination be in writing, and so produced. (5)

The defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents of written documents, although notice may have been given to the plaintiff to produce them, and he refuses to produce them in that stage of the cause. (6)

If a defendant's counsel in cross-examining a witness put a letter into his hand, and after asking him if he wrote it, desire him to read it, and then put questions upon it, the defendant's counsel is not bound to have the letter read, till after he has addressed the jury (7); because the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course therefore, is, to ask the witness whether that letter is of his handwriting; if the witness admit it to be his handwriting, the cross-examining counsel can, at his proper season, read that letter as evidence; and when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, that the court may be possessed of the whole: if cross-examining were allowed, counsel may put the court in possession only of a part of the contents of the written paper; the court would never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that, which might be produced by the statement of a part. (8)

(1) *Whittingham v. Bloxham*, 4 C. & P. 597. It seems Phillips might have been called in reply, to prove that the goods were not his.

(2) *Blundell (Clerk) v. Howard*, 1 M. & S. 292.

(3) *Bate v. Hill*, 1 C. & P. 100.

(4) *Lucas v. Novosilieski*, 1 Esp. N. P. C. 297.

(5) *Ridley v. Gyde*, 1 M. & Rob. 197.

(6) *Sideways v. Dyson*, 2 Stark. 49. *Graham v. Dyster*, *ibid.* 21. 6 M. & S. 1.

(7) *Holland v. Reeves*, 7 C. & P. 36.

(8) *Ibid.*

A letter written by a witness may be given in evidence to contradict the testimony given by him at the trial (1); but it is not allowable on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask him, whether he wrote a letter to any person, with such or similar contents, without having first shewn the witness the letter, and asking him whether he wrote that letter. (2)

The letter, if in existence, should therefore be produced and shewn to the witness. When it is produced, two or three lines of the letter may be exhibited to a witness, without exhibiting to him the whole, and he may be asked, whether he wrote the part exhibited; but if he deny, that he wrote such part, he cannot be examined as to the general contents of the letter (3); because the paper itself ought to be produced, in order that the whole may be seen, and the one part explained by the other.

If, on cross-examination, a witness admit a letter to be in his handwriting, he cannot be questioned by counsel whether statements such as they may suggest, are contained in it, but the whole of the letter must be read in evidence. (4)

When a letter must be read in evidence.

In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case: it may, however, be permitted to be read at an earlier period, if the counsel suggest, that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof. (5)

The foregoing decisions apply to letters which are producible, upon the principle, that the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence; but if the paper be not *in esse*, these decisions are not applicable, and do not decide the question, whether counsel may be allowed to cross-examine a witness, as to his having written a letter containing a different statement to that which he has made. (6)

When the letter is not *in esse*.

Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance without producing them. (7)

On an application for a new trial, one of the witnesses made an affidavit who was called on the second trial; it was proposed to cross-examine the witness from an office copy of her affidavit, which was ordered by the judge's order (in the usual form) to be admitted as a true copy:—It was held, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon. (8)

Examination from the office copy of an affidavit.

Generally speaking, a witness is allowed to explain any thing he may have sworn either in his examination in chief, or on cross-examination. (9)

WITNESS MAKING AN ADDITION TO HIS EVIDENCE AFTER CROSS-EXAMINATION.

(1) *De Sailly v. Morgan*, 2 Esp. N. P. C. 691.

(2) *Queen's case*, 2 B. & B. 286.

(3) *Ibid.*

(4) *Ibid.* 288.

(5) *Ibid.*

(6) *Phillipps' Ev.* 931—938.

(7) *Roberts v. Daxon*, Peake's N. P. C. 116.

(8) *Davies v. Davies*, 9 C. & P. 252.

(9) A witness who has been examined for the crown, and cross-examined, and has left the table, cannot afterwards, upon his own application, make any addition to his evidence, if the prisoner's counsel object; but the court will hear an application from counsel, after the witness shall have communicated with the crown solicitor. *Regina v. Price*, 1 Armstrong & Macartney (Irish), 73.

PROOF BY
WITNESSES.

7. *Re-examination and Recall of Witnesses.*

RE-EXAMINATION AND RE-
CALL OF WIT-
NESSES.

Judgment of
Chief Justice
Abbott in the
Queen's case.

The object of a re-examination is to afford the witness an opportunity of reconciling the statements, which he may have made on his cross-examination with his examination in chief, and of vindicating his character.

In the *Queen's case* (1) Chief Justice Abbott said, "I think the court has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness."

"And I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are, in themselves evidence against him in the suit; and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party, has a right to lay before the court the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit."

The foregoing language of Chief Justice Abbott has been qualified in *Prince v. Samo* (2), where it was held, that a witness, cross-examined as to assertions of the plaintiff in a particular conversation, could not be examined as to other unconnected assertions of the plaintiff in the same conversation, although connected with the subject of the suit, Lord Denman observing,—"Upon the whole, we think it must be taken as settled, that proof of a detached statement made by a witness at a former time, does not authorise proof by the party calling that witness of all that he said at the same time, but only of so much, as can be in some way connected with the statement proved.

"We forbear from entering into a detailed examination of the doctrine here laid down. We have considered it repeatedly with the utmost care, and with all the diffidence inspired by such an authority; but we cannot assent to it. We will merely observe, that it was not introduced as an answer to any question by the House of Lords, and may therefore be strictly regarded as extra-judicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms

Judgment of
Lord Denman
in *Prince v.*
Samo.

(1) 2 B. & B. 297.

(2) 7 A. & E. 634.

adopted by Lord Eldon, or any of the other judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority. We ought to add, that, in our opinion, the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."

PROOF BY
WITNESSES.

If that, which the witness has stated in answer to the question on his cross-examination, arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in the re-examination, what those inquiries were (1); he may also be asked, what induced him to give to that person the account which he has stated in the cross-examination. (2)

The counsel calling a witness who has given unfavourable evidence on cross-examination may, on re-examination, ask him questions to shew inducements to betray the party who has called him. (3)

Witness may be asked his reasons for betraying the party by whom he was called.

But if, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel shall say, that at a time specified he told A. that he was one of the witnesses against the defendant, and being re-examined by plaintiff's or prosecutor's counsel states, what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only, as it related to his being one of the witnesses. (4)

"In general, if a witness on cross-examination voluntarily give inadmissible evidence, it will not be inserted in the judge's notes; nor can it be treated as evidence in the cause, for an adverse witness cannot obtrude evidence against a party on cross-examination, which he could not give in chief; but if a party choose to cross-examine the witness as to inadmissible facts, the other party is entitled to re-examine him, as to such evidence so given." (5)

Objectionable evidence on cross-examination.

The judge will allow a witness for the plaintiff to be recalled on the application of plaintiff's counsel, before plaintiff's case is closed. (6)

RECALLING
WITNESSES.

But the judge will not (except under special circumstances) allow plaintiff, after his case has closed, to recall a witness to prove a material fact. (7)

Where the plaintiff's case was, that a certain sale under a *feri facias* was fair and *bond fide*: — It was held, that the sheriff who sold the goods was a competent witness for the plaintiff; but that, although such witness had been released in the meantime, he could not be recalled on the part of the plaintiff after the statement of the defendant's case. (8)

Where witness will not be recalled.

Where, in an action against the indorser of a promissory note, the plaintiff omitted to prove a legal notice of dishonour, and was nonsuited in consequence of it, the judge not allowing a witness to be recalled to prove that fact; — it was laid down as a general principle, that, after the

(1) 2 B. & B. 294.

(2) Ibid. Phillipps' Ev. 940.

(3) *Dunn v. Aslett*, 2 M. & Rob. 122.

(4) *Queen's case*, 2 B. & B. 294.

(5) *Blewett v. Tregonning*, 3 A. & E. 584.
5 N. & M. 308. Phillipps' Ev. 944.

(6) *White v. Smith*, 1 Armstrong & Macartney (Irish), 171.

(7) *Murray v. Dublin (Sheriffs of)*, *ibid.* 130. A witness offered for cross-examination by the crown to the prisoner's counsel, but not then examined, cannot afterwards be examined on the part of the crown.
Nally's case, 1 Irish Circuit Cases, 118.

(8) *Kelly v. Smith*, *ibid.* 150.

**PROOF BY
WITNESSES.**

plaintiff has closed his case, the judge will not allow him to recall a witness or go into evidence on the merits. (1)

8. Opinion and Skill.**OPINION AND
SKILL.**

"Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another," it being for "the jury to decide on the materiality of facts and the duty of disclosing them." (2)

Scientific men. And where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only respecting the facts as proved at the trial. (3)

Ship-builders. A ship-builder may state his opinion of the seaworthiness of a ship, from examining a survey which had been taken by others, and at which he was not present. (4)

Imitated handwriting. A clerk of the post-office accustomed to inspect franks for the detection of forgeries, has been permitted to prove, that the handwriting of an instrument was not a natural hand, although he never saw the supposed person write; and that two writings, suspected to be in imitated hands, were written by the same person. (5)

Seal engravers. Seal engravers may be called to prove the difference between a genuine impression, and one supposed to be false. (6)

Artists. The opinion of artists in paintings are evidence, as to the genuineness of a picture. (7)

Merchants. Commercial men may prove the meaning of any particular expression used in a letter on a commercial subject. (8)

Engineers. Where an embankment, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour are admissible evidence (9); and an engineer may prove from his experiments, what he considered was the effect of the embankment. (10)

Mechanics. On a *scire facias* to repeal a patent for a machine, it is allowable, to prove the fact of its non originality, to put into the hands of a witness, who had constructed a machine for the same purpose, a drawing not made by himself, and to ask him, whether he had such a recollection of the machine he made, as to be able to say, that such is a correct drawing of it? (11)

Medical men. The opinion of medical men is evidence as to the state of a patient, whom

(1) *Johnston v. Clinton*, 1 Armstrong & Macartney (Irish), 123.

(2) Per Lord Denman in *Campbell v. Rickards*, 5 B. & Ad. 840.

(3) *Jameson v. Drinkald*, 12 Moore, 148.

(4) *Thornton v. Royal Exch. Ass. Comp.* Peake's N. P. C. 37. *Beckwith v. Sydebotham*, 1 Camp. 117. *Chaurand v. Angerstein*, Peake's N. P. C. 61.

(5) *Goodtitle d. Revett v. Braham*, 4 T. R. 498. Harrison's Ev. 43., *sed vide ante*, 1657—1700. *contra*.

(6) *Folkes v. Chadd*, 3 Doug. 157.

(7) *Ibid*.

(8) *Chaurand v. Angerstein*, Peake's N. P. C. 37.

(9) *Folkes v. Chadd*, 3 Doug. 157.

(10) *Ibid*.

(11) *Rex v. Hadden*, 2 C. & P. 184.

they have seen (1), or where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses at the trial. Thus, on a question of sanity, a medical man who has heard the trial may be asked, whether the facts proved, shew symptoms of insanity? (2) But *unprofessional* persons cannot, under any circumstances, give an opinion respecting the fact of sanity or insanity, or whether a person be capable of managing his affairs or not; — because that is the issue, which the jury have to try. (3)

PROOF BY
WITNESSES.

Unprofessional persons cannot, under any circumstances, give an opinion respecting the fact of sanity or insanity.

9. Refreshing Memory from written Memoranda.

A witness can depose to such facts only, as are within his own knowledge; but, even in giving evidence in chief, there is no rule, which requires a witness to depose to facts with an expression of certainty, that excludes all doubt in his mind. (4) Witnesses are permitted to refresh their memories from writing, when only used for the purpose of reviving or assisting their memories, and to bring to their minds a recollection of facts.

REFRESHING
MEMORY FROM
WRITTEN
MEMORANDA.

Memoranda assisting the memory of the witness, and bringing to his mind a recollection of the facts.

When a witness admits his memory to have been revived by the previous inspection of a writing, it does not seem to be required, as a condition of the admission of his oral testimony, that the writing should be produced in court. (5) Thus, it was held, that a clerk might refresh his memory as to the deliveries of goods by looking at entries made in his presence by his master in a ledger from entries made by the clerk in a waste book, such entries in the ledger having been checked by the clerk, while the facts were fresh in his memory, and that the waste book need not be produced. (6)

Entries in a
ledger.

To prove the date of an act of bankruptcy, an old witness has been allowed to recur to his depositions made at the time to refresh his memory (7); — and a barrister may give evidence of what a witness said upon a former trial, in which he was counsel; and, to refresh his memory, may make use of the notes which he then made, upon the back of his brief. (8)

Depositions.

A barrister may give evidence by referring to the notes on his brief.

But if the writing have not the effect of reviving the witness's memory, but notwithstanding enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced. (9)

Evidence can be received from witnesses, who only recollect having seen the writing before; and, though they have no independent recollection of

Witnesses having no abstract recol-

(1) Phillipps' Ev. 899.

(2) *Rex v. Searle*, 1 M. & Rob. 75., *sed quare*. If he can be asked whether, from the testimony given, the act with which the prisoner is charged, is in his opinion an act of insanity? — which is the very point to be decided by the jury. *Rex v. Wright*, R. & R. C. C. 456.

(3) *Regina v. Neville*, 1 Crawford & Dix (Irish), 96. n., *vide etiam Clark v. Periam*, 2 Atk. 340.

(4) It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not aver posi-

tively to these facts. Phillipps' Ev. 898. *Per De Grey C. J. in Miller's case*, 3 Wils. 427. ; and for false evidence so given, a witness may be indicted for perjury.

(5) Phillipps' Ev. 893.

(6) *Burton v. Plummer*, 4 N. & M. 315. 2 A. & E. 341.

(7) *Vaughan v. Martin*, 1 Esp. N. P. C. 440. *post*, 1782.

(8) *Guinea's case*, 1 Irish Circuit Cases, 167.

(9) *Doe v. Perkins*, 3 T. R. 754. *Tanner v. Taylor*, *cit. ibid.* *Howard v. Canfield*, 5 Dowl. P. C. 417., *et vide Kensington v. Inglis*, 8 East, 273.

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WITNESSES.

lection of the facts in an instrument, but remembering that at the time they saw it, they knew the contents to be correct.

Judgment of Lord Tenterden in *Maugham v. Hubbard*.

Witnesses having neither any recollection of the facts mentioned in a memoranda, nor any recollection of the writing itself.

MEMORANDA
BY WHOM
WRITTEN.

the facts mentioned in it, yet remember that, at the time they saw it, they knew the contents to be correct. Thus, "where a witness called to prove the execution of a deed, sees his signature to the attestation, and says that he is therefore sure, that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add, that he has no recollection of the fact of the execution of the deed." (1)

In *Maugham v. Hubbard* (2), which was an action against assignees to recover money wrongfully paid to them, the debt having been previously paid to the bankrupt, it appeared in evidence, that the following entry was made in the plaintiff's book by the bankrupt — "4th of November, 1822 Dr. R. Lancaster. Check 20*l*. R. L.:" — It was held, that the bankrupt might speak from his recollection of the entry in the book, as having refreshed his memory, though the book could not be used as evidence for want of a receipt stamp; Lord Tenterden observing, "that though it was not itself admissible in evidence to prove the payment of the money, the witness might use it to refresh his memory; and that his having said that he had no doubt that he received the money, was sufficient evidence of the fact." On a motion for a new trial, his lordship said, "Here the witness, on seeing the entry signed by himself, said that he had no doubt he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said, that he had no doubt he received the money, there was sufficient parol evidence to prove the payment."

Testimony of witnesses are also admissible, when the memoranda bring to their minds neither any recollection of the facts mentioned in them, nor any recollection of the writing itself, but which, nevertheless, enable them to swear to a particular fact from the convictions on their minds on seeing a writing which they know to be genuine; as where a banker's clerk is shewn a bill of exchange, which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing any thing upon that bill (3); but the witness, though he may have no present independent recollection, must, on seeing the paper, be able to depose positively to the facts, as to which he is examined. (4)

Thus, in *Harrison v. Bradley* (5) it was held, that a witness could not be questioned as to a fact of which he had no recollection, and as to which he could not speak, except from an affidavit made by himself, and placed in his hands to refresh his memory.

The rule that the best evidence must be produced, precludes a witness from refreshing his memory with a copy of an instrument, which might itself be used for refreshing his memory, as much as it precludes the admission of evidence of the copy of an instrument, which would be evidence in itself. (6) Therefore, where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him,

(1) *Per* Bayley J. in *Maugham v. Hubbard*, 8 B. & C. 14. 2 M. & R. 5.

(2) 8 B. & C. 15. *Rex v. St. Martin's, Leicester (Inhab. of)*, 2 A. & E. 210.

(3) *Phillipps' Ev.* 893.

(4) *Ibid.* *Rex v. St. Martin's, Leicester (Inhab. of)*, 2 A. & E. 210.

(5) 1 *Armstrong & Macartney (Irish)*, 15.

(6) *Rex v. St. Martin's, Leicester (Inhab. of)*, 2 A. & E. 215. *Per* Patterson J. in *Burton v. Plummer*, *ibid.* 341.

his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; for the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (1)

PROOF BY
WITNESSES.

But when a witness on looking at a written paper has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is admissible, although the paper may not have been written by him.

A witness, for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined from time to time, soon after they were written, and while the facts stated in them were fresh in his memory. (2)

Witness can refresh his memory by referring to entries in a book, which he did not write;

Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence *per se* in respect of the cash items, amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that, upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the account. (3)

Where an agent who had given a receipt for money, afterwards became blind, such receipt, although unstamped, was allowed to be read over to him in court for the purpose of refreshing his memory. (4)

and, if blind, they can be read to him.

Mr. Phillipps observes (5), "The effect of a memorandum, in assisting a witness, will depend upon the state of his memory, and the time when the memorandum was made — which will vary in different cases;" perhaps the best mode of ascertaining the fact will be, whether, at the time the memoranda were made, such a length of time had elapsed, as to render it probable, that the memory of the witness might have become deficient.

TIME AT WHICH
MEMORANDA
WERE MADE.

But, in *Jones v. Stroud* (6) Chief Justice Best held, that a witness has no right to refresh his memory with a copy of a paper made by himself six months after he made the original, although the original be *lost*, and that when lost, was so covered with figures, that it was unintelligible, the original paper having been written near the time of the transaction.

In *Steinkeller v. Newton* (7) to refresh the memory of a witness, it was proposed to put into his hands a paper, which he had delivered to the defendant's attorney in the month of June 1838, after the cause had been set down for trial. It was objected, that the paper was not made contemporaneously with the facts; to which it was answered, that it was only to refresh the memory of the witness, and if it were made at the time, or the next day, it would be admissible; and that it ought to be admitted, if made within a sufficiently short period from the transaction for the judge to say, that the recollection of the transaction was more fresh in the memory of the witness. That as the paper was only written twenty months ago, it might

(1) Phillipps' Ev. 895.

(2) *Burrough v. Martin*, 2 Camp. 112.

(3) *Jacob v. Lindsay*, 1 East, 460.

(4) *Catt v. Howard*, 3 Stark. 3.

(5) Ev. 896.

(6) 2 C. & P. 196., *sed quare*, Is not this a rejection of secondary written evidence? Phillipps' Ev. 897, 898., vide etiam *Sandwell v. Sandwell*, Comb. 445.

(7) 9 C. & P. 314.

**PROOF BY
WITNESSES.**

**Depositions
before commis-
sioners of
bankrupts.**

**PRACTICE AS TO
CROSS-EXAMIN-
ATION.**

be used to refresh the witness's memory as to a date, although it was written some time after the transaction; and that there should be a reasonable construction put upon the rule: to which Chief Justice Tindal said, "The difference is this—it must be confined to papers written contemporaneously with the transaction."

Where a witness had been examined before commissioners of bankrupts shortly after the act of bankruptcy, it seems, that he may refer to the deposition he then made, for the purpose of refreshing his memory as to that date. (1)

If the counsel for the defendant in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence; and the opposite counsel may also ask the witness when it was written, without being bound to put it in. (2)

But if the paper be merely given to a witness to prove the handwriting to it, the counsel on the opposite side have not a right to see it. (3)

If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see the entries if they wish to do so; but if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence. (4)

**IMPEACHING
AND SUPPORT-
ING THE CREDIT
OF WITNESSES.
GENERALLY.**

Evidence to contradict a witness, must relate to something stated by the witness, not wholly irrelevant to the matters in issue.

10. *Impeaching and supporting the Credit of Witnesses.*

Evidence, for the purpose of contradicting a witness, must relate to something stated by the witness not wholly irrelevant to the matters in issue.

If in an action on a bill it has been assumed for the defence, that such bill was, at the same time with another, usuriously discounted by the plaintiff, and after a *prima facie* case of usury has been made out, a witness who is called to disprove it, is asked as to something he had said respecting a trial relative to the other bill, this is not a matter so far collateral, that the other side may not call a witness to contradict him, as to what he said. (5)

A witness cannot be called to contradict another, who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion, as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause. (6)

Where a witness who was called to prove the signature of the attesting witness to a bond, swore that the signature was not in the supposed attesting witness's handwriting, another paper, not in evidence in the cause, was put into his hand, which he also stated was not that person's writing:—It was held, that the plaintiff was not at liberty to prove, for the purpose of

(1) *Smith v. Morgan*, 2 M. & Rob. 257. ante, 1779.

(2) *Rex v. Ramsden*, 2 C. & P. 603. Per Eyre C. J. in *Hardy's case*, 24 Howell's St. Tr. 824.

(3) *Sinclair v. Stevenson*, 1 C. & P. 582. 2 Bing. 514. 10 Moore, 46.

(4) *Gregory v. Tavernor*, 6 C. & P. 281. *Loyd v. Freshfield*, 2 ibid. 325. 8 D. & R. 19.

(5) *Meagor v. Simmons*, 3 C. & P. 75. M. & M. 121.

(6) *Elton v. Larkins*, 5 C. & P. 385. 5 C. & P. 1 M. & Rob. 196.

contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond; Mr. Baron Alderson observing, "This case is very different from that, where a party denies one document to be in his handwriting, and admits others put into his hands; there it has been made a question, whether those documents may not be looked at by the jury, in order to see whether they have really been written by the same person. On that point there has been some difference of opinion; but the real question there is, does it not enable the jury to appreciate the testimony given by the witness? The present case is, however, very different; and the evidence, if admitted, would have the effect of raising a collateral issue." (1)

PROOF BY
WITNESSES.

Judgment of
Mr. Baron
Alderson in
Hughes v.
Rogers.

Where a question is put to a witness in cross-examination, the answer to which, may have a tendency to discredit him, if such question be collateral to the matter in issue, the answer which the witness gives, must be taken as conclusive, and other witnesses cannot be called to contradict him. (2)

To inquire of a witness in cross-examination, whether he had not attempted to dissuade another witness examined on the opposite side from being present at the trial, has been held to be so far immaterial to the issue, that if the witness answer in the negative (namely, that he never made such an attempt), evidence to contradict him on that point, would not be admissible. (3)

In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally, whether he has ever made such a statement, but particulars must be specified to him (4), and there must be an express denial. (5)

QUESTIONS FOR
THE PURPOSE
OF CONTRADICT-
ING A WITNESS.

Thus, in *Angus v. Smith* (6) Chief Justice Tindal said, "I understand the rule to be, that before you can contradict a witness by shewing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so; because it may frequently happen that, upon the general question, he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said." (7)

Judgment of
Chief Justice
Tindal in *An-*
gus v. Smith.

But when, after exhausting a witness's memory as to the contents of a letter (not however by leading questions, but by examining him in the regular manner), the witness may then be asked, whether it contained a particular passage recited to him which had been sworn to on the other side?—otherwise it would be impossible ever to come to a direct contradiction. (8)

If a witness, examined in chief on the part of the plaintiff, be asked, whether he remembered a quarrel taking place between A. and B., shall answer that he has heard of a quarrel between them, but does not know the cause of it, and if such witness be not asked upon his cross-examination whether he

(1) *Hughes v. Rogers*, 8 M. & W. 123.

(2) *Harris v. Tippet*, 2 Camp. 637. *Rex v. Watson*, 2 Stark. 149. *Exp. Arnsby*, 2 D. & C. 213. *Rex v. Rudge*, Peake's Add. Cas. 232., et vide *Rex v. Fewin*, 2 Camp. 638.

(3) *Harris v. Tippet*, 2 Camp. 637.

(4) *Angus v. Smith*, M. & M. 473.

(5) *Puin v. Beeston*, 1 M. & Rob. 20.

(6) M. & M. 473.

(7) Vide etiam *Edmonds v. Waller*, 3 Stark. 8.

(8) *Courteen v. Touse*, 1 Camp. 43.

**PROOF BY
WITNESSES.**

has or has not made a declaration touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel. (1)

So, where he answers, that he does not remember it, and such witness is not asked on his cross-examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove, that the other witness had made such a declaration. (2)

Where a witness on cross-examination denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness is not at liberty to lead, by reading from his brief the words denied, the conversation spoken to by the first witness being evidence of itself. (3)

A witness on his cross-examination cannot be asked, even with a view to impeach his credit, as to the contents of any written document not produced. (4)

To impeach the credit of a witness, he can only be examined as to his general character.

"If you would impeach the credit of a witness, you can only examine to his general character, and not to particular facts; every man is supposed to be capable of supporting the one, but it is not likely he should be prepared to answer the other without notice; and unless his general character and behaviour be in issue, he has no notice:" thus, if a witness, on being examined, as to whether he has not been guilty of felony or of some infamous offence, deny the charge, the party against whom the witness has been called, will not be allowed to prove the truth of the charge; and such evidence is not admissible, either for the purpose of contradicting or of discrediting him. (5)

If a witness have been convicted of an infamous crime, the record of his conviction may be given in evidence towards the impeachment of his credit (6); and if a witness be cross-examined as to what he swore in an affidavit, the affidavit must be produced. (7)

Contradictory statements.

The credit of a witness may be impeached, by proof, that he has written letters or made statements out of court on the same subject, contrary to what he swears on the trial. (8)

Witness neither admitting nor denying statements.

Judgment of Mr. Baron Parke in *Crowley v. Page*.

With respect to witnesses neither admitting or denying statements, Mr. Baron Parke in *Crowley v. Page* (9) observed, "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements as are relevant, that are admissible; and in order to lay a foundation for the admis-

(1) *Queen's case*, 2 B. & B. 299.

(2) *Ibid.*

(3) *Hallett v. Cousens*, 2 M. & Rob. 298.

(4) *Pujolas v. Holland*, 1 Irish Circuit Cases, 19.

(5) Bull. N. P. 296. (a.) *Watson's case*, 32 Howell's St. Tr. 490. *De La Motte's case*, 21 *ibid.* 811. *Laver's case*, 16 *ibid.* 246. 284. *Rex v. Watson*, 2 Stark. 149. *Sharp v. Scoging*, Holt's N. P. C. 541. *Spenceley*,

q. t. v. De Willott, 7 East, 108. 3 Smith, 283. Phillipps' Ev. 923—925.

(6) *Rex v. Watson*, 2 Stark. 149. Per Lord Ellenborough in *Spenceley, q. t. v. De Willott*, 7 East, 108. 3 Smith, 289.

(7) *Sainthill v. Bound*, 4 Esp. N. P. C. 74.

(8) *De Saily v. Morgan*, 2 *ibid.* 691. *Christian v. Coombe*, *ibid.* 489.

(9) 7 C. & P. 791.

**PROOF BY
WITNESSES.**

sion of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked, whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it ; but if he says he does not recollect, that is not an admission (1) ; and you may give evidence on the other side, to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if the rule were not so, you could never contradict a witness who said he could not remember."

A letter written by a witness, or a deposition signed by him, may be used as evidence to contradict his testimony, the letter or deposition being first proved. An examined copy of an answer in Chancery is sufficient proof of the answer for the purpose of contradicting a witness (2) ; but a conviction before a magistrate, purporting to set out the deposition of a witness, is not admissible as proof of such deposition. (3)

Witness contradicted by written documents.

" A party never shall be permitted to produce general evidence to discredit his own witness ;" that is, a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit, because " that would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause, which make against the party who called him, yet the party may call other witnesses to prove, that those facts were otherwise ; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." (4)

PARTY DISCREDITING HIS OWN WITNESS.

The indorsee of a bill, in an action against the acceptor, having called a witness to prove the indorsement, who disproved it, the plaintiff was afterwards allowed to call the indorser himself to prove his own indorsement. (5)

Where the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore on being called by the plaintiff, that he had not given any warranty ; Lord Ellenborough allowed the plaintiff to call another witness to prove, that at the time of the sale the servant had expressly warranted its soundness ; and observed, " I know of no rule of law by which the truth is on such an occasion to be shut out, and justice is to be perverted ;" " if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." (6)

Judgment of Lord Ellenborough in *Alexander v. Gibson*.

" A party can contradict his own witness, if he speak to a material fact Party can con-

(1) *Sed vide Pain v. Beeston*, 1 M. & Rob. 20., in which Chief Justice Tindal held, that it was not admissible to impeach a witness by shewing, that he had made a particular statement, unless the witness deny having made such statement ; and that it would be inconclusive, if he only swear that, he had no recollection of making such statement.

(2) *Ewer v. Ambrose*, 4 B. & C. 25.
(3) *Rex v. Howe*, 6 Esp. N. P. C. 125.
1 Camp. 461.
(4) Bull. N. P. 296. (a.)
(5) *Richardson v. Allan*, 2 Stark. 334.
(6) *Alexander v. Gibson*, 2 Camp. 556.

**PROOF BY
WITNESSES.**

tradict his own witness by evidence which proves a material fact relevant to the issue.

in the case, against the interest of those who called him. On a collateral fact he cannot be contradicted, not only because such evidence goes to the credit of the witness, but because a multiplicity of issues ought not to be introduced" (1); in fact, it would be against all justice, that the whole of a man's testimony should be struck out, because a witness sets him right as to a single fact.

In *Bernasconi v. Farebrother* (2), *Wright v. Beckett* (3), and *Dunn v. Aslett* (4), a party was permitted to prove, that a witness had made previous statements directly opposite to those, which he swore to at the trial.

It has been urged, in support of these decisions, that if this rule did not prevail, there would be no security against an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; and, as observed Mr. Phillipps (5), "the ends of justice are best attained, by allowing a free and ample scope for scrutinising evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." (6)

But, in *Holdsworth v. Dartmouth (Mayor of)* (7) it was held, that where a witness gives on cross-examination unfavourable testimony to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by shewing he had given such different account; Mr. Baron Parke observing, "Upon consideration, I think the evidence inadmissible. My doubt, at first, was, whether, as the fact was elicited in cross-examination, the witness was not made for this purpose the witness of the plaintiff; and whether, as to this particular fact not asked to in chief, the party calling him, might not shew he had given a different account. I never had any doubt, but that the opinion of my brother Bolland was right in *Wright v. Beckett* (8), if the fact were asked to in the examination in chief, as by calling the witness you take him for better and for worse, and must not throw discredit on him. I am now satisfied that it makes no difference, that the fact is elicited on cross-examination. The effect and object of the evidence is to discredit the witness. It goes to his general credit to shew, that he has given a different account of the matter before; and it is a clear rule, that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence to call testimony to discredit him."

Where in an action upon a policy of insurance against fire, one issue was

(1) *Per* Parke J. in *Friedlander v. Lond. Ass. Comp.* 4 B. & Ad. 193., *vide etiam* Bull. N. P. 297. *Richardson v. Allan*, 2 Stark. 334. *Ewer v. Ambrose*, 3 B. & C. 746. *Wright v. Beckett*, 1 M. & Rob. 429. *Lowe v. Jolliffe*, 1 W. Black. 365. *Pike v. Badmaring*, cit. Str. 1096. (a.) *Bradley v. Ricardo*, 8 Bing. 57. *Alexander v. Gibson*, 2 Camp. 555. Phillipps' Ev. 901—904.

(2) 10 B. & C. 549.

(3) 1 M. & Rob. 427.

(4) 2 *ibid.* 122.

(5) Ev. 905.

(6) In criminal cases, where a witness unexpectedly gives evidence contradictory of facts stated in a previous deposition, it is competent to the judge to order such deposition to be read, in order to impeach the credit of such witness. *Rex v. Oldroyd*, R. & R. C. C. 88.

And it seems, that the prosecutor also has a right to call for such depositions for the same purpose. *Ibid.*

(7) 2 M. & Rob. 153.

(8) 1 *ibid.* 414.

Judgment of Mr. Baron Parke in *Holdsworth v. Dartmouth (Mayor of)*.

whether or not goods of the plaintiff had been destroyed by fire as alleged in the declaration; and a witness was called for the plaintiff to prove that part of the goods were supplied to the plaintiff by him before the fire; but on being shewn an invoice and letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed that the letter (supposed to have been sent from Edinburgh) was written by him in London, at the desire of the plaintiff; that the invoice was drawn up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman; and that the son and shopman persuaded him to state, that the goods had been sent according to the invoice and letter:—It was held, that the son and shopman, who had already been examined for the plaintiff, might have been called back to contradict all these statements. (1)

For the purpose of impugning the testimony of a witness, his declaration at another time may be inquired into, but not for the purpose of confirming his evidence (2), because it is the oath that confirms, and the bare assertion which requires confirmation; but, as Mr. Phillipps (3) observes, "In one point of view, a former statement by the witness appears to be admissible in confirmation of his evidence, and that is, where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; in that case perhaps, in order to repel such an imputation, it might be proper to shew, that the witness made a similar statement at a time, when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts." (4)

Declaration of a witness at another time may be inquired into, but not for the purpose of confirming his evidence.

It has likewise been stated by Sir W. D. Evans (5), "If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out, that he has a near connection with the party on whose behalf he appears, or that a change of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstances, and the testimony is placed upon the same level which it would have had, if the motives for receding from a previous intention never had existed. Upon an accusation for rape, the disclosure of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection."

Evidence to support the character of a witness is admissible, where fraud

EVIDENCE IN
SUPPORT OF THE
CHARACTER OF
A WITNESS.

(1) *Friedlander v. Lond. Ass. Comp.* 4 B. & Ad. 193. *antè*, 1785, 1786. If a witness be produced and examined in a criminal proceeding by a prosecutor, but who disclaims all knowledge respecting the fact at issue, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer, supposed to have been made by such witness before a committee of the House of Commons, or in any other place, and by demanding of him, whether the particulars so suggested were not the answers he had so made. Dom. Proc. April 10. 1788.

From the case of *Ewes v. Ambrose* (3 B. & C. 746.) it is questionable, whether the answer of a witness in Chancery be admissible in evidence to disprove the statements of a witness.

(2) *Rex v. Parker*, 3 Doug. 242., *sed vide Lutterell v. Reynell*, 1 Mod. 283.

(3) Ev. 945.

(4) *Vide etiam dict.* Lord Redesdale in *Berkeley Peerage case*, 5 June, 1811, MS. cit. *ibid.* Bull. N. P. 294. (a.)

(5) 2 Evans' Pothier 251.

**PROOF BY
WITNESSES.**

Witness ac-
cused of fraud ;

is expressly imputed to him, but evidence to general character is not admissible.(1) Thus, in a suit by the heir-at-law of a testator, imputations having been cast upon the character of a *deceased* attorney, by whom the will was prepared, and who was one of the attesting witnesses, charging him with fraud in the execution of the will : — It was held, that the devisee might call witnesses to shew, the general good character of such attorney.(2) And this principle extends to all subscribing witnesses if dead, because, if living, they might be produced as witnesses, and their character might then be the subject of examination ; and after their death an opportunity ought to be given to shew, what credit is to be attached to their attestations.(3) But it seems, that evidence of statements made by a deceased witness is not admissible, either for the purpose of supporting or impeaching his character ; not even with respect to the latter point, if the statement amount to a confession of forgery of the instrument in question.(4)

keeping a gam-
ing-house ;

Where a witness was asked on cross-examination, whether he had not become bail for a witness previously examined ; and who replied affirmatively, and that he believed it was on a charge of keeping a gaming-house : the court, at the suggestion of counsel, in order to prevent any impression against the character of the party so accused, allowed such party to be recalled, and asked, whether the charge was in fact true or false.(5)

fornication ;

In an action against the maker of a promissory note, one of the subscribing witnesses was asked, if she did not constantly sleep with her master, the plaintiff ; — she said that she did not : — upon which it was held, that a witness might be called for the defendant to prove, that she did so, and that this was not collateral to the issue ; though, if the question had been, whether the witness had walked the streets as a prostitute, that would have been collateral, and had the witness denied it, other witnesses could not have been called to contradict her.(6)

impeachment of
character.

Where in an action for seduction a witness was asked questions, tending to impeach her character : — It was held, that the plaintiff was at liberty to call witnesses as to the witness's general good character.(7)

Questions to
which, the ex-
amination as to
the credit of a
witness is li-
mited.

Examination as to the credit of a witness is limited to the following questions, " Have you the means of knowing what the general character of this witness was ? and from such knowledge of his general character, would you believe him on his oath ? " (8)

It is not essential, that witnesses who state, that they would not believe another person on his oath, should have ever heard such person give evidence upon his oath ; as the real question is, whether the witnesses have such knowledge of the person's character and conduct, as enables them

(1) *Durham (Bishop of) v. Beaumont*, 1 Camp. 207.

(2) *Provis v. Reed*, 3 M. & P. 4. 5 Bing. 435., vide etiam *Doe d. Reed v. Harris*, 7 C. & P. 330., where similar evidence was rejected because the attorney was alive.

(3) *Doe d. Walker v. Stephenson*, 3 Esp. N. P. C. 284.

(4) *Stobart v. Dryden*, 1 M. & W. 615.

(5) *Rex v. Noel*, 6 C. & P. 336.

(6) *Thomas v. David*, 7 *ibid.* 350. If the prosecutrix of an indictment for an as-

sault with intent to commit a rape, have been cross-examined as to crimes committed by her several years before the alleged offence, evidence will be received to shew that her character had since been good. *Rex v. Clarke*, 2 Stark. 241.

(7) *Brown v. Goodwin*, 1 Irish Circuit Cases, 61., et ante, 6. tit. ADULTERY.

(8) Per Lord Ellenborough in *Mason v. Hartsink*, 4 Esp. N. P. C. 102. *Roobwood's case*, 13 Howell's St. Tr. 210. *Anon.* 3 Ves. & B. 93.

conscientiously to say, that it is impossible to place any reliance on any statement that such person may make. (1)

In ejectment by an heir-at-law to set aside a will, for fraud and imposition practised by the defendant, witnesses will not be allowed to speak to his general good character (2); because, in civil actions, evidence of the defendant's character cannot be given. (3)

But where the character of the plaintiff or defendant on the record is attempted to be impeached in the cross-examination of the adversary's witnesses, if those witnesses deny the imputation intended to be conveyed, the party cannot go into evidence of his character. (4)

In answer to evidence against character, the other party may cross-examine such witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness. (5)

PROOF BY
WITNESSES.

Where evidence of the plaintiff's and defendant's character cannot be given.

11. *Questions tending to degrade Witnesses.*

Seemingly, there is no express decision, that a witness is compelled to answer questions degrading to his character; but authorities exist that the witness is not compellable to answer such questions. Lord Ellenborough in *Watson's case* (6) said, "You may ask the witness whether he has been guilty of such a crime (improperly asking him in a degree, because you are calling upon him, upon the sanction of his oath, to answer that which he is not bound to answer, for no man is bound to criminate himself); but if from a desire to exculpate himself from the imputation of crime, he gives an answer, it has been held by many of our judges, and I never knew it ruled to the contrary, that having put such question, you must be bound by the answer. The court is not a court to try a collateral question of crime, and it would be unjust if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be produced to charge him; there is no possibility of a fair and competent trial upon that subject, and, therefore, in no instance is it due." (7)

In *Frost v. Holloway* (8) Lord Ellenborough compelled a witness to answer, whether he had not been confined for theft in gaol; and on the witness's appealing to the court, said, "If you do not answer, I will send you there." (9)

In *Cundell v. Pratt* (10) the witness was asked, whether she was not cohabiting in a state of incest; Chief Justice Best refused to enforce an answer to such a question, observing, "Until I am told by the House of Lords that I

QUESTIONS
TENDING TO
DEGRADE WIT-
NESSES.

No express decision exists that a witness is compelled to answer questions degrading to his character.

Judgment of Lord Ellenborough in *Watson's case*.

Judgment of Chief Justice Best in *Cundell v. Pratt*.

(1) *Rex v. Bispham*, 4 C. & P. 392., vide etiam *Carlos v. Brook*, 10 Ves. 50.

(2) *Goodright d. Faro v. Hicks*, Bull. N. P. 296. (a.)

(3) *Anon. Loft*, 321.

(4) *King v. Francis*, 3 Esp. N. P. C. 116.

(5) *Phillipps' Ev.* 925.

(6) *Cit. ibid.* 923. 32 Howell's St. Tr. 490. 2 Stark. 151.

(7) *Rex v. Edwards*, 4 T. R. 440. *Rose*

v. Blakemore, R. & M. 383. *Hardy's case*, 24 Howell's St. Tr. 726. *Harris v. Tippet*, 2 Camp. 637. *Roberts v. Allatt*, M. & M. 192., sed vide *Rex v. Lewis*, 4 Esp. N. P. C. 225. *Macbride v. Macbride*, *ibid.* 242. *Phillipps' Ev.* 921.

(8) K. B. Sitt. after H. T. 1818.

(9) *Ex rel. Gurney*, *cit.* 1 Stark. Ev. 171. n.

(10) M. & M. 108.

**PROOF BY
WITNESSES.**

am wrong, the rule I shall always act on is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this from questions that tend to degrade them, many an innocent man would unjustly suffer; the question may subject her to punishment, I think therefore it ought not to be put."

If the witness deny a fact, or refuse to answer a question degrading to his character, the party will not be precluded from establishing it by independent testimony. (1)

**QUESTIONS
CRIMINATORY.****12. Questions criminatory.**

No man bound to answer any question which will subject him to penalties or infamy.

No man is bound to answer questions, that will subject him to penalties or to infamy (2); if asked, whether he were a deer-stealer, or whether he were a vagabond, or any thing that will subject him to punishment either by statute or common law, whether he be guilty of larceny or the like, the law does not oblige him to answer any such things (3); in fact, a witness is not only not bound to answer a question the answer to which would criminate him, but he is not bound to answer any question, the answer to which would *tend* to criminate him. (4)

Judgment of Lord Eldon in *Paxton v. Douglas*.

Thus, in *Paxton v. Douglas* (5) Lord Eldon said, "I have looked into all the cases, and I find the distinctions between questions supposed to have a tendency to criminate, and questions to which it is supposed answers may be given, as having no connection with the other questions, so very nice, that I can only say, the strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards it, and that, as these interrogatories are framed, this party cannot be compelled to answer."

An accomplice giving evidence not bound to answer questions respecting his own criminality.

Thus, an accomplice, who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner, for he is not protected from a prosecution for such offences. (6)

Forging coal-meters' certificates.

Where a witness was asked whether he had not been imprisoned on a conviction for forging coal-meter's certificates:—It was held, he was not bound to answer. (7)

Arson.

On the trial of an indictment for arson, a witness for the prosecution was in custody on a charge of felony, the counsel for the prisoner wished to ask him, "Have you not said, that you committed the offence for which you

(1) *Queen's case*, 2 B. & B. 311.

(2) *Cook's case*, 11 Howell's St. Tr. 1331. *Rex v. Lewis*, 4 Esp. N. P. C. 225.

(3) *Sir J. Friend's case*, 10 Howell's St. Tr. 1090. *Hardy's case*, 24 *ibid.* 720. *Cates v. Hardacre*, 3 Taunt. 424. *Parkhurst v. Lowten*, 2 Swanst. 216. *Lord Macclesfield's case*, 16 Howell's St. Tr. 1149. *Rex v. Gordon (Lord George)*, Doug. 593. Acts of Indemnity to witnesses, 45 Geo. 3. c. 126. 1 & 2

Geo. 4. c. 21., *vide etiam* Preamble of 46 Geo. 3. c. 37. Phillipps' Ev. 914.

(4) *Cates v. Hardacre*, 3 Taunt. 424. *Macbride v. Macbride*, 4 Esp. N. P. C. 243. *Rex v. Lewis*, *ibid.* 225.

(5) 19 Ves. 226.

(6) Phillipps' Ev. 914.

(7) *Millman v. Tucker*, Peake's Add. Ca. 222.

are now in custody?"—It was holden, that this question ought not to be put. (1)

PROOF BY
WITNESSES

In an action for seducing the plaintiff's daughter, *per quod servitium amisit*, the daughter is not bound to answer in cross-examination, whether she had not previously been criminal with other men (2); nor is evidence of such criminal intercourse admissible. (3) On an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of a bastard child, but he may confess the fact. (4)

Seduction.

The persons who are supposed to have been seconds at a duel, may refuse to give evidence on the trial of the principals; but their testimony may be received as the testimony of persons admitted witnesses for the crown; and, if once sworn, they must disclose the whole truth, although they may thereby involve themselves in the guilt of the transaction. (5)

Duellists.

The court of Exchequer will, in a penal proceeding, restrain a plaintiff from the use of answers in equity, which may tend to criminate the witness. (6)

Answers in equity.

A witness is privileged from answering a question, the answer to which, might subject him to a penal forfeiture of his estate.

LIABILITY TO
FORFEITURE.

A broker in an alleged stock-jobbing transaction, is not compellable to give evidence of it, though he is only liable to a pecuniary penalty. (7)

Broker.

A witness was not obliged to answer, whether he was a Roman Catholic. (8)

Roman Catholic.

If a witness answer questions to which he might have demurred as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on stat. 5 Geo. 2. c. 3. s. 21., the defendant's examination before the commissioners may be given in evidence to shew, that, by his own confession, he had concealed property of the bankrupt. (9)

Effect of witness's answering questions to which he might have demurred.

A witness is not excused from answering a question on the ground, that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty be past. (10)

When time for recovery of penalty has passed.

By stat. 46 Geo. 3. c. 37. a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which, has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatsoever, "by reason only, or on the sole ground, that the answering the question may establish, or tend to establish, that the witness owes a debt, or is otherwise subject to a civil suit:" but this statute does not affect the rule of evidence, "that a party to a suit cannot be called upon against his will by the opposite party to give evidence." (11)

LIABILITY TO
CIVIL SUIT.
Stat. 46 Geo. 3.
c. 37.

On an inquiry in an action for crim. con. into the circumstances of the defendant, the executor of a deceased relation is bound to answer a question, which requires him to state the amount of property the defendant acquired under the will of his testator. (12)

Executor of a deceased relation bound to state the amount of property which a defendant in a crim. con. action received from his testator.

(1) *Rex v. Pegler*, 5 C. & P. 521.

(2) *Dodd v. Norris*, 3 Camp. 519.

(3) *Hodgson's case*, 1 R. & R. C. C. 211.

(4) *Rex v. St. Mary's, Nottingham*, 13 East, 58. n.

(5) *Rex v. England*, Leach, C. C. 767.

(6) *Jackson v. Benson (Clerk)*, 1 Y. & J. 32.

(7) *Raines v. Towgood*, Peake's Add. Cas. 105.

(8) *Rex v. Gordon (Lord George)*, Doug. 590.

(9) *Smith v. Beadnell*, 1 Camp. 30.

(10) *Roberts v. Allatt*, M. & M. 192., vide *Rex v. Reading*, 7 Howell's St. Tr. 296.

(11) *Per Lord Ellenborough in Rex v. Woburn (Inhab. of)*, 10 East, 395. Exp. *Chamberlain*, 19 Ves. 482.

(12) *Peter v. Hancock*, 1 C. & P. 375.

**PROOF BY
WITNESSES.**

Articled clerk.

Witness not bound to answer an oblique charge.

Witness will not be compelled to state where he lives, if he state that he believes there is a bailable writ out against him.

Witness refusing to answer, as by so doing, he might be liable to a *qui tam* action.

**DEMURRER TO
EVIDENCE.**

Defined.

Resolutions in *Wright v. Pindar*.

Joinder in demurrer on written evidence.

An articled clerk to an attorney, who is bound by his articles to keep all his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interests of the master's clients, though the disclosure may go to support a civil action against the master. (1)

A witness is not bound to answer a question, the answer to which may obliquely charge him, when there can be no other direct evidence against him of a demand. (2)

The judge at a trial will not compel a witness to say where he lives, if he state, that he believes that a bailable writ is out against him, at the instigation of a party whose counsel had put the question. (3)

In an action on a bill of exchange, if a person called to prove the consideration say, that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand as if there was no consideration. (4)

9. DEMURRER TO EVIDENCE.

A demurrer to evidence is a proceeding by which the judges of the court in which the action is depending are called upon to declare, what the law is upon the facts shewn in evidence, analogous to the demurrer upon facts alleged in pleading.

"If the plaintiff or defendant give in evidence matter of record, or writings, or parol evidence, on which a doubt in law arises, the other side may demur to the evidence; otherwise, if there be a doubt whether the fact be well proved, for the jury may find it on their own knowledge." (5)

In *Wright v. Pindar* (6) it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or that it be doubtful, whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true." (7)

If a matter of record or other matter in writing be offered in evidence to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict by demurring to the evidence, and obliging the party offering the

(1) *Webb v. Smith*, 1 C. & P. 337. R. & M. 106.

(2) *Doxon v. Haigh*, 1 Esp. N. P. C. 411.

(3) *Watson v. Bevern*, 1 C. & P. 363.

(4) *Dandridge v. Corden*, 3 ibid. 11.

(5) Bull. N. P. 312. (a.) Co. Litt. 72. (a.) *Baker's case*, 5 Co. 104. *Fitz-Harris v. Boiun*, 1 Lev. 87. If an indorsement to a foreign bill of exchange be forged, and a question arise as to the proof of the identity of the

indorser, and the evidence be objected to, as being insufficient for that purpose, the proper course for taking advantage of the objection is by demurring to the evidence, and not by bill of exceptions. *Bulkeley v. Butler*, 3 D. & R. 625. 2 B. & C. 434.

(6) Aleyn, 18. *Gibson v. Hunter*, 2 Hen. Black. 207.

(7) Vide etiam *Fanshaw v. Cockedge* (in error), 3 Bro. P. C. 690. Doug. 119.

same to join in demurrer, or wave the evidence (1); and the reason given for it is, that there cannot be any variance of matter in writing. (2)

DEMURRER TO EVIDENCE.

The books also agree, that if parol evidence be offered, and the adverse party demur, he who offers the evidence may join in demurrer if he will. But the language of the old books is very indistinct upon the question, whether the party offering parol evidence shall be obliged to join in demurrer.

Parol evidence.

If the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate; or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in the demurrer. (3)

But on a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record, every fact and every conclusion, which the evidence offered conduces to prove. (4)

Circumstantial evidence.

If in an information, or any other suit, evidence be given for the king, and the defendant offer to demur upon it, the king's counsel cannot be compelled to join in demurrer; but in such case the court ought to direct the jury to find the special matter, and upon that they shall adjudge the law. (5)

Where joinder in demurrer cannot be enforced.

If the matter be clear, the court need not admit a demurrer. (6)

Where the judge can overrule a demurrer.

If the judge admit that for evidence which is not, the party cannot demur for that cause, but must tender a bill of exceptions. (7)

Where there is a demurrer to evidence, the judge orders the associate to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*. (8)

Form of drawing up a demurrer to evidence.

The most usual course, on a demurrer to evidence, is to discharge the jury without more inquiry, though they may find damages *de bene esse*, and for a writ of inquiry to be executed after. (9)

Assessment of damages.

On a demurrer to evidence, the only question for the consideration of the court is, whether the evidence given be such, as ought to be left to the jury in support of the issue joined; and no objection can be made to the declaration or other pleadings in that stage of the cause (10); for the party ought to admit the whole effect of the evidence, and not merely the facts which compose it; so that, if it be only presumptive, he must distinctly admit every conclusion, which the jury might have drawn from it. (11)

Question for the consideration of the court.

(1) *Gibson v. Hunter*, 2 Hen. Black. 206. *Slatford*, 1 Salk. 284. *Miller v. Warre*, 1 C. & P. 239.
 (2) *Middleton v. Baker*, Cro. Eliz. 752. 5 Co. 104.
 (3) Tidd, 866.
 (4) *Gibson v. Hunter*, 2 Hen. Black. 187. 6 Bro. P. C. 255.
 (5) *Baker's case*, 5 Co. 104. Bull. N. P. 313. (b.)
 (6) Bull. N. P. 313. (b.) *Worsley v. Fiskier*, 2 Rol. Rep. 119. *Gibson v. Hunter*, 2 Hen. Black. 208.
 (7) Bull. N. P. 313. (b.) *Thruston v.*
 (8) Bull. N. P. 313. (a.) cit. Co. Litt. 72. Per Pemberton C. J. in *Terry v. Westmore*, Maidstone, 1682.
 (9) Bull. N. P. 313. (b.) ? *Darrose v. Newbott*, Cro. Car. 143. *Herbert v. Walters*, 1 Ld. Raym. 60. *Newys v. Larke*, Plowd. 410. Doug. 222. n.
 (10) Bull. N. P. 313. (a.) *Cocksedge v. Fanshaw*, Doug. 119.
 (11) *Gibson v. Hunter*, 2 Hen. Black. 187.

DEMURRER TO EVIDENCE.

The judgment on a demurrer to evidence is, that the evidence is or is not sufficient to maintain the issue joined. (1)

The judgment.

BILL OF EXCEPTIONS.

Grounds for a bill of exceptions.

Stat. Westm. 2.
(13 Edw. 1.)
c. 31.

10. BILL OF EXCEPTIONS.

A bill of exceptions is founded upon some objections in point of law to the opinion and direction of the court upon a trial at bar, or of the judge *Nisi Prius*, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it, or for overruling a challenge, or refusing a demurrer to evidence, &c. In these cases it is enacted by stat. Westm. 2. (2) c. 31., that "if the party write the exception, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals; and if one will not, another shall. And if the king, on complaint made of the justices, cause the record to come before him, and the exception be not found in the roll, and the party shew the exception written, with the seal of the justice affixed, the justice shall be commanded, that he appear at a certain day to confess or deny his seal; and if the judge cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." This statute extends to inferior courts (3), and to trials at bar, as well as those at *Nisi Prius*. (4)

(1) *Cort v. Birkbeck*, Doug. 218. The following form of a demurrer to evidence and joinder thereto may perhaps be found useful at an assizes, and which is extracted from Bull. N. P. 313. (b.): — "Afterwards on the day, and at the place within contained, before Sir Richard Adams, Knight, one of the barons of our lord the king, of his court of Exchequer at Westminster, Sir Richard Aston, Knight, one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and others their fellows, justices of our said lord the king, assigned to take the assizes in and for the city of W——, in the county of the same city, according to the form of the statute, &c. came as well the within named C. W. Esq., as the within named G. W. Esq., by their attorneys within named. And the jurors of the jury, whereof mention is within made; that is to say, R. L. &c. being called, likewise came, and being chosen, tried, and sworn to say the truth of the premises within contained: as to the first issue between the parties within joined, say that the said G. W. is guilty of the trespass within complained of, in manner and form as the said C. W. hath above complained; and they assess the damages of the said C. W. by reason thereof, to sixpence. And as to the issue lastly within joined between the said parties, the said G. W. shews in evidence to the jury aforesaid, to prove and maintain the issue lastly within joined on his part by one witness, that [so state the evidence]. And the said C. W. says, that the aforesaid matter to the jurors aforesaid, in form aforesaid shewn

in evidence by the said G. W., is not sufficient in law to maintain the said issue lastly within joined, on the part of the said G. W., and that he the said C. W. to the matter aforesaid, in form aforesaid shewn in evidence, hath no necessity, nor is he obliged by the laws of the land to answer (and that he is ready to verify); wherefore, for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said C. W. prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that his damages by reason of the trespass within complained of, may be adjudged to him, &c. And the said G. W., for that he hath shewn in evidence to the jury aforesaid, sufficient matter to maintain the issue lastly within joined, on the part of the said G. W., and which he is ready to verify; and forasmuch as the said C. W. doth not deny, nor in any manner answer the said matter, prays judgment; and that the said C. W. may be barred from having his aforesaid action against him, and that the jury aforesaid may be discharged from giving their verdict upon the issue lastly joined, &c.; wherefore let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict thereupon."

(2) 13 Edw. 1. c. 31.

(3) 2 Inst. 427.

(4) The bill of exceptions taken by defendant on a former trial is admissible to shew, that certain payments were made by plaintiff by defendant's direction and authority, although it is stated in the bill of exceptions, that the payments were admitted

A bill of exceptions is not to draw the whole matter into examination again ; it is only for a single point ; and the truth of it can never be doubted, after the bill is sealed, for the adverse party is concluded from averring the contrary, or supplying an omission in it. (1)

If a bill of exceptions be tendered to a judge in the course of a trial at Nisi Prius, the facts still go to the jury. (2)

A bill of exceptions lies, where the judge improperly directs a nonsuit (3), or states to the jury, that there is evidence to support the issue when there is none. (4) It likewise lies on a trial at bar (5), and on the direction of the sheriff to a jury in a county court. (6)

If the plaintiff intend to bring a writ of error on the ground of misdirection in point of law, he should not submit to be nonsuited, but appear and put the judge to express such opinion by way of direction to the jury, and thereupon tender a bill of exceptions. (7)

A bill of exceptions is only to be made use of upon a writ of error, and therefore, where a writ of error will not lie, there can be no bill of exceptions. (8)

On the trial of a feigned issue out of Chancery, a party is not entitled to a bill of exceptions. (9)

The bill of exceptions must be tendered at the trial. (10) But a bill of exceptions being in the nature of a writ of error, cannot be delivered in the court out of which the record issues. (11)

The nature and reason of the thing requires the exception should be reduced into writing when taken and disallowed, like a special verdict or a demurrer to evidence, not that they need to be drawn up in form, but the substance must be reduced into writing while the thing is transacting (12), because it is to become a record.

The bill of exceptions is either tacked to the record or not ; if it be not tacked to the record, it is necessary to set out the whole of the proceedings previous to the trial, but otherwise it begins with the proceedings after issue joined (13); and in either case it goes on to state, according to the circumstances, that a witness was produced to prove certain facts ; the particular evidence offered, or given to the jury, in support of the whole or a part of the case ; or that a challenge was made, or demurrer to evidence tendered ; the allegations of counsel, respecting the competency of the witness, the admissibility of the evidence, or the legal effect of it, &c. ; the opinion and direction of the court or judge thereon ; the verdict of the jury ; and the exception of the counsel to the opinion given. (14)

**BILL OF EX-
CEPTIONS.**

The object of a bill of exceptions.

The facts go to the jury, notwithstanding a bill of exceptions.

Where it lies.

Where it does not lie.

When to be tendered.

Must be reduced into writing.

**FORM OF BILL
OF EXCEPTIONS.**

by defendant's counsel at the former trial, and were not proved. *Harrison v. Bradley*, 1 *Armstrong & Macartney* (Irish), 15.

(1) Bull. N. P. 316. (a.) *Bridgman v. Holt*, Show. Par. Ca. 120.

(2) *Miller v. Warre*, 1 C. & P. 237. 240. n. 7 D. & R. 1. 4 B. & C. 538.

(3) *Strother v. Hutchinson*, 4 Bing. N. C. 83., sed vide *Doe d. Tolson v. Fisher*, 2 Bligh, N. S. 9.

(4) Per Best J. in *Bulkeley v. Butler*, 2 B. & C. 445.

(5) *Rowe v. Brenton*, 3 M. & R. 266.

(6) *Strother v. Hutchinson*, 4 Bing. N. C. 83.

(7) *Doe d. Tolson v. Fisher* (in error), 2 Bligh, N. S. 9.

(8) *Rex v. Preston* (Inhab. of), Str. 1040. C. T. H. 249.

(9) *Bullen v. Michel*, 2 Price, 416.

(10) Bull. N. P. 315. *Thruston v. Slatford*, 1 Salk. 284.

(11) *Davenport v. Tyrrel*, 1 W. Black. 679. Bull. N. P. 316. (b.)

(12) Bull. N. P. 315. *Wright v. Sharp*, 1 Salk. 288.

(13) Bull. N. P. 317. 319. (a.)

(14) Tidd, 863, 864.

**BILL OF EX-
CEPTIONS.**

Where exceptions are not properly taken (as where they appear upon the record after the finding of the jury), the court of error cannot give judgment thereon. (1)

(1) *Armstrong v. Lewis (in error)*, 4 M. & Sc. 1. 2 C. & M. 274.

The following is a form of a bill of exceptions, separate from the record. (Tidd's Forms, 327, Lond. 1828.):—

“— to wit. Be it remembered, that in the term of —, in the — year of the reign of our sovereign lord George the Fourth, now king of the united kingdom of Great Britain and Ireland, &c. came A. B. by — his attorney, into the court of our said lord the king before the king himself at Westminster, and impleaded C. D. in a certain plea of trespass on the case upon promises; on which the said A. B. declared against him, that, &c. [*set out the declaration and other pleadings, and proceed as follows*]. And thereupon issue was joined between the said A. B. and the said C. D. And afterwards, to wit, at the sittings of Nisi Prius, holden at the Guildhall of the city of London aforesaid, in and for the said city, on — the — day of —, in the — year of the reign of our said lord the king, before the right honourable Charles Lord Tenterden, chief justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, John Henry Abbott, Esq. being associated unto the said chief justice, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city of London aforesaid, for that purpose duly impanelled; that is to say, E. F. of — and G. H. of —, &c. [*names and additions of jury*] good and lawful men of the said city of London: at which day, came there as well the said A. B. as the said C. D. by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said A. B. to maintain and prove the said issue on his part, gave in evidence that, &c. [*here set out the evidence on the part of the plaintiff, and afterwards that on the part of the defendant, and then proceed as follows*]: Whereupon the said counsel for the said C. D. did then and there insist before the said chief justice, on the behalf of the said C. D., that the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said C. D. to a verdict, and to bar the said A. B. of his action aforesaid; and the said counsel for the said C. D. did then and there pray the said chief justice, to admit and allow the said matters so produced and given in evidence for the said C. D. to be conclusive evidence in favour of

the said C. D. to entitle him to a verdict in this cause, and to bar the said A. B. of his action aforesaid: But to this the counsel learned in the law of the said A. B. did then and there insist, before the said chief justice, that the same were not sufficient, nor ought to be admitted or allowed, to entitle the said C. D. to a verdict, or to bar the said A. B. of his action aforesaid; and the said chief justice did then and there declare, and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said C. D. were not sufficient to bar the said A. B. of his action aforesaid, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said A. B. and — *L. damages*; whereupon the said counsel for the said C. D. did then and there, on the behalf of the said C. D. except to the aforesaid opinion of the said chief justice, and insisted on the said several matters, as an absolute bar to the said action: And inasmuch as the said several matters so produced and given in evidence on the part of the said C. D. as by his counsel aforesaid, objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said C. D. did then and there propose their aforesaid exceptions to the opinion of the said chief justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid, according to the form of the statute in such case made and provided: And thereupon the said chief justice, at the request of the said counsel for the said C. D., did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said — day of —, in the — year of the reign of his present majesty.”

Bill of exceptions to be tacked to the record, as to a witness's being bound to answer a question tending to disgrace him in K. B. (Tidd's Forms, 329. Lond. 1828.)

After the end of the issue, and award of the *venire facias*, proceed as follows:—

“Which said issue, in form aforesaid joined between the said parties, afterwards, to wit, at the sittings of Nisi Prius holden at Westminster Hall, in and for the county of Middlesex, on — the — day of —, in the — year of the reign of our lord the now king, before the right honourable Charles Lord Tenterden, chief justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, John Henry Abbott, Esq. being associated unto the said chief justice according to the form of the statute in such case made and provided, came on to be tried

**BILL OF EX-
CEPTIONS.**

When the judge allows the matter to be evidence, but not conclusive.

When the judge should sign the bill.

Effect of signing.

Amendment.

When the judge can refuse to sign the bill.

Consequence of the judge refusing to sign the bill.

If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exception will lie, as if a man produce the probate of a will to prove the devise of a term for years, and the judge leave it to the jury, he may have an attain against the jury if they find against the will.(1)

If the bill be legally tendered, and the exceptions in it truly stated, then the judge ought to set his seal in testimony, that such exceptions were taken at the trial.(2)

When the bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed.(3)

Where a bill of exceptions stated the direction of the judge to the jury, that the jury gave their verdict for the plaintiff, and that the counsel for the defendant did except, &c. : — It was held, that an amendment might be permitted after the judge's seal had been affixed, to allege, that the exceptions had been made before the verdict was delivered.(4)

If the bill contain matters false or untruly stated, or matters wherein they were not overruled, the judge is not obliged to affix his seal.

If the judge refuse to sign the bill, the party grieved by the denial may have a writ upon the statute, commanding the same to be done *juxta formam statuti*: it recites the form of an exception taken and overruled, and it follows, "*vobis præcipimus quod si ita est, tunc sigilla vestra apponatis;*" and if it be returned "*quod non ita est,*" an action will lie for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given, and upon such recovery, a peremptory writ commanding the same.(5)

by a jury of the said county of Middlesex for that purpose duly impanelled: At which day came there as well the said A. B. as the said C. D. by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue: And upon the trial of that issue one E. F. was produced and examined upon oath as a witness by the counsel learned in the law for the said A. B. in support of the said action; and upon the cross-examination of the said E. F. by the counsel learned in the law for the said C. D. the said E. F. was asked by the said last-mentioned counsel, whether he had not been imprisoned, upon a conviction for forging a coal-meter's ticket; Whereupon the said chief justice then and there interposed, and before the said E. F. had given any answer to the said question, declared and delivered his opinion, that the said E. F. was not bound to answer the said question; and the said E. F. thereupon then and there refused to answer the same: And afterwards, at the said trial, the said chief justice, in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said E. F.'s refusal to answer the said question, threw no manner of discredit upon him the said E. F.; and the jury aforesaid thereupon then and there

gave their verdict for the said A. B. and —l. damages: Whereupon the said counsel for the said C. D. did then and there, on behalf of the said C. D., except to the aforesaid opinion of the said chief justice, and insisted that the said E. F. was bound to answer the said question, and that his refusal to answer the same was, and ought to be considered by the said jury as an impeachment of his credit: And inasmuch as the said several matters herein before mentioned, do not appear by the record, &c." [*conclude as in the last precedent*].

(1) Bull. N. P. 316. (a.) *Chichester v. Philips*, Sir T. Raym. 405.

(2) Bull. N. P. 316. (a.)

(3) Tidd, 864.

(4) *Culley v. Doe d. Taylerson*, 3 P. & D. 539. Where a bill of exceptions is taken at the trial of a cause, it must be set down for argument within the first four days of the ensuing term. *Hill v. Watts*, 1 Alcock & Napier (Irish), 130.

(5) Bull. N. P. 316. (a.) *Bridgman v. Holt*, Show. Par. Ca. 120. 2 Inst. 426. In *Sir H. Vane's case*, who was indicted for high treason, the court refused to sign a bill of exceptions, because they said criminal cases were not within the statute, but only actions between party and party. But in *Paget v. Coventry (Bishop of)*, 1 Leon. 5., it was allowed in an indictment for a trespass; and in *Anon.* 1 Vent. 366., in an inform-

**BILL OF EX-
CEPTIONS.****Waver of bill
of exceptions.**

When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned. (1)

And if a party who has tendered a bill of exceptions, bring a writ of error before he has procured the judge's signature to such bill, he thereby waves the bill of exceptions, and will not be permitted afterwards to tack or append the bill to the writ of error. (2)

But it seems this rule is not imperative, and that where the bill of exceptions has been delayed from the default of the defendant above, or for other sufficient reasons, the court will allow the bill of exceptions to be tacked to the record *nunc pro tunc*. (3)

On a bill of exceptions the court of error may look at the whole evidence set out to be informed, whether the verdict is sustained, at least where the bill sets out the whole, and the exception is not confined to one point. (4)

Costs.

A bill of exceptions being no part of the record in the court below, is not to be included in the taxation of costs there. (5)

Where, in case, the plaintiff recovered a verdict at the trial, and had judgment in C. B., and upon a bill of exceptions returned into K. B., judgment was reversed and the plaintiff took nothing by his writ, it was holden, that the defendant could not have costs. (6)

JUDGMENT.**Proceedings on,
after reversal.**

The judgment on the writ of error, as in other cases, is either, that the former judgment be affirmed or reversed.

If it be reversed a *venire de novo* issues, which must be made returnable in the King's Bench, although the judgment was given in the Common Pleas. (7)

11. RIGHT TO BEGIN AND REPLY. (8)**RIGHT TO
BEGIN AND
REPLY.**

It may be stated as a general principle, that the party on whom the *onus probandi* is cast, has the right to commence.

**Judgment of
Mr. Baron Al-
derson in *Amos
v. Hughes*.**

In *Amos v. Hughes* (9), which was an action brought for a breach of contract to emboss calico in a workmanlike manner, the allegation of the breach in the declaration was, that the defendant did not emboss the calico in a workmanlike manner, but on the contrary embossed it in a bad and unworkmanlike manner; to which it was pleaded, that the defendant did emboss the calico in a workmanlike manner, and issue thereupon. A question arose, which party was entitled to begin, and Mr. Baron Alderson held, that the plaintiff was entitled, observing, "Questions of this kind were not to be decided by simply ascertaining on which side the affirmative, in point of form, lay: the proper test is, which party would be successful, if no evidence at all were given. Now here, supposing no evidence to be given on either side,

ation in nature of a *quo warranto*. Sir Henry Vane's case, 1 Lev. 68. Bull. N. P. 568. Y. & J. 4. acc. *Smyth v. Latham*, 1 C. & M. 316. (a.)

(1) *Doe d. Roberts v. Roberts*, 2 Chitt. 272. 2 B. & Ad. 367.

(2) *Dillon v. Doe d. Parker*, 1 Bing. 17. *Willans v. Taylor*, 5 ibid. 512. 4 M. & P. 257.

(3) *Taylor v. Willans*, 2 B. & Ad. 846.

(4) *Vines v. Reading (Corporation of)*, 1

(5) *Gardner v. Baillie*, 1 B. & P. 32.

(6) *Bell v. Potts*, 5 East, 49. 2 Esp. N. P. C. 712. et vide *Nowell v. Roake*, 7 B. & C. 404. 1 M. & R. 170.

(7) *Tidd*, 865.

(8) *Ante*, 178. tit. ARBITRATION AND AWARDS; et *ante*, 1454. tit. EJECTMENT.

(9) 1 M. & Rob. 464.

the defendant would be entitled to the verdict, for it is not to be assumed that the work was badly executed; therefore the burden of proof lies upon the plaintiff." The same principles were acted upon in *Mills v. Barber* (1), in which Mr. Baron Alderson said, "Upon the question as to who is to begin, it is not the proper test to examine whether, if the particular allegation be struck out of the plea, there will or will not be a defence to the action; it is immaterial whether the allegation be in the affirmative or negative."

RIGHT TO BEGIN AND REPLY.

Judgment of Mr. Baron Alderson in *Mills v. Barber*.

In actions on bills of exchange and promissory notes, and on bankers' cheques, if the pleas of the defendant impeach the consideration, the *onus probandi* is cast on the defendant (2); the law presuming, that they were given for a good consideration, unless the contrary be proved. Nor does it make any difference in such a case, that the affirmative of the issue is, in point of form, on the plaintiff, as if he take issue on a plea, that there was no consideration for the bill, note, or cheque. (3)

Bills of exchange; where defendant ought to begin.

If there be several *bond fide* issues on the record, as to some of which, the *onus probandi* is on the plaintiff, and the others on the defendant, it seems, that the plaintiff is entitled to begin. (4)

WHERE THERE ARE SEVERAL ISSUES.

The plaintiff's counsel has a right to begin and state the facts, although by a rule of court the defendant is under an obligation to admit the plaintiff's case, because "it is not like the case of an issue, proof of the affirmative of which, lies on the defendant." (5)

Where the plea avers affirmative matter, but concludes with a special traverse of a part of the declaration, the plaintiff, and not the defendant, begins. (6)

Plea averring affirmative matter, but concluding with a special traverse.

In an action on the warranty of a horse, if the plea allege, that the horse was sound, and issue be joined thereon, the plaintiff is entitled to begin. (7)

In *assumpsit*, where the declaration stated, that the defendant agreed to build houses according to a specification, and assigned for breach, that he did not build according to the specification, and the defendant pleaded, that he did so build; the court held, that on this issue, the plaintiff must begin, and prove, that the defendant had not built according to the specification. (8)

Assumpsit.

Where in an action of covenant to repair, the breach was, that the defendant did not repair, but suffered the premises to be ruinous, &c. and the defendant pleaded, that he did repair, and did not suffer the premises to become ruinous, &c.; it was decided, by Lord Abinger, that on this issue the plaintiff must begin. (9)

Covenant to repair.

Where a declaration on a policy of insurance averred, that the person insured was in good health; and the plea stated, that he was in bad health, with a verification; to which it was replied, that he was in good health, as averred in the declaration, and concluded to the country: — It was held,

Policy of insurance.

(1) 1 M. & W. 427.

(2) *Lacey v. Forrester*, 2 C. M. & R. 59. *Mills v. Oddy*, *ibid.* 103.

(3) *Faith v. McIntyre*, 7 C. & P. 44. *Smart v. Rayner*, 6 *ibid.* 721. *Mills v. Oddy*, *ibid.* 728.

(4) *Williams v. Thomas*, 4 *ibid.* 234. *James v. Salter*, 1 M. & Rob. 501. *Curtis v. Wheeler*, M. & M. 493. *Wood v. Pringle*, 1 M. & Rob. 277., *sed vide Smart v. Rayner*, 6 C. & P. 721.

(5) *Per Tindal C. J. in Thwaites v. Sainsbury*, 5 C. & P. 69.

(6) *Per Parke B. in Crowley v. Page*, 7 *ibid.* 789.

(7) *Osborn v. Thompson*, 2 M. & Rob. 254.

(8) *Smith v. Davies*, 7 C. & P. 307., *et vide Shilcock v. Passman*, *ibid.* 289. *Scott v. Lewis*, *ibid.* 347.

(9) *Soward v. Leggatt*, *ibid.* 613.

RIGHT TO BEGIN AND REPLY.

IN WHAT CASES PROOF OF DAMAGES ENTITLES PLAINTIFF TO BEGIN.

Where proof of damages or amount of claim entitles the plaintiff to begin.

Exception to general rule in actions for personal injuries.

PROOF OF DAMAGES.

Judgment of Chief Justice Tindal in *Carter v. Jones*.

Where affirmative proof lies on the plaintiff to shew what damages he is entitled to.

Judgment of Chief Justice Tindal in *Reeve v. Underhill*.

that the plaintiff had the right to begin (1); because "it lies on the plaintiff to establish that, which is the very condition of the insurance, namely, that the party whose life is insured was in good health."

If it can be collected from the pleadings and statements of counsel, that substantial damages are the object of an action, the plaintiff has the right to begin, though all the issues are on the defendant. (2)

But in order to entitle the plaintiff to begin on this ground, it is not sufficient, that the claim appears upon the record to be larger than that confessed and avoided by the pleas; otherwise, it would almost always be in the power of the plaintiff to secure the right to begin; but the judge must be satisfied at the trial, that there is a *bond fide* intention to give evidence in support of a larger claim, than that confessed on the record. (3)

In some cases, though the pleas go to the whole length of the plaintiff's claim, the plaintiff will be entitled to begin, and may prove the amount of damages claimed by him in the event of a verdict passing in his favour on the special plea.

In *Carter v. Jones* (4) Chief Justice Tindal said, "The judges have come to a resolution, that justice would be better administered by altering the rule of practice, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. I do not see any hardship in the rule, as it is most reasonable that the plaintiff, who brings the case into court, should be heard first to state his complaint."

The rule is thus stated in S. C. 1 M. & Rob. 281.:—"A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained account, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant."

In *Absalom v. Beaumont* (5), which was an action on a policy of insurance against fire, there were four pleas, in all of which, the affirmative was on the defendant; Lord Denman held, that "In all cases where any affirmative issue, or, to speak more correctly, any affirmative proof lay on the plaintiff to shew what damages he was entitled to, the plaintiff had a right to begin."

In *Reeve v. Underhill* (6), which was an action of covenant to recover damages for the breach of a contract not under seal, the plea was, that the deed was obtained by fraud, upon which issue was joined; the defendant claimed the right to begin; on behalf of the plaintiff it was contended, that the case came within the new rule as one of unliquidated damages; but the contrary was ruled, Chief Justice Tindal observing, "I am of opinion, that the present case is not within the rule which has been laid down by the judges;" "the rule allowing the plaintiff to begin, applies to actions for libel, words, malicious prosecution, and similar cases." It "can hardly be said in any case, where the action is for the breach of a special

(1) *Rawlins v. Desborough*, 2 M. & Rob. 70.

(2) *Hoggett v. Oxley*, 2 M. & Rob. 251.

(3) *Smart v. Rayner*, 6 C. & P. 721. *Homan v. Thompson*, *ibid.* 717.

(4) *Carter v. Jones*, 6 C. & P. 64. 1 M. & Rob. 281.

(5) 1 M. & Rob. 441. n.

(6) 6 C. & P. 773. 1 M. & Rob. 440.

vide etiam *Lewis v. Wells*, 7 C. & P. 221

Wootton v. Barton, 1 M. & Rob. 518.; contra, per Denman C. J. in *Absalom v. Beaumont*, *ibid.* 441.

agreement, that the damages are precisely ascertained ; but here the amount is, after all, matter of mere calculation, and not liable to be increased by any matter that the plaintiff can urge in aggravation ; it is otherwise in actions of libel, slander, and other cases, where the action is brought for malicious injuries."

RIGHT TO BEGIN AND REPLY.

In *Wootton v. Barton* (1) it was said by Mr. Baron Parke in a similar case, "that the only rule laid down by the judges was, that in actions for personal injuries where damages are sought, as in actions of assault, &c., and in libel and slander, the plaintiff should begin." Nor does an action of trover appear to be within the rule (2) ; but an action for false imprisonment is within the rule. (3)

If the action be for a personal injury, it is not necessary that it should be in form *ex delicto* ; in many instances compensation is sought for what is in substance a *tort*, though in the action it may assume the form of a mere breach of contract ; and the rule has been held to apply in one case, where the complaint was in substance as well as in form a breach of contract, namely, in an action for breach of promise of marriage. (4)

In an action for a personal injury, it is not necessary that it should be in form *ex delicto*.

Lord Tenterden in *Fowler v. Coster* (5) appears to have entertained opinions similar to those embodied in the foregoing resolution, where, in an action on a bill of exchange, and to which the defendant pleaded a non joinder in abatement, his Lordship held, that the defendant was entitled to begin ; because, "that wherever it appears on the record, or by the statement of the counsel engaged, that there is really no dispute about the sum to be recovered, but the damages are either nominal, or else mere matter of computation, then, if the affirmative of the issue is on the defendant, he is entitled to begin." (6)

WHEN DEFENDANT IS TO BEGIN.

Plea in abatement.

Defendant's right.

In covenant for not repairing, &c. if the defendant plead affirmative pleas, which are denied by the replication, he is in general entitled to begin. (7)

Covenant.

In an action of debt for a penalty of 50*l.* for carrying the plaintiff to prison under mesne process within twenty-four hours, where the defendant pleaded, that it was by the plaintiff's own consent, and the plaintiff replied that he did not consent : — It was held, the defendant should begin. (8)

Debt.

If the plaintiff aver the liability of the whole parish to church-rates, and the defendant plead the exemption of a part of it, with a traverse of the liability of the whole, on which issue is taken, the *onus* of proof lies on the defendant. (9)

Parochial liability to church-rates.

In trespass *quare clausum fregit*, the plea being of a right of way, it was held, before the promulgation of the new rule, that the defendant was entitled to begin. (10) . So, likewise, where *liberum tenementum* was pleaded, and no general issue. (11) And in trespass for shooting a dog, where there were several special pleas of justification, but no plea of the general issue, it

Right of way.

(1) 1 M. & Rob. 518.

(2) Vide *Scott v. Lewis*, 7 C. & P. 347.

(3) *Atkinson v. Warne*, 6 *ibid.* 687.

(4) *Harrison v. Gould*, 7 *ibid.* 580.

(5) M. & M. 241.

(6) These dicta seemingly overrule *Robey v. Howard*, 2 Stark. 555. *Lacon v. Higgins* 3 *ibid.* 178. *Bedell v. Russell* R. & M. 293.

Cooper v. Wakley M. & M. 248. 3 C. & P. 474. *Jackson v. Hesketh*, 2 Stark. 518. *Cot-*

ton v. James, M. & M. 273. *Hodges v. Holder*, 3 Camp. 366.

(7) *Lewis v. Wells*, 7 C. & P. 221.

(8) *Silk v. Humphrey*, *ibid.* 14.

(9) *Craven v. Sanderson*, 4 A. & E. 666.

(10) *Jackson v. Hesketh*, 2 Stark. 518.

Cotton v. James, M. & M. 273. *Hodges v. Holder*, 3 Camp. 366.

(11) *Pearson v. Coles*, 1 M. & Rob. 206.

RIGHT TO BEGIN AND REPLY.

Issue in error to avoid an outlawry.

Existence of a custom.

Replevin.

Ejectment.

Effect of the judge making an erroneous decision, respecting the right to begin.

RIGHT TO REPLY.

Statement of facts by defendant's counsel, but not calling witnesses in support of them.

was held that, the defendant was entitled to begin, although the declaration alleged special damage. (1)

On an issue in error to avoid an outlawry, because the plaintiff was beyond seas; it was pleaded that the plaintiff went abroad fraudulently to defeat the outlawry, upon which issue was joined:—It was held, that the defendant had the right to begin. (2)

Where the substantial question to be tried, is the existence of a custom affirmed by the defendant, he is entitled to begin, although the plaintiff's counsel allege, that he seeks to recover real damages. (3)

If the defendant in *replevin* plead property in a third person, and issue be taken thereon, he is entitled to begin. (4) So, also, where the defendant pleads a plea averring notice, and issue is taken on the fact of notice, the defendant begins. (5)

With respect to the right to begin in ejectment, it has already experienced attention (6); but it may be observed that, in *Doe v. Huddart* (*Sir Joseph*) (7), Mr. Baron Bolland said, "that in actions of ejectment the courts would as far as possible follow the course in other actions, and not unnecessarily create an anomaly to the general rules of evidence upon trials."

In *Doe d. Smith v. Smart* (8) the plaintiff claimed as heir at law, and, as to part of the property, as assignee of an outstanding term, and the defendant, who claimed as devisee, refused to admit the assignment:—It was held, that the defendant was entitled to begin; Mr. Baron Gurney, after consulting Mr. Justice Patteson, observing, "The real question in dispute is the validity of this will. The mischief would be extremely great, if a party, by merely getting an outstanding term, should obtain an advantage to which he is not really entitled."

An erroneous decision of the judge as to the right to begin was, in *Bird v. Higginson* (9), considered no ground for a new trial; but in *Huckman v. Fernie* (10) Lord Abinger said, "We cannot agree, however, that this a matter entirely for the disposal of the judge at Nisi Prius. I cannot say that we should interfere in a very doubtful case; but if the decision of the judge were clearly and manifestly wrong, the court would interfere to set it right."

If the defendant's counsel merely comment on the plaintiff's case, and adduce no evidence, the plaintiff's counsel cannot reply, for he has already been heard; but if the defendant adduce any species of evidence, the plaintiff has the general right of reply.

If the defendant's counsel read a paper, or state essential facts which he proposes to prove, and afterwards decline to call witnesses to support such paper or facts, the plaintiff's counsel is entitled to reply (11), if the judge will permit, it being purely discretionary with the judge to give that privilege. (12)

In *Faith v. McIntyre* (13) the counsel for the defendant, having proved a document in cross-examination, read it in the course of his address to

(1) *Fish v. Traversa*, 3 C. & P. 578., et vide *Morris v. Nugent*, 7 ibid. 572.

(2) *Bryan v. Wagstaff*, R. & M. 327.

(3) *Bastard v. Smith*, 2 M. & Rob. 129.

(4) *Colstone v. Hiscolbs*, 1 ibid. 301.

(5) *Warner v. Haines*, 6 C. & P. 666.

(6) *Ante*, 1454.

(7) 2 C. M. & R. 316.

(8) 1 M. & Rob. 476.

(9) 2 A. & E. 160.

(10) 3 M. & W. 517.

(11) *Rex v. Bignold*, D. & R. N. P.C. 59.

(12) *Crerar v. Sodo*, M. & M. 86.

(13) 7 C. & P. 44.

the jury without putting it in evidence; upon which the right to reply was claimed, but Mr. Baron Parke said, "I have often heard it threatened, that if a counsel or a party opened new facts, the opposite side would have the reply; but I never heard such a reply actually made. Perhaps, as Mr. Platt has proved the document, and read it to the jury, he ought in good faith to put it in; but I certainly never knew an instance of a reply upon a mere opening." (1)

RIGHT TO BEGIN AND REPLY.

Judgment of Mr. Baron Parke in *Faith v. McIntyre*.

Where, on the trial of an issue out of the court of Chancery, a person who is not a party on the record is, by order of that court, "to be at liberty to attend the trial of such issue," the counsel of such person has no right to address the jury, or to call witnesses; but he may cross-examine the witnesses of both parties, and suggest points of law. (2)

If the defendant raise a legal question, and the plaintiff answer that objection, the defendant's counsel is entitled to be heard upon the matters of law in reply. (3)

Defendant raising legal questions.

If the plaintiff adduce fresh evidence in contradiction of some new facts stated by the defendant's witnesses, it is unnecessary to preface such evidence by observations; for, after the defendant's counsel has observed upon the evidence in contradiction, the plaintiff's counsel is entitled to a general reply. And in such case the defendant's counsel is not entitled to reason upon the whole of the evidence, but on the subject of contradiction only, having already made his observations on the supposition, that his witnesses would be believed, and his case established. (4)

Where plaintiff adduces fresh evidence.

Lord Ellenborough in *Rees v. Smith* (5) said, that "The general rule of the right to give evidence in reply was, that a case is not to be cut into parts; but that when it is known, what the question in issue is, it must be met at once. If, indeed, any one fact be adduced by the defendant, to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact; he cannot go into general evidence in reply to the defendant's case. There is no instance in which the plaintiff is entitled to go into half his case, and reserve the remainder."

Judgment of Lord Ellenborough in *Rees v. Smith*.

But *Browne v. Murray* (6), *Sylvester v. Hall* (7), *Williams v. Davies* (8), seem to have established a contrary practice.

The practice however is, as stated by Mr. Phillipps (9), "that the plaintiff may elect to give such evidence, and, if he elect, he is bound to go into his whole case. If he undertake to repel the defendant's plea, he must go through all the evidence, which he proposes to give for that purpose. It is much more convenient for the due administration of justice, that that course should be adopted, otherwise there would be no end to evidence on either side, as the defendant would be entitled to call witnesses to answer those last produced by the plaintiff, to rebut the justification. (10)

"Still, however, it is apprehended, that this rule must be taken with the qualification which Lord Ellenborough's rule admitted, namely, that where the defendant proves a specific fact, as evidence in support of an issue, the

(1) See *vide Rex v. Bignold*, D. & R. N. P. C. 59. *Rex v. Carlile*, 6 C. & P. 636.

(2) *Wright v. Wright*, 4 C. & P. 389.

(3) *Per Lord Tenterden in Arden v. Tucker*, 1 M. & Rob. 193.

(4) 1 Stark. Ev. 366.

(5) 2 Stark. 31.

(6) R. & M. 254.

(7) *Ibid.* n.

(8) 1 C. & M. 464.

(9) Ev. 843.

(10) *Per Park J. in Roe (Bart.) v. Day*, 7 C. & P. 707.

RIGHT TO BEGIN AND REPLY.

Order of proof discretionary with the judge.

Counsel cannot be made to elect, upon what count or demise he relies.

Claim of right to begin.

NUMBER OF COUNSEL TO BE HEARD.

The leader can take the examination of a witness from his junior.

Where several defendants appear by separate attorneys.

Landlord and tenant defending in ejectment by different counsel.

Party appearing in person.

Where party conducts his own case.

Judgment of Mr. Baron Alderson in *Moscatti v. Lawson*.

In a case with

plaintiff may give evidence in contradiction to that fact: in the majority of cases, the plaintiff could not be reasonably called upon to give such contradictory evidence by anticipation, nor could he foresee that such a fact would be proved."

It seems, that the order of proof is discretionary with the court, such discretion to be governed by a consideration of convenience in such case; but plaintiff's counsel cannot be made to elect, upon what count or demise he relies (1); because a counsel has a right to leave his case generally in the hands of a jury.

In *Rawlins v. Desborough* (2) Lord Denman held, that only one counsel on each side had a right to be heard, when the question was upon whom the right to begin was cast.

If several counsel be on the same side, the leader can take a witness from the examination of a junior counsel, and conclude the examination (3) himself; but if the junior counsel have concluded his examination, such a right is, strictly speaking, forfeited. (4)

If several defendants appear by separate attorneys, and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint. (5)

If, in ejectment, a landlord and tenant defend by different attorneys and counsel, and the tenant claim no title, but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel who does not address the jury, will be at liberty to cross-examine, and also to call witnesses. (6)

A party appearing in person must examine the witnesses as well as address the jury (7): counsel can only be heard to assist him on legal objections, because, as observed by Chief Justice Tindal, "It would be very derogatory to the dignity of the bar, and otherwise mischievous, to allow a counsel to make out the facts from the witnesses, and afterwards for a defendant to state what he chooses to the jury."

The practice of counsel assisting parties when conducting their cases in person with legal arguments only, has been in *Moscatti v. Lawson* (8) justly reprobated by Mr. Baron Alderson in the following language:—"Either a barrister is retained in a cause, or he is not; if he is retained in it, he ought to be in his proper place—at the head of it, and to conduct it throughout. The institution of barristers is principally to assist the court in the dispensing of justice; and the present is one among many instances which shew, that if parties persist in conducting their own causes, no time and no strength would be sufficient to get through the business of the country."

Where two defendants appear and plead by the same attorney, but at the

(1) *Swinburn, q. t. v. Jones*, 1 M. & Rob. 322.

(2) 2 *ibid.* 70.

(3) *Doe v. Roe*, 2 Camp. 280.

(4) *Ibid.*

(5) *Chippendale v. Masson*, 4 Camp. 174.

Doe d. Fox v. Bromley, 6 D. & R. 292.

Perring v. Tucker, M. & M. 391. 4 C. & P.

70. *Tidd, N. P.* 510., *sed vide King v.*

Williamson, 3 Stark. 162. *Rex v. Cook*, 1 C. & P. 321. *Ridgway v. Philip*, 1 C. M. &

R. 415. *Massey v. Goyder*, 4 C. & P. 162.

(6) *Doe d. Hogg v. Tindale*, 3 C. & P. 565. M. & M. 314.

(7) *Shuttleworth v. Nicholson*, 1 M. & Rob. 254.

(8) *Ibid.* 455.

trial, counsel appear for one defendant only, and the other defendant appear in person, the counsel only will be allowed to address the jury; but the defendant who has no counsel may cross-examine the witnesses. (1)

When points of law incidentally arise, all the counsel on both sides are usually heard by the court, and the leading counsel of the party making the objection, or submitting the point, alone replies. (2)

In cases where the defendants have no right to a separate address or examination, yet, any or all of the counsel for the defendants will be heard on a legal objection, as that there is no evidence against one of their clients. (3)

If a defendant rely upon a legal objection, and call evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply. (4)

If, on the trial of a case, the defendant's counsel call no witnesses, but in his address to the jury cite cases, the practice is for the plaintiff's counsel to observe on the effect of those cases, confining himself to the law, without touching on the facts. (5)

If certain parts of a book be used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observe upon the general state of the book, and refer to other parts of it, such observations do not give the plaintiff's counsel the right to reply. (6).

The objection of a witness to a question, which he is not bound to answer, is not a point on which counsel are heard (7), because the privilege is that of the witness, and not of the party.

In *Moriarty v. Brooks* (8) a learned serjeant in addressing the jury for the defendant said, that "he must call witnesses, unless the jury were satisfied by the evidence, that the defendant was entitled to a verdict;" upon which Lord Lyndhurst said, "You have no right to ask the jury their opinion in that way; you must either call your witnesses, or else close your case without saying any thing about them."

RIGHT TO BEGIN AND REPLY.

two defendants, where one appears by counsel, and the other in person.

ARGUMENTS OF COUNSEL.

When points of law incidentally arise.

Although defendants have no right to a separate address, yet every counsel will be heard on a legal objection.

Defendant relying upon a legal objection, and calling evidence to support it.

Counsel citing cases, but not calling witnesses.

Parts of a book cited.

Objection of a witness to a question.

Counsel no right to interrogate a jury.

12. AMENDMENTS AT NISI PRIUS.

It seems that a judge on circuit, or at the sittings, has jurisdiction to order any amendment before the cause is called on, which he might have made at chambers (9); but as soon as the cause is called on, and the jury sworn, this jurisdiction ceases, and his equitable control over the proceedings survives, only to the extent given by statute. (10)

By stat. 1 Geo. 4. c. 55. the justices of the superior courts at Westminster may, during their circuits, grant like summonses and make like orders in all actions depending in any of these courts in which the issue would, if tried, be tried upon such their respective circuits, as if they had been judges of the court in which the actions are depending.

At the trial permission has been granted to add a *similiter*, and the jury

AMENDMENTS AT NISI PRIUS.

Stat. 1 Geo. 4. c. 55.

Similiter.

(1) *Perring v. Tucker*, 4 C. & P. 70. M. & M. 391.

(2) *Roscoe's Ev.* 179.

(3) *Poole v. Sidden*, cit. *ibid.* 180.

(4) *Arden v. Tucker*, 1 M. & Rob. 192.

(5) 3 C. & P. 105. n., et vide *Pullen v. White*, *ibid.* 434. *Power v. Barham*, 7 *ibid.* 356.

(6) *Pullen v. White*, 3 *ibid.* 434.

(7) *Rex v. Adey*, 1 M. & Rob. 94.

(8) 6 C. & P. 684.

(9) *Vide* stat. 1 Geo. 4. c. 55. 11 Geo. 4. & 1 Will. 4. c. 70. 1 & 2 Vict. c. 45.

(10) *Lush. Pr.* 481.

AMENDMENTS AT NISI PRIUS.

Inaccurate description of the demised land in ejectment.

Date of writ.

Indorsement on *distringas*.

Insertion of an *indebitatus* count.

Omissions from gross negligence.

Extension of the demise in ejectment.

Profert.

Stat. 9 Geo. 4. c. 15.

In cases where a variance shall appear between written or printed evidence and the record, the court may order the record to be amended on payment of costs.

Misstatement as to the court, in setting out a record of a judgment;

re-sworn (1); but "on the parties going down to trial, the clerk ought to make up the Nisi Prius record by inserting the *similiter*, although omitted by the party."

In an action of ejectment, where there was a mistake in the description of the land demised, an amendment was permitted previously to the trial coming on; Chief Justice Best observing, "If you have come down to trial merely upon this formal defence, I will not allow the plaintiff to amend, but upon terms of paying your costs up to this time, and upon your giving up possession. If you have a real defence, you will not be prejudiced by the amendment; and the plaintiff must pay the costs of the application merely." (2)

Amendments have likewise been allowed by inserting the date of the writ (3); by indorsing on the *distringas* the execution thereof, the plaintiff being permitted to withdraw and re-enter the record (4); by inserting in the declaration an *indebitatus* count on which the defendant had paid money into court (5), which had been omitted by accident. But an amendment was refused, where the plea had been omitted from gross negligence (6); nor will the plaintiff be allowed to erase words improperly inserted by his attorney on the record, when it was re-sealing. (7)

After the cause is called over, an extension of the demise will not be permitted. (8)

A trial will not be put off to enable the plaintiff to amend, by inserting an excuse of *profert* instead of *profert* of a bond; because "it is matter of material allegation." (9)

By stat. 9 Geo. 4. c. 15. it is enacted, "that it shall and may be lawful for every court of record, holding plea in civil actions, any judge sitting at Nisi Prius," if "such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action," "when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

In consequence of stat. 3 & 4 Will. 4. c. 42. having essentially extended the powers of the judges respecting the amendments of variances, the decisions under stat 9 Geo. 4. c. 15. are, comparatively speaking, almost unimportant.

It has been held under stat. 9 Geo. 4. c. 15. that in setting out a record of a judgment, a misstatement as to the court in which it was obtained may be amended (10); and that a mistake in the date of a bill of ex-

(1) *Dyson v. Warris*, 1 M. & Rob. 474., acc. *Wright, q. t. v. Horton*, 1 Stark. 400. Per cur. in *Siboni v. Kirkman*, 3 M. & W. 48.

(2) *Doe d. Lewis v. Coles*, R. & M. 380.

(3) *Cox v. Painter*, 1 N. & P. 581.

(4) *Masters v. Lewis*, 2 M. & Rob. 59.

(5) *Ernest v. Brown*, *ibid*. 13.

(6) *Whitehead v. Scott*, 1 *ibid*. 137. n.

(7) *Drummond v. Burt*, *ibid*. 136.

(8) *Doe v. Huy*, *ibid*. 243.

(9) *Paine v. Bustin*, 1 Stark. 74.

(10) *Briant v. Eicke*, M. & M. 359.

change (1), or mis-description of a promissory note as a bill of exchange, may be rectified. (2)

In an action for not obeying a *subpœna* (3) it was held by the court of Common Pleas, that a declaration ought to be amended by inserting, instead of "a copy of a writ of *subpœna*," "a copy of so much of the writ of *subpœna* as related to the defendant;" and a statement of a contract may be made conformable to the written contract produced at the trial, as to the time for the performance of it, though it may not appear in the declaration whether the contract was written or oral. (4)

The foregoing decision appears to overrule *Ryder v. Malbon* (5), that a variance between the statement in an avowry of the terms of a tenancy, and the proof produced in support of it, was not within the statute, on the ground, that the statute applied only to cases in which some particular written instrument is professed to be set out or recited in the pleadings.

Where no matter in print or writing is produced in evidence, a judge at Nisi Prius has no power under stat. 9 Geo. 4. c. 15. to amend the record from the oral testimony of witnesses called to speak to the contents of a written document that had been destroyed, and which, on their evidence, appeared to be materially different from the statement of the document on the record. (6)

In one case Lord Tenterden refused to amend the declaration, when the mistake arose from the want of common care in drawing it. (7)

In an action for a malicious arrest, the declaration contained an allegation that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy &c.," and the proof was merely a discontinuance:—It was held, that the error could not be amended at Nisi Prius under stat. 9 Geo. 4. c. 15., not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof. (8)

Stat. 3 & 4 Will. 4. c. 42. s. 23. extends the powers of stat. 9 Geo. 4. c. 15. by vesting in the judges while trying causes at Nisi Prius, the amendment of variances between written or printed documents produced in evidence, and the recital thereof in the record. (9)

AMENDMENTS.
AT NISI PRIUS.

or date of a promissory note.
Writ of *subpœna*.

Cases to which the statute does not apply.

Mistakes from negligence.

Allegation different from the proof.

The powers of stat. 9 Geo. 4. c. 15., extended by stat. 3 & 4 Will. 4. c. 42. s. 23.

(1) *Parks v. Edge*, 1 C. & M. 429. *Bentzing v. Scott*, 4 C. & P. 24.

(2) *Moilliet v. Powell*, 6 C. & P. 233.

(3) *Masterman v. Judson*, 8 Bing. 224.

(4) *Lamey v. Bishop*, 4 B. & Ad. 479.

(5) 3 C. & P. 594.

(6) *Brooks v. Blanshard*, 1 C. & M. 779. 3 Tyrw. 844., *sed vide* stat. 3 & 4 Will. 4. c. 42. s. 23. *Quære*, If a copy had been produced in such case as secondary evidence, whether the judge could have amended from such copy? *Ibid*.

(7) *Jelf (Knight) v. Oriel*, 4 C. & P. 22.

(8) *Webb v. Hill*, M. & M. 253. 3 C. & P. 485.

(9) The stat. 3 & 4 Will. 4. c. 42. s. 23., after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials by reason of [variances] (the word '*vacancies*' is used in the statute) as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the

trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which, the opposite party cannot have been prejudiced, and that the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: And that it was expedient to allow such amendments as thereafter mentioned was to be made on the trial of the cause;" enacts, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record,

AMENDMENTS AT NISI PRIUS.

Amendment
may be made
on the very
point in issue.

Amendments
will be made, if
they do not
affect the mat-
ter essentially
in dispute.

Laying demise
without men-
tioning the
year.

In *Doe d. Marriott v. Edwards* (1) Mr. Baron Parke stated, "In future, parties must not come down to trial on the ground, that there is a variance in the record which they suppose a judge will not rectify:" thus, an amendment may now be made on the very point in issue between the parties on the terms of holding, on a plea of *non tenuit*. (2)

Amendments at Nisi Prius will in general be made, if they do not affect the matter essentially in dispute between the litigant parties, and which have not a tendency to mislead the opposite party. Thus, where the plaintiff declared on a contract of the defendant to sell him a quantity of potatoes, the produce of certain land of the defendant, to be delivered within a reasonable time, and to be paid for on delivery; and the proof was of a contract to sell the potatoes at so much a sack, the plaintiff to have them at digging up time, and to find diggers; the judge at the trial having allowed an amendment of the declaration accordingly, the court refused a new trial, no affidavit being produced to shew, that the defendant had been prejudiced by the amendment. (3)

In *Doe d. Parsons v. Heather* (4) it appeared, that a declaration in ejectment laid the demise on the 31st of October, without mentioning any year; at the trial, the lessor of the plaintiff proved a title in himself on the 31st of October, 1840:—upon which it was held, first, that this was not a variance between the declaration and the proof, so as to empower the judge at the trial to amend the declaration under stat. 3 & 4 Will. 4. c. 42. s. 23, by inserting the year; and that the omission was no ground of nonsuit (5);—

writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case

such trial shall be had at Nisi Prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea*, or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had, provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

(1) 1 M. & Rob. 321.

(2) *Gayler v. Farrant*, 4 Bing. N.C. 296.

(3) *Sainsbury v. Matthews*, 4 M. & W. 343., vide etiam *Whitwill v. Scheer*, 8 A. & E. 301.

(4) 8 M. & W. 158.

(5) It seems that the defendant's proper course, in such a case, is to apply to the court to compel the plaintiff to insert the correct date.

Mr. Baron Parke observing, "If a defendant in ejectment considers himself prejudiced by the uncertainty of the date of the demise, his proper course is to apply to the court to compel the plaintiff to insert the correct date."

AMENDMENTS
AT NISI PRIUS.

If a corporation aggregate sue for use and occupation of "standings, market-places, and sheds," and it appear, that they allowed the defendant to take tolls from others, who occupied sheds and standings, the judge at the trial will allow the word "tolls" to be inserted in the declaration, the defendant paying the costs of the amendment. (1)

Tolls.

In *Hanbury v. Ella* (2) a promise to pay was amended into a promise to *guarantee*, Mr. Justice Parke observing, "I may observe, that if such amendments were not permitted, there would be an end of the benefit of those new rules for pleading, laid down by the judges, which proceed upon the assumption that, by the said act of the 3 & 4 Will. 4. c. 42. s. 23., the powers of amendment at the trial in cases of variance, in particulars not material to the merits of the case, are greatly enlarged."

Power of amendment is exercised liberally.

In *Parry v. Fairhurst* (3) a contract as "carriers" was altered into one as "wharfingers," Mr. Baron Alderson stating, "We should do great injustice, parties being bound down to one count or one plea, as they at present are, unless we were liberal in amending variances."

Contract as "carriers" altered into one as "wharfingers."

In trespass for breaking the plaintiff's close, called "Clover Hill," the defendants pleaded not guilty, and that the close was not the plaintiff's. The real name of the close appeared to be "Clover Moor;" upon which, Mr. Justice Coleridge ordered the record to be amended by inserting the word "Moor" instead of "Hill." (4)

Name of a place.

Where, in debt on bond, there was a variance between the penalty in the bond produced in evidence, and the penalty in the bond stated in the declaration, the latter being 260*l.*, and the former 200*l.*:—It was held, that it was within stat. 3 & 4 Will. 4. c. 42. s. 23., and might be amended; for although the "case is not precisely within the language of the 23d sect., it is clearly within the spirit of it." (5)

Variance respecting the penalty in a bond.

It seems, that the nature of the action or defence ought not to make any difference in the exercise of the power of amendment; in every instance in which the prohibitory rules apply, the power which accompanies the prohibition ought to apply also.

Nature of action immaterial.

In *Doe d. Marriott v. Edwards* (6) Mr. Baron Parke amended the description of the parish, in an action of ejectment for a forfeiture. It was objected, that the action was a harsh and oppressive proceeding; but the learned judge said, "I do not think that the supposed impropriety of the action is a consideration which ought to influence me in deciding, whether I shall give leave to amend under the act of parliament."

Amending the description of a parish in an action of ejectment.

In *Mash v. Densham* (7), which was an action on the case for a fraudulent misrepresentation of the soundness of a horse, and the plea was not guilty, Mr. Baron Alderson amended the declaration, by substituting for an

Fraudulent misrepresentation of the soundness of a horse.

(1) *Carmarthen (Mayor of) v. Lewis*, *ibid.* 608. M. 420. 4 Tyrw. 271. *Seemle*, that stat. 3 & 4 Will. 4. c. 42. s. 23. applies to cases tried before the sheriff. *Ibid.*
(2) 1 A. & E. 61.
(3) 2 C. M. & R. 196. S. C. *post*, 1812. (6) 1 M. & Rob. 321. 6 C. & P. 208.
(4) *Howell v. Thomas*, 7 C. & P. 342. (7) 1 M. & Rob. 443.
(5) *Per* Bayley B. in *Hill v. Salt*, 2 C. &

AMENDMENTS AT NISI PRIUS

allegation, that the defendant represented the horse "to be sound and a good worker:" — that the defendant warranted the horse "to be sound in the wind."

In *Hemming v. Parry* (1) the declaration in an action for a breach of warranty of a horse stated a general warranty, to which the defendant pleaded *non assumpsit*. Upon the proof, it appeared, that the warranty was "sound except in one foot." The breach of warranty complained of consisted in an unsoundness of the wind. Mr. Baron Alderson amended the declaration, observing, "that if the defence had depended in any way upon the qualification, he would not have allowed the amendment, as the case would have gone to the merits."

Variance respecting the manner of payment for goods.

In *Ivey v. Young* (2) the variance was between a contract for certain goods to be paid for on delivery, and a contract for each to be paid for on delivery with five *per cent.* discount. It further appeared, that part had been delivered. An application to amend was opposed, on the ground that, if the contract had been stated properly, the defendant might have been prepared to shew, that he rescinded the contract on the plaintiff's refusal to pay on the first delivery. Mr. Baron Alderson allowed the cause to proceed; and nothing being elicited to shew, that the defendant rescinded the contract on that ground, the learned judge made the amendment, and the plaintiff had a verdict.

Assault and false imprisonment.

Where in a plea justifying an assault and false imprisonment, the defendant pleaded, that the plaintiff assaulted "him and his servant," and the proof was, that he assaulted his "servant only," the judge gave leave to amend. (3)

Damages done by a mob.

In an action against the inhabitants of a place for damages done by a mob under stat. 7 & 8 Geo. 4. c. 81., the court allowed the proceedings to be amended, by substituting the word "borough" for "hundred," there being no such hundred, and the time for commencing a fresh action having expired. (4)

AMENDMENTS
REFUSED.

Lessor's title in ejectment.

In *Doe d. Poole v. Errington* (5) there was a count laying a joint demise by two: it appeared that they claimed as tenants in common, and an application was made to amend "by inserting several demises, or striking out the name of one of the lessors;" but Mr. Justice Taunton refused the application, stating, that "the nature of the lessor's title, was a question affecting the merits of the case."

Omitting to justify in trespass.

In trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors, but, by mistake, omitted to justify the taking of the handkerchiefs:—It was held, that this omission could not be amended at the trial. (6)

Amendment of the *venire facias*.

Stat. 3 & 4 Will. 4. c. 42. gives no authority to amend the award of the *venire facias* on the Nisi Prius record (7); or to strike out the name of a defendant (8); or to increase the amount of damages laid in the declaration. (9)

(1) 6 C. & P. 580.

(2) 1 M. & Rob. 546.

(3) *Timothy v. Simpson*, 1 C. M. & R. 765.

(4) *Horton v. Stamford (Inhab. of)*, 2 Dowl. P. C. 96., vide etiam *Lakin v. Watson*, ibid. 633.

(5) 1 A. & E. 750.

(6) *John v. Currie*, 6 C. & P. 618

(7) *Adams v. Power*, 7 ibid. 76.

(8) *Cooper v. Whitehouse*, 6 ibid. 545.

(9) *Watkins v. Morgan*, ibid. 661.

In case for an irregular distress, a variance in the statement of the party to whom the rent distrained for is due, is a variance in a point material to the merits of the case, and is fatal. (1)

AMENDMENTS
AT NISI PRIUS.

Irregular distress.

Payee v. the maker of a promissory note.

In an action by the payee against the maker of a promissory note, the defendant pleaded, that the note was drawn and given to the plaintiff in consequence of an agreement with a third person, in payment of money won at play by the third person; and the evidence was, that a bill of exchange was first given to the third party in payment of the gambling debt, which was cancelled, with consent of the parties, at a subsequent period; and in lieu thereof, the promissory note on which the action was brought, was given with a different time to run: the judge would not give leave to amend the plea to suit these facts. (2)

In debt for the arrears of an annuity, the declaration was, that the defendant granted an annuity to the plaintiff during an existing contract, and during any new contract; and the proof was, that he granted it during the existing contract, and covenanted to pay it during any new contract:—It was held, that this was a fatal variance; that the record could not be amended, or the trial postponed under stat. 3 & 4 Vict. c. 105. s. 48.; and that the declaration not stating, whether the plaintiff was suing for arrears, accrued during the old contract, or during the new contract, was bad for uncertainty. (3)

Arrears of an annuity.

By stat. 3 & 4 Will. 4. c. 42. s. 24. "the court or judge shall and may, if he or they think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document; and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such, as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

Stat. 3 & 4
Will. 4. c. 42.
s. 24.

The judge may direct the jury to find the facts specially.

In *Frankum v. Falmouth (Earl of)* (4) the plaintiff declared, that being possessed of a mill, he was entitled to the use of a certain stream of water for the mill, but the defendant wrongfully and injuriously diverted the same: the defendant traversed the right to the watercourse. It appeared, that the mill was of modern erection, and that therefore the plaintiff's claim to the water was not in respect of the mill, but *ex jure naturæ*, in right of the stream running to his land, and of an antecedent appropriation of the water by the plaintiff, by the erection of the mill. An application to amend the declaration was refused; but a special finding was directed under the 24th section, that the defendant had diverted the water from its accustomed and proper course to the plaintiff's premises, as they existed before the mill was erected. The verdict was entered for the defendant on the issue; and a motion was refused to give judgment for the plaintiff, because the variance

CASES OF
SPECIAL FIND-
ING.

(1) *Ireland v. Johnson*, 1 Bing. N. C. 162. This is a point which, under the new rules, might be traversed.

not hold, that what might be traversed cannot be amended under the act?

(2) *Boulton v. Coghlan*, 4 L. Journ. N. S. 172.

Quære, Whether this might have been amended at the trial, upon application for that purpose? and whether the rule would

(3) *Galwey v. Galwey*, 1 Armstrong & Martiney (Irish), 32.

(4) 6 C. & P. 529. 2 A. & E. 452.

AMENDMENTS AT NISI PRIUS.

The word
"wrongfully"
does not put the
title in issue.

Judgment of
Lord Denman
in *Guest v.*
Elwes.

Where the mis-
statement may
have preju-
diced the de-
fence.

REVIEW OF JUDGE'S DE- CISION.

was material, and that the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land; for, as observed by Lord Denman, "the word 'wrongfully' does not put the title in issue."

In *Guest v. Elwes* (1) an action was brought against the sheriff for an escape. At the trial, the proof upon an issue joined on a plea of "not guilty" was, that the defendant negligently omitted to arrest. Mr. Baron Alderson directed the facts to be found specially; and Lord Denman in delivering the judgment of the court of King's Bench for the plaintiff said, "We are fully convinced, that in this case the defendant experienced no disadvantage whatever from the course adopted; and that on the other hand the plaintiff, who had suffered by some breach of duty on the part of the sheriff, and who most probably was without the means of discovering beforehand precisely what it was, might have been really injured by too strict adherence to the issue actually joined;" the court have no power, whatever the judge at Nisi Prius might have, to impose terms "on the successful party, whose mistake has been corrected, and whose right, if claimed, as it has been proved, might possibly never have been disputed by the defendant."

Where the mis-statement may have prejudiced the defence, the fair course is to permit the amendment at Nisi Prius on terms; and accordingly, in two cases of slander, a material variance in the words was amended on the terms of the plaintiff's withdrawing the record, and paying the costs of the day, with liberty to the defendant to plead *de novo*. (2)

In an action on the case against the defendants as carriers, for negligence, it appeared from the evidence, that the defendants, if liable at all, were liable as wharfingers on a contract to forward. Immediately before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which, however, the learned judge refused to do, but left it to the jury to say, whether there was a contract to forward, or a contract to carry; and they found that there was a contract to forward. He then directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the court might proceed thereon according to the 3 & 4 Will. 4. c. 42. s. 24. The court allowed the amendment on payment of costs, and granted a new trial on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day pursuant to s. 23. of that stat. (3)

It seems that the judge's discretion in making amendments under Lord Tenterden's Act cannot be reviewed (4) by the court; and in *Doe d. Pook v. Errington* (5) the same doctrine seems to have been held by Lord Denman, with respect to a review of the judge's discretion in refusing amendments under the later and more extensive statute. The court of Exchequer, however, appears to have considered, that in the latter case the judge's decision may be reviewed. In one case (6), that court is reported to have set aside a nonsuit, and granted a new trial on payment of costs, where the judge at Nisi Prius had refused to amend a count on a bill of exchange, by inserting the words "three months after the date thereof" in the descrip-

(1) 5 A. & E. 118.

(2) Roscoe's Ev. 71. cit. *Lejune v. Den-*
nett, Winton Spring Ass. 1835. *Sheers v.*
Philp, Launceston Spring Ass. 1836.

(3) *Parry v. Fairhurst*, 2 C. M. & R. 190.
S. C. ante, 1809.

(4) *Parks v. Edge*, 1 C. & M. 429.

(5) 1 A. & E. 750.

(6) *Pullen v. Seymour*, 5 Dowl. P.C. 164.

tion of the bill : the argument appears to have been urged, that the judge's decision is final. By the express words of the statute, a party dissatisfied with the allowance of an amendment, may apply to the court for a new trial, on the ground, that it ought not to have been permitted.

AMENDMENTS
AT NISI PRIUS.

But generally, where a judge grants an amendment, if he exercise the discretion given him by the statute according "to the best of his information at the time, and does not plainly appear to have been wrong, the court will not interfere." (1)

13. POSTPONEMENT OF TRIAL.

POSTPONEMENT
OF TRIAL.

If there be any *bonâ fide* and unavoidable reason or fact properly shewn, on affidavit, why it is unsafe to proceed to trial — as where it appears, that injustice would be done by refusing the application, and that the party who applies has conducted himself fairly — the court will in general grant an application to put off the trial.

WHEN
GRANTED.

The court will postpone a trial upon the application of the defendant, where they would unhesitatingly refuse it, if made by the plaintiff; because the plaintiff has the record in his own power, and need not enter it for trial, if he be not prepared to try, or may withdraw the record, if from any cause it become necessary; the court will not in general entertain a motion by him to put off the trial, nor will the judge at Nisi Prius, unless it be merely to put off the trial from one sitting to another in term, or for a few days during the sittings after term. (2)

Postponement
will be granted
to the defend-
ant when it
will not to the
plaintiff.

In applications for the postponement of trials, an inquiry will not be instituted respecting the admissibility of the evidence required (3); and the affidavit, if made on the part of the defendant, need not positively shew a good defence on the merits. (4)

Where a libel had been published at the instance of one of the parties, for the purpose of influencing the jury, the court put off the trial upon the application of the other party. (5)

Jury unduly
influenced.

Where the defendant's attorney was so ill, that he could not attend, the court, upon application, postponed the trial. (6)

Illness of
attorney.

An application will be entertained to put off the trial of an issue out of Chancery, as well as in other cases (7); but a judge at Nisi Prius will not put off or hasten a trial, in order to prevent or facilitate an injunction or any other proceedings in equity. (8)

Issue out of
Chancery.

Where there was a demurrer, and also an issue in fact, and the court thought it desirable, that the demurrer should be first argued, they postponed the trial of the issue (9); but the point of law was the foundation of the plaintiff's right to damages.

Demurrer and
issue of fact.

Upon an affidavit, that a copy of a judicial document in the West Indies

Judicial docu-
ment.

(1) *Per* Lord Abinger in *Sainsbury v. Matthews*, 4 M. & W. 343., vide etiam *Whitwill v. Scheer*, 8 A. & E. 301. Respecting errors in FINES and RECOVERIES, vide stat. 3 & 4 Will. 4. c. 74. ss. 7 & 8.

(2) *Curtis v. Barker*, 2 C. & P. 185. Archb. C. Att. Prac. 531.

(3) *Mackenzie v. Hudson*, 1 D. & R. 59.

(4) *Att. Gen. v. Hull*, 2 Dowl. P. C. 111. *Hill v. Prosser*, 3 ibid. 704.

(5) *Rex v. Gray*, 1 Burr. 499. *Willis v. Farrer*, 3 Y. & J. 381.

(6) *Hayley v. Grant*, Sayer, 63.

(7) *Burton v. Lawton*, 4 Camp. 163.

(8) *Goldschmidt v. Marryat*, 1 Camp. 559.

Lush. Pr. 468.

(9) *Burdett (Bart.) v. Coleman*, 13 East, 27.

POSTPONEMENT OF TRIAL.

Absence of witnesses.

was necessary to the defence, the court postponed the trial, and refused to inquire into the admissibility of it as evidence. (1)

Where a material witness for either party is absent, the court will allow the trial to be put off, either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period, under particular circumstances (2); — to another day of the same sittings or assizes at the instance of either party; — to another sittings, term, or assizes at the instance of the *defendant only*, for a plaintiff may have all the effect of such an application by withdrawing his record. (3)

Even where the court had twice before put off the trial on account of the absence of a material witness on a whaling voyage, and the defendant applied a third time to put off the trial, on account of the witness being still absent, the court granted the application, upon the terms of the defendant's bringing the money into court, or giving security for it, to the satisfaction of the master. (4)

Interrogatories.

If it be necessary to examine witnesses abroad upon interrogatories, the court will put off the trial until the examinations are returned (5); but the nature of the evidence should be particularly pointed out in the affidavit.

WHEN IT WILL NOT BE GRANTED.

The application for postponement will in general be refused, if the applicant have conducted himself unfairly, or have been the cause of any improper delay. (6)

Improper delay or unfair dealing.

It will likewise be refused, if the application be made merely because the counsel were not prepared. (7)

Counsel not prepared.

When an action was brought by the assignees of a bankrupt, the court refused to put off the trial, because a petition was pending against the commission of bankruptcy. (8)

Petition pending against a fiat.

The application to postpone a trial has been denied, where it appeared that there was no likelihood of the witness's return (9); or where the witness did not go abroad until after notice of trial was given, as he might previously have been served with a *subpoena* (10); or where the evidence of the absent witness was intended to sustain a defence not favoured by the court. (11)

Absence of witness.

Arrest of de- fendant.

Where the defendant was arrested as he was coming to court to attend his cause, the judge at *Nisi Prius* refused to put off the trial on that account, unless, upon payment of costs. (12)

Penal action.

A postponement has been refused upon the application of the plaintiff in a penal action. (13)

Suit in eccle- siastical court.

The court has refused to put off a trial, until a suit concerning the same matter in the ecclesiastical court should be determined.

APPLICATION TO WHOM MADE.

The application must be made either to the court or to the judge at *Nisi Prius*; but it should be made to the court, if practicable. (14)

(1) *Mackenzie v. Hudson*, 1 D. & R. 159.

(2) *Stratford v. Marshall*, Barnes, 440.

(3) Archb. by Chitt. 1096. cit. MS. H. T. 1826, cor. Abbott C. J.; vide *Curtis v. Barker*, 2 C. & P. 185. *Ansley v. Birch*, 3 Camp. 333. Reg. Gen. 2 Taunt. 221.

(4) Archb. by Chitt. 1097. cit. MS. E. T. 1820.

(5) *Furly v. Newnham*, Doug. 419. *Brown v. Murray*, 4 D. & R. 830. *M'Cauley v. Thorpe*, 1 Chitt. 685.

(6) *Saunders v. Pittman*, 1 B. & P. 33.

Taylor v. Gilkes, 1 Chitt. 730. *Wade v. Birmingham*, 2 ibid. 5. 1 M. & R. 111. (a)

(7) *Colebrooke v. Dobbs*, 3 Burr. 1319.

(8) — (Assignees of) v. —, 2 Chitt. 411.

(9) *Rex v. D'Eon*, 1 W. Black. 515.

(10) *Bourne v. Church*, Barnes, 442, et

vide *Postan v. Rose*, 4 C. & P. 271.

(11) *Robinson v. Smyth*, 1 B. & P. 454.

(12) *Solomon v. Underhill*, 1 Camp. 229.

(13) Tidd, 771. n.

(14) R. E. 49 Geo. 3. C. P., et vide *Ann.*

3 Taunt. 315.

On the other hand, motions to regulate the trial of a cause in other respects, must be made to the judge who is to try it. (1)

POSTPONEMENT
OF TRIAL.

But the trial cannot be put off by the mere consent of parties (2), without the sanction of the judge at Nisi Prius.

The affidavit on which the application is founded, may be made either by the party, or by his attorney in the cause (3), or by the attorney's clerk, if he will swear, that he has the management of the cause, and is acquainted with its circumstances. (4)

BY WHOM TO
BE MADE.

If the affidavit is to be used at Nisi Prius, a copy of it must, if possible, be given to the other party on the previous day.

This application, which must in all cases be made speedily after the occasion of it be known (5), will not be entertained at Nisi Prius when it might have been made to the court, or a judge at chambers. (6) And where a rule was moved for on the last day of term, the court refused it, because, if granted, cause must have been shewn to it at Nisi Prius, and because the party had sufficient time to move and make it absolute within the term. (7) It must be made before the jury are sworn. (8)

WHEN TO BE
MADE.

The application must, as previously observed, be founded on an affidavit stating the grounds upon which it is made. If made on account of the absence of a material witness, the affidavit in ordinary cases states, the time issue was joined, the period for which notice of trial was given, the absence of the witness, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him, and the time at which he is expected to return.

The applica-
tion must be
founded on
affidavit.

But if the witness be abroad, or if, from the nature of the application, it may be suspected, that it is made merely for the purpose of delay, the court usually require, that the affidavit shall state the cause of action, and the evidence expected from the witness in order that they may judge, if it be material, and that it also state circumstances from which they may infer the probability of the witness's return within a reasonable time. (9) It is in general best, that the affidavit should state (if possible) when the witness is expected to return (10); but an allegation, "that he is not expected to return *until* such a time," is deemed sufficient (11), because it is an implied assertion, and upon which perjury could be assigned.

It is not requisite to state the name of the witness on account of whose absence the party cannot proceed to trial. (12)

Name of wit-
ness.

(1) *Johnson v. Coke and Gas Comp.* 7 Taunt. 390.

(2) R. M. 50 Geo. 3. C. P. Archb. C. Att. Prac. 532.

(3) *Duberly v. Gunning*, Peake's N. P. C. 132..

(4) *Sullivan v. Magill*, 1 Hen. Black. 637.

(5) *Darke v. Dick*, 1 Price, P. C. 38.

(6) Lush. Pr. 467. cit. 1 Taunt. 465.

(7) *Anon.* 3 Taunt. 315.

(8) *Packham v. Newman*, 3 Dowl. P. C. 166. Lush. Pr. 467.

(9) *Rex v. D'Eon*, 3 Burr. 1513. 1 W. Black. 510. *Lord v. Cooke*, *ibid.* 436.

(10) 1 Chitt. 730. n. (a.) Archb. by Chitt. 1099.

(11) *Anon.* 2 Chitt. 411. Lush. Pr. 469.

(12) *Smith v. Dobson*, 2 D. & R. 420. *Buckingham v. Banks*, 4 *ibid.* 832. n. Archb. by Chitt. 1099.

Affidavit to put off the trial on account of the absence of a material witness. [Tidd's Forms, 273. Lond. 1828.]

"In the Queen's Bench, &c.

"A. B. plaintiff, and C. D. defendant.

"C. D. of —, the defendant in this cause, maketh oath and saith, that issue was joined in this cause, in — term last past, and that notice was given for the trial thereof at the — sitting within [or, 'at the sittings after'] the said term: And this deponent further saith, that E. F., late of —, is a material witness for him this deponent in

POSTPONEMENT OF TRIAL.

Costs.

If the application be made at *Nisi Prius*, it is granted only on payment of costs, that is to say, the same costs, as if the record were withdrawn. (1)

If made to the court, and notice be not given to the other party until after he has incurred expenses in bringing up his witnesses, the court will make the payment of such expenses a condition of their granting the rule. (2)

14. NONSUIT.

Nonsuit.

"There cannot be a verdict unless the plaintiff appears" (3); consequently, if the plaintiff find that his evidence is not sufficient to maintain his case, he may elect to be nonsuit, even while the jury are considering their verdict, in order, that he may have an opportunity of bringing it on again, either in another shape, or when better prepared with evidence; for after a nonsuit, which is only a default, he may commence another suit against the defendant for the same cause of action. But if a verdict be once given, and judgment follow thereon, he is for ever barred from suing the defendant upon the same ground of complaint (4); and if the counsel for the defendant have addressed the jury and examined witnesses, he cannot demand a nonsuit. (5)

When defendant cannot insist on a nonsuit.

Effect of reserving a point for a nonsuit.

The effect of reserving a point for a nonsuit was stated by Mr. Justice Patteson in *Dewar v. Purday* (6) to be, "that the cause will go on, and the plaintiff obtain a verdict; if by any circumstance he loses that benefit, the consent does not hold;" therefore, if the jury are afterwards from necessity discharged without a verdict, or the judge irregularly nonsuits without the plaintiff's consent, the defendant cannot, on a motion by plaintiff for a new trial, argue the point reserved.

It is only in cases, where a verdict can be given, that the plaintiff can be nonsuited (7): and it is absolutely optional with the plaintiff, whether he will submit to a nonsuit or not (8): thus in *Arnold v. Johnson* (9) Chief Justice Pratt said, "Nobody had a right to demand the plaintiff but the defendant:" therefore, when, after a cause was called on, and the jury sworn, neither counsel, attorneys, parties, nor witnesses appeared, it was holden, that the only way was to discharge the jury, for the plaintiff could not be nonsuited. But the plaintiff may be nonsuited in an undefended cause (10); and he may in a defended cause be nonsuited, with liberty to enter a verdict. (11)

Where a wrongful nonsuit will not be set aside.

A wrongful nonsuit will not be set aside, if it be clear, that the plaintiff cannot ultimately recover. (12)

the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof, without the testimony of him the said E. F.: And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused inquiry to be made, &c. [stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend].

"Sworn, &c.

C. D."

(1) *Walker v. Lane*, 1 Gale, 52.

(2) *Att. Gen. v. Hull*, 2 Dowl. P. C. 111.

(3) *Per Park J. in Anderson v. Shaw*, 3 Bing. 291.

(4) Archb. by Chitt. 466.

(5) *Roberts v. Croft*, 7 C. & P. 376.

(6) 3 A. & E. 166.

(7) *Heath v. Walker*, Str. 1117.

(8) *Watkins v. Towers*, 2 T. R. 275. *Minchin v. Clement*, 1 B. & A. 252. *Lumby v. Allday*, 1 C. & J. 301.

(9) Str. 267.

(10) *Halhead v. Abrahams*, 3 Taunt. 81. *Treacher v. Hinton*, 4 B. & A. 413. 1 M. & R. 261. (a.)

(11) *Rapp v. Latham*, 2 B. & A. 797.

(12) *McDonnell v. Carr*, 1 Hayes & Jones (Irish), 256.

A plaintiff may be nonsuited after payment of money into court (1); otherwise, the cause would be reduced to a mere writ of inquiry, or after a plea of tender (2); or in case of a trial by proviso. (3)

Where there are several issues, some found for plaintiff, others for defendant, liberty may be reserved to enter a nonsuit on those found for the plaintiff. (4)

If two defendants plead to issue, the plaintiff cannot be nonsuit as to one defendant, and have a verdict against the other. (5)

If a plaintiff elect to be nonsuited, he cannot afterwards move to set it aside (6); but if he submit merely because the judge intimates an adverse opinion, he can move the court to set it aside; and, as observed by Lord Lyndhurst in *Alexander v. Barker* (7), the "court are bound to consider it, as if the case had gone to the jury with that opinion."

A bill of exceptions lies, if a judge improperly direct a nonsuit. (8)

If the plaintiff have not given material evidence in the county according to his undertaking, the defendant must take his objection at Nisi Prius. (9)

Formerly it was holden, that if one of two defendants suffered judgment by default, and the other proceeded to trial, the plaintiff could not be nonsuit as to the latter, but that there must be a verdict against him (10): but this has since been ruled otherwise (11); and the usual practice is now according to the latter decision. (12)

A nonsuit can only be recorded at Nisi Prius, and not by the court *in banc* (13); but sometimes with consent, the court will allow the plaintiff to take a verdict, with liberty to the defendant to enter a nonsuit (14); or that the court above shall have the same powers of amendment as the judge at Nisi Prius. (15)

Upon being nonsuited, the plaintiff is liable to costs, in the same manner, as if the defendant had obtained a verdict (16); and if the nonsuit be set aside upon payment of costs, such payment is a condition precedent to the setting aside of the nonsuit; for, until it be made, the plaintiff cannot proceed to another trial. (17)

NONSUIT.

Payment of money into court.
Tender.
Trial by proviso.
Several issues found for plaintiff and defendant respectively.
Where plaintiff cannot be nonsuit as to one defendant, and have a verdict against the other.
Bill of exceptions lies if an improper nonsuit be directed.
Where plaintiff has not given material evidence in the county according to his undertaking.

Responsibility for costs.

15. THE VERDICT.

Every verdict is compounded of law and fact: of the facts, as ascertained by the finding of the jury; of the law, as expounded by the judges, with relation to the evidence, and applied by the jury to the facts.

The verdict is either general or special. The jury can in all cases give a general verdict, thus taking upon themselves to judge both of the law and

THE VERDICT.

- | | |
|-----------------------------------------------------------|---------------------------------------------------------------------------------|
| (1) <i>Gutteridge v. Smith</i> , 2 Hen. Black. 374. | (11) <i>Murphy v. Donlan</i> , 5 B. & C. 178. |
| (2) <i>Anderson v. Shaw</i> , 3 Bing. 290. | (12) Archb. C. Att. Prac. 464. |
| (3) Ibid. | (13) <i>Gardener v. Davis</i> , 1 Wils. 301. |
| (4) <i>Shepherd v. Chester (Bishop of)</i> , 6 ibid. 435. | <i>Hicks v. Young</i> , Barnes, 458. |
| (5) <i>Revett v. Brown</i> , 2 M. & P. 18. | (14) <i>Minchin v. Clement</i> , 1 B. & A. 252. |
| (6) <i>Simpson v. Clayton</i> , 2 Bing. N.C. 467. | <i>Watkins v. Towers</i> , 2 T. R. 275. |
| (7) 2 C. & J. 136. | (15) <i>Carne v. Street</i> , Bodmin, Sum. Ass. 1838, cit. Roscoe's Ev. 182. |
| (8) <i>Strother v. Hutchinson</i> , 4 Bing. N.C. 83. | (16) <i>Cameron v. Reynolds</i> , Cowp. 407. |
| (9) <i>How v. Pickard</i> , 2 M. & W. 373. | <i>Da Costa v. Clarke</i> , 2 B. & P. 376. <i>Davila v. Herring</i> , Str. 300. |
| (10) <i>Hannay (Bart.) v. Smith</i> , 3 T. R. 662. | (17) <i>Nichols v. Bozon</i> , 13 East, 185. |

THE VERDICT.

the fact; or where the questions of law arising in the case are doubtful, they may give a special verdict; that is, they may find the facts of the case specially, leaving to the court the application of the law to the facts thus found (1); or they may find a general verdict subject to a special case.

General verdict.

A general verdict is, where the jury find for one or other of the parties, or partly for one, partly for the other, without stating the facts from which they have drawn their conclusion.

A verdict must comprehend the issues submitted to the jury.

A verdict must comprehend the whole issue or issues submitted to the jury in that particular cause, otherwise the judgment founded on it, may be reversed (2); as where a jury found not guilty as to part, and gave no verdict as to the rest, the judgment was reversed. (3)

Excess of damages.

The defendant should take care, where there are several counts in the declaration, that a verdict be given for him on all those counts which are not proved, in order that he may be allowed his costs upon those issues.

Care must be taken not to take the verdict for more damages than are laid in the declaration. But a mistake in this respect may be remedied, by entering a *remittitur damna* for the excess. (4)

Special verdict.

A special verdict must state the facts proved at the trial, and not merely the evidence given to prove these facts; otherwise, the verdict will be insufficient, and the court will award a *venire de novo*. (5) But deeds should not be set out in it, *in hæc verba*, but merely the substance of them stated, unless the question in dispute rest on their construction.

A negative need not be found in a special verdict, unless when necessary to shew, that some particular matter therein mentioned, does not come within a particular exception. (6)

The special verdict is dictated by the court at the trial, and signed by counsel on both sides, before the jury are discharged. If, in settling it, any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly. (7)

The execution after special verdict, is the same as in other cases.

Special case.

Where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the judge, or the court above, on a special case stated by the counsel on both sides with regard to the matter of law, which has this advantage of a special verdict, that it is attended with much less expense, and obtains a much speedier decision. (8)

On the other hand, however, as nothing appears upon the record but the general verdicts, the parties are hereby precluded from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. (9)

But the objection here mentioned, is now usually obviated by the judge at Nisi Prius giving liberty to either party to have the special case afterwards turned into a special verdict, should it become necessary to take the opinion of a court of error on the case; or it may be done by the consent

(1) Co. Litt. 226. (a.) 228. (a.), *et vide* v. Wilson, 8 T. R. 362. Hubbard v. Johnstone, stat. Westm. 2. (13 Edw. 1.) c. 30. s. 2. 3 Taunt. 209.

(2) Miller v. Trets, 1 Ld. Raym. 324. Archb. by Chitt. 468.

(3) Cattle v. Andrews, 3 Salk. 372.

(4) Archb. C. Att. Prac. 629.

(5) Bird v. Appleton, 1 East, 111. Rex

(6) Nottingham (Mayor of) v. Lambert, Willes, 117.

(7) Archb. by Chitt. 469.

(8) Ibid. 472.

(9) 3 Black. Com. 378.

of the parties, and frequently is done upon the suggestion of the court, before or after the argument of the special case. Unless the judge thus expressly reserves this power of turning the special case into a special verdict, it cannot be done. (1)

16. NEW TRIAL.

The supreme courts are invested with a discretionary authority in the granting or refusing applications for new trials; but their decisions are ever influenced by the principles of substantial justice and equity.

NEW TRIAL.

Sometimes, however, the discovery of new evidence subsequently to the trial is allowed, where it will assist the justice of the case, to be a sufficient ground for granting a new trial. (2)

Discovery of new evidence since the trial.

A conviction of the witness for perjury, founded on the evidence he gave, will in general entitle the party to a new trial, but nothing short of a conviction; not even the finding a true bill by the grand jury (3), unless it appears that the whole story was a fiction, and the witnesses were suborned. (4) Nor will the court grant a new trial upon affidavits showing, that the testimony given was false. (5)

Conviction of the witnesses for perjury.

When either party have been taken by surprise, or where witnesses have deceived those by whom they have been called (6), the courts will grant a new trial on terms (7); but the facts must be conclusive, and it must appear, that the verdict was mainly to be ascribed to such causes.

Parties taken by surprise.

It is also a ground for a new trial, if the verdict be perverse, or contrary to the weight of evidence (8); but in other cases a rule *nisi* for a new trial will not be granted for either party, where the sum given or recoverable is under 20*l.*, and damages only are sought. (9) This rule is adopted out of consideration to the parties themselves, and is applicable to every case where, by the practice of the court, the rule can only be granted on payment of the costs of the former trial. (10)

Verdict against evidence.

If the judge misdirect the jury upon a matter of law (11); or reject evidence which ought to have been admitted; or admit that which ought to have been rejected (12); a new trial will be granted.

MISTAKE OR MISDIRECTION OF THE JUDGE.

The court will grant a new trial on the ground of misdirection in a penal action after a verdict for the defendant (13), although the sum recovered should be less than 20*l.*

Misdirection consists in the misstatement to the jury of some legal principle involved in the case, or submitting as the basis of their verdict, questions

(1) *Canterbury (Archbishop of) v. Robertson*, 2 Dowl. P. C. 78. 1 C. & M. 714.

(2) *Broadhead v. Marshall*, 2 W. Black. 955. *Weak v. Callaway*, 7 Price, 677.

(3) *Benfield v. Petrie*, 3 Doug. 24. *Petrie v. Millies*, *ibid.* 27. *Thurtell v. Beaumont*, 1 Bing. 339. *Seeley v. Mahew*, 4 Bing. 561.

(4) *Fabrilus v. Cock*, 3 Burr. 1771.

(5) *Proctor v. Simmons*, 9 Moore, 581. *Feise v. Parkinson*, 4 Taunt. 640.

(6) *Hewlett v. Cruchley*, 5 Taunt. 277.

(7) *Greatwood v. Sims*, 2 Chitt. 269. *Hartwright v. Budham*, 11 Price, 383.

(8) *Freeman v. Price*, 1 Y. & J. 402.

(9) *Young v. Harris*, 2 C. & J. 14. *Dyball v. Duffield*, 1 Chitt. 265. *n. Turner v. Lewis*, *ibid.* 265. *Haine v. Davey*, 4 A. & E. 892. *Brown v. Ray*, 9 Moore, 583.

(10) — *v. Phillips*, 1 C. & M. 26.

(11) *How v. Strobe*, 2 Wils. 269. *Anon.* 2 Salk. 649. *Jarrett v. Leonard*, 2 M. & S. 265.

(12) *Thomkins v. Hill*, 7 Mod. 64.

(13) *Wilson v. Rastall*, 4 T. R. 753. *Calcraft v. Gibbs*, 5 *ibid.* 19.

NEW TRIAL.

Discharging
the jury with-
out consent.

WHEN THE
COURT WILL
NOT GRANT A
NEW TRIAL.

Where suf-
ficient evidence
to warrant the
verdict, with-
out the aid of
the improper
evidence.

Facts proved
by incomp-
etent witness,
also established
by a compe-
tent witness.

WAIVER OF
MISDIRECTION.

Counsel acqui-
escing in the
ruling of the
judge.

Point of law
not taken at
the trial.

When point of
law, if taken,
may be re-
moved by evi-
dence.

Document not
in evidence.

Party will not
be let into a
defence, of
which he was
apprised at the
trial.

immaterial, irrelevant, or not warranted by the evidence; and as the jury are bound to take their law from the court, the presumption is, that they have done so; and unless it be quite clear, that the result must have been the same, if the proper questions had been put, or the law rightly stated, a new trial will be granted. (1) But the observations of the judge in summing up on different parts of the evidence, whether too strong or too weak, do not constitute a misdirection, provided the whole case was fairly left to the jury (2); nor the omission of any part of the evidence, for that should have been pointed out to him at the time. (3)

Another ground for a new trial arising from a mistake of the judge, is the discharging the jury on a material issue without consent. (4) Each party has a right to a verdict upon every issue, more particularly since the new rules respecting costs.

The court will not grant a new trial on the ground of the reception of improper evidence, where there is sufficient evidence without it to warrant the verdict. (5)

Neither will a new trial be granted on the ground of the rejection of a witness as incompetent, who was really competent, where the fact which he was called to prove, was established by another witness and was not disputed, and the verdict was founded on a collateral point on which the defendant relied. (6)

If the plaintiff's counsel at the trial acquiesce in the ruling of the judge, and in consequence, a verdict is entered for the defendant, without his case being opened, the plaintiff cannot afterwards move for a new trial on the ground of misdirection. (7)

It rarely happens, that the court will grant a new trial upon a point of law, which has not been taken at the trial. (8) And in no case, where the objection, if taken, might have been removed by evidence, will a new trial be ordered. (9)

If at the trial of a cause, the counsel on both sides argue on the effect of an instrument as being in evidence, and it is by mistake never in fact produced, the omission, after verdict, cannot be taken advantage of. (10)

The court have refused to grant a new trial to let the party into a defence, of which he was apprised at the trial (11), such as by giving the defendant an opportunity of proving by way of defence, the illegality of a policy of insurance. (12)

But where the defendant in an action on a policy, failed to prove a breach of the Convoy Act, through the mistake of a witness who had failed in producing the necessary document from the admiralty, the court granted a new trial, after a verdict for the plaintiff on the merits. (13)

If the jury have been improperly selected, or convened by a party in-

(1) *Gregory v. Tuffs*, 2 Dowl. P. C. 711.

(2) *Att. Gen. v. Good*, M'Clel. & Y. 286.
Newcastle (Duke of) v. Broxtowe (Hundred of), 4 B. & Ad. 273. *Belcher v. Prittie*, 10 Bing. 408. *Foster v. Steele*, 5 Scott, 28.

(3) *Robinson v. Gleadow*, 2 Bing. N. C. 156.

(4) *Tinkler v. Rowland*, 4 A. & E. 868.

(5) *Nathan v. Buckland*, 2 Moore, 153.
Horford v. Wilson, 1 Taunt. 12.

(6) *Edwards v. Evans*, 3 East, 451.

(7) *Robinson v. Cook*, 6 Taunt. 336.

(8) *Ritchie v. Bowsfield*, 7 ibid. 309. 1 Stark. Ev. 469. *Cox v. Kitchin*, 1 B. & P. 339.

(9) *Malkin v. Vickerstaff*, 3 B. & A. 89.

(10) *Doe v. Penry*, 1 Anst. 266. 1 Stark. Ev. 470. n.

(11) *Vernon v. Hankey*, 2 T. R. 113.

(12) *Gist v. Mason*, 1 ibid. 84.

(13) *D'Aguilar v. Tobin*, 2 Marsh. 265.

terested, it will be ground for setting aside the verdict. (1) Where it was discovered after the trial, that the son of the party had answered to the father's name and served, the court refused to set aside the verdict, no injustice appearing to have been done (2); but in a similar case, where the mistake was discovered before the verdict was given, and the objection made, but the opposite party insisted on going on, and succeeded, the verdict was set aside. (3)

NEW TRIAL.

The courts do not interfere for the purpose of granting, "unless to remedy some manifest abuse, or to correct some manifest error in law or fact." Where there is a contrariety of evidence, the court will not grant a new trial, unless it clearly appear, that the jury have drawn an erroneous conclusion, even although there are circumstances in the case pregnant with suspicion, and which lead to a contrary conclusion, or although the verdict be contrary to the opinion and direction of the judge who tried the cause. (4)

MISTAKE OR
ILL-CONDUCT
OF THE JURY.

Where a plaintiff is in conscience entitled to recover, the courts will not grant a new trial, although he has obtained a verdict upon a presumption contrary to evidence (5), or upon a point of law not reserved on the trial. (6)

Where plain-
tiff is in con-
science entitled
to recover.

If the jury, being divided, determine their verdict by lots (7), notwithstanding the verdict be in accordance with the evidence and the opinion of the judge (8); or if they accept refreshment from the successful party; or procure themselves to be summoned on the trial; or previously to the trial express an intention to favour the party succeeding; or be guilty of any other act of misconduct or partiality, which casts a suspicion on the verdict—a new trial will be granted.

Jury determin-
ing their verdict
by lots.

Where the judge, while summing up in favour of the one party, was stopped by the jury, who declared themselves satisfied, and immediately found a verdict for the other, the court set it aside. (9)

It is a matter of discretion with the court, in *all* cases, whether they will grant a new trial for excessive damages. (10)

EXCESSIVE
DAMAGES.

Where a plaintiff is entitled to recover for part of his demand, and is also entitled to recover the residue, but in a different form of action, the court will not reduce the damages, a verdict having been obtained for the whole demand. (11)

If a jury give damages to such an amount, either too small or too great, as would satisfy any reasonable mind, that they must have acted "under the influence either of undue motives, or some gross error or misconception," this will be a ground for a new trial. (12) It is not unusual, however; where a new trial is granted for excessive damages, to make it a condition, that

(1) *Baylis v. Lucas*, Cowp. 112., sed vide *Brunskill v. Giles*, 9 Bing. 13.

(2) *Hill v. Yates*, 12 East, 229.

(3) *Dovey v. Hobson*, 1 T. R. 11. Lush. Pr. 535.

(4) *Carstairs v. Stein*, 4 M. & S. 192.

(5) *Wilkinson v. Payne*, 4 T. R. 468.

(6) *Cox v. Kitchen*, 1 B. & P. 338.

(7) *Farie v. Delaval*, 1 T. R. 11.

(8) *Hale v. Cove*, Str. 642.

(9) *Gainsford v. Blachford*, 6 Price, 36.

(10) *Ducker v. Wood*, 1 T. R. 277. *Jones v. Sparrow*, 5 ibid. 257. *Goldsmith v. Sefton*

(Lord), 3 Anst. 808. *Hewlett v. Cruchley*, 5 Taunt. 277. *Duberley v. Gunning*, 4 T. R. 651. *Chambers v. Caulfield*, 6 East, 244. *Bennett v. Allcott*, 2 T. R. 166. *Pleydell v. Dorchester (Earl)*, 7 ibid. 529.

(11) Per Abbott C. J. in *Mayfield v. Wadsley*, 3 B. & C. 357.

(12) Per Lord Ellenborough in *Chambers v. Caulfield*, 6 East, 244. *Gough v. Farr*, 1 Y. & J. 477. *Masters v. Barnwell*, 7 Bing. 224. *Hewlett v. Cruchley*, 5 Taunt. 277. *Mahoney v. Fraser*, 1 Dowl. P. C. 703. *Price v. Severn*, 7 Bing. 316.

NEW TRIAL.

the first verdict shall stand as a security, for what may be found by the second, and then be reduced accordingly. (1)

Affidavits of juryman cannot be received, to shew the principles on which they acted.

The affidavit of a juryman can never be received to shew, on what grounds the jury acted, but "the court must derive their knowledge from some other source" (2), though it may be admissible, as to what took place in open court, such as to shew what questions they put to a judge, or to supply the defect of notes by counsel. But as to the one it has been observed, that the information would come better from any other source; and respecting the other, that the judge's notes were the better authority. (3) And from the inadmissibility of the affidavit of a juror, neither party can avail himself of the confession or admission of a juryman. (4)

On the same ground the courts will not, after the jury have parted, hear from them, by affidavit or otherwise, that the verdict given, was not the one they intended to give. (5)

Verdict for defendant on an indictment for a misdemeanour.

A new trial will not be granted after a verdict for the defendant, upon an indictment for a misdemeanour, on the ground, that the verdict was against evidence. (6)

Mistake in evidence.

A new trial has been granted on an affidavit made by a material witness, that he had made a mistake in his evidence. (7)

Effect of rule for a new trial.

The rule for a new trial, unless some restrictions are expressly imposed, has the effect of sending the whole case before another jury, and the former is considered, as though it had never taken place. (8) Under particular circumstances, the courts will limit the inquiry to a given point or issue (9); for in some cases it might be unjust to open the whole case; as where, in an action of *tort*, one or more of the defendants have been fairly acquitted. (10) But except in cases like these, and except where a particular point has been reserved, the courts are unwilling to impose any restrictions (11); in fact, the court cannot restrict the inquiry, "where it is a matter of right to have a new trial." (12)

SPEEDY JUDGMENT AND EXECUTION.**17. SPEEDY JUDGMENT AND EXECUTION. (13)**

Stat. 1 Will. 4. c. 7. s. 2.

By stat. 1 Will. 4. c. 7. s. 2. the judge before whom any action shall be tried, may certify before the end of the sittings or assizes, that execution ought to issue forthwith; in which case judgment may be signed, and execution issued, according to the terms of the certificate. (14)

(1) *Pleydell v. Dorchester (Earl)*, 7 T. R. 529.
(2) *Per* Lord Mansfield in *Vusie v. Delaval*, 1 T. R. 11. *Owen v. Warburton*, 1 Bing. N. C. 326.

(3) *Everett v. Youells*, 4 B. & Ad. 681.
(4) *Aylett v. Jewell*, 2 W. Black. 1299.
(5) *Jackson v. Williamson*, 2 T. R. 281.
(6) *Rez v. Mann*, 4 M. & S. 337. *Rez v. Reynell (Clerk)*, 6 East, 315.

(7) *Richardson v. Fisher*, 1 Bing. 145.
(8) *Bernasconi v. Farebrother*, 3 B. & Ad. 372. *Mahoney v. Fraser*, 1 Dowl. P. C. 703.

(9) *Bower v. Hill*, 5 Dowl. P. C. 183. *Thwaites v. Sainsbury*, 7 Bing. 497.

(10) *Price v. Harris*, 10 Bing. 331. *Rez v. Mawbey (Bart.)*, 6 T. R. 638.

(11) *Hutchinson, q. t. v. Piper*, 4 Taunt. 555. *Lush. Pr.* 539.

(12) *Per cur. in Mahoney v. Fraser*, 1 Dowl. P. C. 703.

(13) *Vide ante*, 1462—1490. tit. EXECUTION.

(14) By stat. 1 Will. 4. c. 7. s. 2. "In all actions brought in either of the superior courts, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such

The judges in granting or withholding the certificate seem to be influenced by the consideration, whether the verdict is likely to be set aside, and whether the defence has been reasonable or vexatious. SPEEDY JUDGMENT AND EXECUTION.

Under this statute certificates have been granted in actions of *assumpsit* on promissory notes, bills of exchange, or in other actions, where there appeared to be no reasonable ground of defence to the action. (1) Assumpsit.

In one case, where a verdict was taken by consent in an action of *assumpsit*, a certificate was granted, although the consent contained no such terms; Mr. Justice Parke observing, "that he thought the general object of the statute was to accelerate execution for all debts, where there was really no doubt on the claim for the sum recovered." (2)

The plaintiff in actions of debt, as well as in other forms of action, is entitled to the certificate for early execution (3), the stat. 1 Will. 4. c. 7. s. 2. not being confined to actions of contract, but to all in which the judge in his discretion shall think it right to grant the certificate; and it has been granted by Mr. Justice Patteson in an action for mesne profits in ejectment. (4) Debt.

Mesne profits.

Where an action for criminal conversation was brought, and the plaintiff in his discretion elected to be nonsuited, the certificate was granted. (5) Nonsuit in an action for crim. con.

If the plaintiff have a verdict on one count, while a demurrer be pending on another, immediate execution will be granted upon an undertaking to enter a *nolle prosequi* on the count demurred to. (6)

Where, however, there is a reasonable ground for the defence made, as in a case for negligent driving, on which there is conflicting evidence, the court will not grant the certificate (7); and it is not usually granted on trials at the sittings in term. Negligent driving.

Where an action was brought against an executor on his testator's bond, a verdict being given for the plaintiff on the plea of *non est factum*, the judge made an order for an immediate execution; but the court of Exchequer held, that the plaintiff was not entitled, until an action had been brought suggesting a *devastavit*, to issue an execution against the defendant. (8) Executor on his testator's bond.

In general, affidavits are not admissible to support applications for immediate execution, although they may, state that the defendant has *threatened* to make away with his property, upon the principle, that the "statute was only intended to apply, where the judge on the facts appearing on the trial, thought there should be execution immediately." (9) Defendant threatening to make away, or making away with his property.

certificate, and subject, or not, to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day: Provided always,

that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

(1) *Bell v. Smith*, 5 C. & F. 10.

(2) *Anon.* 1 M. & Rob. 167.

(3) *Younge v. Crooks*, *ibid.* 220.

(4) *Barden v. Cox*, *ibid.* 203.

(5) *Hambidge v. Crawley*, 5 C. & P. 9. n.

(6) *Allsopp v. Smith*, 7 *ibid.* 708.

(7) *Barford v. Nelson*, 5 *ibid.* 8. *Wright v. Guiver*, *ibid.* 9. n. *Crookshank v. Rose*, *ibid.* 19, 20.

(8) *Ward v. Thomas*, 2 Dowl. P. C. 87.

(9) *Per Lord Lyndhurst in Gervas v. Burtchley*, 1 M. & Rob. 150.

SPEEDY JUDGMENT AND EXECUTION.

Stat. 1 Will. 4. c. 7. s. 3.

Entering and recording of judgment.

Teste.

Stat. 1 Will. 4. c. 7. s. 4.

Judgment may be vacated, execution stayed, and new trial granted.

Suggestion to deprive the plaintiff of costs.

Stat. 1 Will. 4. c. 7. s. 6.

Limitation of time for taxation of costs.

Stat. 3 & 4 Will. 4. c. 67. s. 2.

Teste of writs of execution.

Reg. Gen. H. T. 2 Will. 4. s. 75.

Writs of execution to be sealed only.

But in an undefended case Mr. Baron Bayley admitted an affidavit of facts after a verdict for the plaintiff, and on it granted immediate execution (1); but the affidavit stated, that the defendant *was actually making away with his property*.

By stat. 1 Will. 4. c. 7. s. 3. "every judgment to be signed by virtue of this act may be entered and recorded as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act shall and may bear *teste* on the day of issuing thereof; and such judgment and execution shall be as valid and effectual, as if the same had been signed and recorded and issued according to the course of the common law."

A writ of execution cannot be tested of a term previous to the judgment; but the court will allow it to be amended, if improperly tested. (2)

By stat. 1 Will. 4. c. 7. s. 4. "notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the court in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or a new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby in such manner, as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct." (3)

Where a judge at the assizes, in pursuance of stat. 1 Will. 4. c. 7., orders, that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term to the court above, to enter a suggestion to deprive the plaintiff of costs (4); but the judge at Nisi Prius cannot direct the entry of such a suggestion. (5)

By stat. 1 Will. 4. c. 7. s. 6. it is provided, "that no officer of either of the said courts shall, for the purpose of taxing costs on any judgment to be signed by virtue of this act, be compelled to attend at any time between the last day of August and the twenty-first day of October in any year."

By stat. 3 & 4 Will. 4. c. 67. s. 2. "all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof."

By Reg. Gen. H. T. 2 Will. 4. s. 75. "it shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer."

(1) *Ruddick v. Simmons*, *ibid.* 184., et vide *Doe d. Williamson v. Dawson*, 4 C. & P. 589.

(2) *Englehart v. Dunbar*, 2 Dowl. P.C. 202.

(3) By stat. 1 & 2 Will. 4. c. 31. ss. 16—18. similar provisions are made for Ireland.

By stat. 3 & 4 Will. 4. c. 42. s. 19. the provisions of stat. 1 Will. 4. c. 7. were ex-

tended and applied to judgments and executions upon writs of inquiry of damages under stat. 8 & 9 Will. 3. c. 11. before the sheriff, and writs of trial of issues.

(4) *Baddley v. Oliver*, 1 Dowl. P. C. 598. 1 C. & M. 219.

(5) *Ibid.*

EXECUTORS AND ADMINISTRATORS.

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19. Costs, pp. 1910—1912.

Judgment of Chief Justice Tindal in Southgate v. Crowley — *Stat. 3 & 4 Will. 4. c. 42. s. 31.* — *Judgment of Chief Justice Tindal in Wilkinson v. Edwards* — *Operation of stat. 3 & 4 Will. 4. c. 42. confined to cases where executors were not liable to costs under stat. 23 Hen. 8. c. 15.* — *What is requisite to exempt an executor from costs under stat. 3 & 4 Will. 4. c. 42.* — *Time of application for relief* — *Costs in error* — *Non payment of legacy duties* — *Order to refer an attorney's bill for taxation* — *Middlesex Court of Requests Act* — *Restraining an executor from suing for costs of an attorney due to his testator* — *Levy of costs.*

20. JUDGMENT — WRIT OF ERROR — CERTIORARI — SCIRE FACIAS — FIERI FACIAS, pp. 1912—1915.

1. DEFINED.

An executor, *ab exequendo*, is he, to whom another man commits by will, the execution of that his last will and testament; and his office is either particular or universal. DEFINED.

In ordinary cases a person becomes the executor of a will by being so nominated and appointed by the testator; but there are cases in which a person may become an executor without being so nominated and appointed, viz. 1st. By being directed to do certain acts, which properly belong to the office of an executor, — as to dispose of the testator's property, and pay his debts and legacies; and in such cases he is called an executor according to the tenor of the will, and will have probate granted to him accordingly. 2dly. By necessary implication, as where A. B. is appointed executor if C. D. should refuse; in which case it is implied, that C. D. may take upon himself the office, in preference to A. B., if he should think proper. And, 3dly. By representation, or being the executor of a deceased person, who was the executor of some other deceased person; in which case, he is the executor of the latter, as well as of the former. But where there are several executors, it is the executor of the survivor only, who becomes the executor of the first deceased; and if the survivor die intestate, the chain of representation is broken, and application must be made, if needful, to the proper

Ordinary mode in which a person becomes an executor.

DEFINED.**Executor *de son tort*.**

court, to grant letters of administration of the goods of the first deceased left unadministered.

Another way in which a person may become an executor, is by intermeddling, without authority, with the property of the deceased; in which case he becomes what is called an executor *de son tort*, or in his own wrong; and, in so doing, he exposes himself to the liabilities of an executor, with regard to every other person interested in the affairs of the deceased, without obtaining any peculiar advantage for himself.

Where a will contains no appointment of an executor.

It sometimes happens that a will contains no appointment of an executor. In that case, the residuary legatee, or person most interested in the estate of the deceased, may obtain from the ecclesiastical court, letters of administration, with the will annexed, giving bond to the court for the due execution of the office; and every such administrator, from the date of the letters of administration, stands in the same situation as an executor, so far as relates to the administration of the testator's own estate, though it is otherwise as regards the estates of any other persons of whom the deceased was the executor. (1)

WHO CAN AND CANNOT BE EXECUTORS. CORPORATIONS.**2. WHO CAN AND CANNOT BE EXECUTORS.**

As a general principle, all persons can exercise the office of an executor. Thus, the king (2), corporations aggregate (3), and all corporations who can take the oath of an executor (4), are competent to be executors.

INFANTS.**Stat. 38 Geo. 3. c. 87. s. 6.**

An *infant* (5) may be an executor, or a child *in ventre sa mere*; and if the mother be delivered of two or more children at the birth, they will all be entitled. (6) But an infant, although appointed, is by stat. 38 Geo. 3. c. 87. s. 6. disqualified from acting until the age of twenty-one years; and administration *cum testamento annexo* will be granted to his guardian, or such other person as the spiritual court think fit, until such infant attain the age of twenty-one. If, however, there be several executors, those who are of full age may execute the will. (7)

FEME COVERT.

A feme covert, with the consent of her husband, may be an executrix (8); and if she be an infant, the husband, if of age, and assent, can have execution of the will. (9)

INSOLVENTS, OUTLAWS, &c.

Neither poverty, insolvency (10), outlawry, or attainder, are disqualifications, because executors act in *autre droit*. (11) But the court of

(1) Hudson's Guide, 5—10. 2d ed. The unprofessional executor will derive practical information for the performance of his duties from a small treatise entitled, "The Executor's Guide, by J. C. Hudson," and which, seemingly, is an accurate compilation.

(2) 3 Bac. Abr. Executors (A. 1.), 425. 11 Vin. Abr. Executors, 54. [B.]. 4 Inst. 335.

(3) 1 Rol. Abr. Executors (T.), 915. Swinb. p. v. s. 1. 3 Bac. Abr. Executors (A. 2.), 425. 11 Vin. Abr. Executors, 140. [T.]. 1 Black. Com. 28. n.

(4) 3 Bac. Abr. Executors (A. 2.), 425.

(5) Went. Off. Ex. 390. 3 Bac. Abr. Executors (A. 2.), 425. 2 Black. Com. 503.

(6) Godolph. 102. 3 Bac. Abr. Executors (A. 7.), 429.

(7) *Pigot and Gascoigne's case*, cit. Brownl. 46. *Fox v. Tremain*, 1 Mod. 47.

(8) 3 Bac. Abr. Executors (A. 7.), 430. Went. Off. Ex. 362. 2 Black. Com. 503. *sed vide* 1 Fonblanque, 86.

(9) Went. Off. Ex. 391, 392.

(10) 3 Bac. Abr. Executors (A. 3.), 426. *Hills v. Mills*, 1 Salk. 36. *Rex v. Raines* (Knt.), 1 Ld. Raym. 361. *Walker v. Woolleston*, 2 P. Wms. 582. 3 ibid. 389. n. *Anon.* 12 Ves. 4.

(11) Went. Off. Ex. 35, 36. 3 Bac. Abr. Executors (A. 3.), 426. Co. Litt. 128.

Chancery will restrain an insolvent from performing the duties of an executor, and appoint a receiver. (1)

An alien friend may be an executor (2); and so also may an alien enemy, who came here with a safe conduct, or is commorant here by the king's license, and under his protection, although he came without a safe conduct. (3)

If there be several executors, the interest is transmissible to the executor of the surviving executor only, unless he die intestate, in which case an administrator *de bonis non* must be appointed. (4)

Insane persons, idiots, persons born deaf and blind, or whose intellects have been destroyed by age, disease, or intemperance, are incapacitated from being executors. (5)

Alienage, with relation to a hostile country, accompanied with residence abroad, or residence here without the king's permission, either express or implied, is also a species of disability. (6)

British artificers going out of the nation to exercise or teach their trades abroad, or exercising their trades in foreign parts, who shall not return within six months next after due warning given them, are by stat. 5 Geo. 1. c. 27. expressly disqualified from acting as executors.

A person excommunicated may be appointed an executor. (7)

By stat. 3 Jac. 1. c. 5. s. 22. a popish recusant, convicted at the time of the testator's death, is incompetent to act as executor or administrator (8): — and by stat. 3 Car. 1. c. 2. s. 1. if any person send another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contribute to his maintenance when there, both the sender and the sent, and the contributor, are subject to the same disability. But by stat. 31 Geo. 3. c. 32. Roman Catholics who make, take, and subscribe the declaration of their religious profession, and the oath of allegiance and abjuration as appointed by that act, become qualified for an executorship.

By stat. 9 & 10 Will. 3. c. 32. persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, are, for the second offence, disabled from being executors; — but stat. 53 Geo. 3. c. 160. s. 2. repeals the statute, so far, as denying the Trinity.

By stats. 25 Car. 2. c. 2., 1 Geo. 1. st. ii. c. 13., and 13 Will. 3. c. 6. (9), persons not having taken certain oaths, and complied with the other requisites of qualification for offices, cannot be executors; — but an act of indemnity is annually passed for those, who have so omitted to qualify.

WHO CAN AND CANNOT BE EXECUTORS.

ALIENS.

WHERE THERE ARE SEVERAL EXECUTORS.

DISQUALIFIED PERSONS. INSANITY, AGE, AND DISEASE.

ALIENS.

Stat. 5 Geo. 1. c. 27.

BRITISH ARTIFICERS.

Excommunicated persons.

Stat. 3 Jac. 1. c. 5. s. 22.

Popish recusant.

Stat. 3 Car. 1. c. 2. s. 1.

Stat. 31 Geo. 3. c. 32.

Stat. 9 & 10 Will. 3. c. 32.

Stats. 25 Car. 2. c. 2.; 1 Geo. 1. st. ii. c. 13.; and 13 Will. 3. c. 6.

(1) *Utterson v. Mair*, 2 Ves. jun. 95. *Scott v. Becher*, 4 Price, 346.

(2) Went. Off. Ex. 35. 3 Bac. Abr. Executors (A. 4.), 426.

(3) 3 Bac. Abr. Executors (A. 4.), 427. Co. Litt. 129. (b.) *Wells v. Williams*, 1 Salk. 46. 1 Ld. Raym. 282. 1 Lutw. 34.

(4) Went. Off. Ex. 215.

(5) 3 Bac. Abr. Executors (A. 5.), 427.

(6) *Wells v. Williams*, 1 Ld. Raym. 282. *Openheimer v. Levy*, Str. 1082. *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Towers*, ibid. 35. A uniformity of decision does not prevail with respect to the principle of exclusion of alien enemies. 3 Bac. Abr. Ex-

cutors (A. 4.), 427. *Brocks v. Phillips*, Cro. Eliz. 683. *Watford v. Masham*, Sir F. Moore, 431. *Richfeild v. Udal*, Carter, 49. *Villa v. Dimock*, Skin. 370. Molloy, lib. iii. c. 2. s. 10. Went. Off. Ex. 35, 36. *Anon.* Cro. Eliz. 142.

(7) Stat. 53 Geo. 3. c. 127. s. 3., *sed vide* Went. Off. Ex. 38. 226. 3 Bac. Abr. Executors (A. 4.), 427. 2 Burns' Eccl. Law, 222.

(8) *Hill v. Mills*, Show. 293. 11 Vin. Abr. Executors, 142. 144. [T.] 4 Black. Com. 56. Stat. 3 Jac. 1. c. 5. s. 10. 30 Car. 2. st. ii. c. 1.

(9) *Sed vide* stat. 9 Geo. 4. c. 17.

APPOINTMENT
OF EXECUTORS.

Executors derive their authority from the will.

Constructive appointment.

3. APPOINTMENT OF EXECUTORS.

The executor exclusively derives his authority from the will; in fact, to adopt the language of the author of the office of executor (1), "a will is the only bed, where an executor can be begotten or conceived."

The appointment of an executor may be either express or implied; absolute or qualified; exclusive, or in common with others.

He may be expressly nominated, either by a written, or by a nuncupative (2) will.

He may be constructively appointed merely by the testator's recommending or committing to him the charge of those duties, which it is the province of an executor to perform, or by conferring on him those rights, which properly belong to the office, or by any other means, from which the testator's intention to invest him with that character may be distinctly inferred; as where the testator, after giving various legacies, appointed that, his debts and legacies being paid, his wife should have the residue of his goods, on condition, that she gave security for the performance of his will:—this was held sufficient to make her executrix.

Where an infant was nominated executor, and A. and B. overseers, with this condition, that they should have the rule and disposition of the testator's effects, and should pay and receive debts till the infant came of age, they were held to be executors in the mean time. (3)

But, where a testator, being entitled to many shares in the Sun Fire Office and in the mines of Scotland, and a lease for years of a coalmeter's place, gave the same, by a will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies, gave the remainder thereof to his son, and if he should die in his minority without issue, gave the remainder thereof to the trustees for their own use, and all the residue of his estate to such trustees, to pay one moiety to his daughter, and the other moiety to his son:—Sir George Lee held, that there were no words in this will that made the trustees executors; inasmuch, as they had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor. (4)

Absolute appointment.

An absolute appointment is, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time.

Qualified appointment.

An appointment of executors may be qualified; as where A. is appointed executor, on condition that he gives security to pay legacies, or generally to perform the will. So a testator may make A. an executor in respect to his plate and household goods, B. in respect to his cattle, C. as to his leases,

(1) p. 3.

(2) Went. Off. Ex. 20. 3 Bac. Abr. Executors (C. 1.), 450. 11 Vin. Abr. Executors, 136. [R.].

(3) 2 Black. Com. 503. Went. Off. Ex. 21, 22. 3 Bac. Abr. Executors (C. 1.), 451. 11 Vin. Abr. Executors, 136. [R.]. Godolph.

83. Com. Dig. Administrator (B.). Cro. Eliz. 48. *Pickering v. Towers*, Amb. 364. Swinb. p. iv. s. 4., vide etiam in re *Fry*, 1 Hagg. 80. In re *Cringan*, ibid. 548.

(4) *Pickering v. Towers*, 2 C. T. Lee, 401. Amb. 364.

and D. in regard to his debts; or he may appoint A. an executor for his effects in one county, and B. executor for his effects in another; or he may divide the duty when his property is in various countries. (1)

APPOINTMENT
OF EXECUTORS.

An appointment of executor may be limited in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease, to be executor. (2)

An executor may be appointed exclusively: he may also be nominated in conjunction with others; if so, then in the eye of the law, all the executors are considered in the light of one individual. (3)

Exclusive, or
in conjunction
with others.

Essential distinctions exist between the office of coadjutor, or overseer, and that of executor. The coadjutor, or overseer, has no power to administer or intermeddle otherwise than to counsel, persuade, and advise; and if that fail to rectify negligence, or miscarryings in the executors, he may complain to the spiritual court, and his charges for so doing, ought to be allowed out of the testator's estate. (4) If A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. (5) But if A. be made executor, and the testator after in his will expresseth, that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and, if A. refuse, may prove the will alone as executor. (6) Where an infant was made an executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this, they were held to be executors in the mean time. (7) And where the testator named his wife his executrix, and A. B. to assist her, it was held, that A. B. might be executor according to the tenor. (8)

Distinction be-
tween the
office of co-
adjutor, or over-
seer, and that of
executor.

4. ACCEPTANCE OF EXECUTORSHIP.

The office of executor is one, which a person cannot be compelled to undertake.

ACCEPTANCE OF
EXECUTORSHIP.

If an executor appear, and take the usual oath before the surrogate, he can be compelled to execute the duties of his office, and cannot divest himself of the responsibilities. (9)

Not compul-
sory.

The acts which amount to an administration are all such, as indicate an intention to take the executorship (10); and within this class, all such acts as constitute an executor *de son tort* are comprehended. (11)

When an ex-
ecutor cannot
divest himself
of the responsi-
bilities.

Acts which
amount to an
administration.

If an executor issue an advertisement, calling upon persons to send in their accounts, and to pay him all money due to the testator's estate, he being the testator's "executor in trust" (12); or if an executor receive debts due

(1) Went. Off. Ex. 29, 30. 3 Bac. Abr. Executors (C. 4.), 453. 11 Vin. Abr. Executors, 136. [R.], 138, 139. [S.]. *Carte v. Carte*, 3 Atk. 180. *Chetham v. Audley* (Lord), 4 Ves. 72. In re *Lighton*, 1 Hagg N.R. 235.

(2) Swinb. p. iv. s. 17. pl. 1. 4.

(3) 3 Bac. Abr. Executors (C. 4.), 453. Went. Off. Ex. 28, 29.

(4) Went. Off. Ex. 21.

(5) Bro. Ex. pl. 73. Went. Off. Ex. 21. Godolph. pt. ii. c. 2. s. 4.

(6) Bro. Ex. pl. 73. Went. Off. Ex. 21.

(7) Went. Off. Ex. 21.

(8) *Powell v. Stratford*, cit. 3 Phill. 118. Williams on Executors, 175.

(9) Swinb. p. vi. s. 12. *Anon.* 1 Vent. 335. 11 Vin. Abr. Executors, 207. [B. a.].

(10) 3 Bac. Abr. Executors (E. 10.), 469. 1 Rol. Abr. Executors (B.), 917. 11 Vin. Abr. Executors, 205. [B. a.].

(11) 3 Bac. Abr. Executors (E. 10.), 469. 1 Rol. Abr. Executors (B.). 917. Swinb. p. vi. s. 22. Toller on Executors, 43.

(12) *Long v. Symes*, 3 Hagg. 771. 1 Rol. Abr. Executors (B.), 917. 11 Vin. Abr. Executors, 206. [B. a.].

**ACCEPTANCE OF
EXECUTORSHIP.**

to the testator, or if he release or give acquittances for such debts, it will amount to an election of the executorship. (1)

If an executor have refused before the ordinary, and administration hath been granted to another, yet if it appear he had previously administered, and thus determined his election, the letters of administration may be revoked, and he can be enforced to prove. (2)

Acts which do not amount to an administration.

But if an executor take the testator's goods, claiming them as his own private property (although it afterwards appear he had no right, since such claim is expressive of a different purpose from that of administering as executor) (3); or if he sequester goods in the character of a commissary, — that is no assent to the executorship. (4)

Taking the oath as executor is not such an intermeddling as to preclude renunciation. (5)

The administrative rights of an executor of an executor.

“If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the goods of the latter, but he may take upon him the latter, and refuse the former.” (6)

Stat. 55 Geo. 3. c. 184. s. 37.

Penalty for omission to take out probate.

If he administer, he is absolutely bound (7); and under stat. 55 Geo. 3. c. 184. s. 37., if he administer, but omit to take probate within six months after the death of the deceased, he is liable to the penalty of 100*l.*, and 10 *per cent.* on the duty.

**RENUNCIATION
OF EXECUTORSHIP.**

Stats. 31 Hen. 8. c. 5. and 53 Geo. 2. c. 127.

An executor cannot be compelled to assume the office of executor.

Citation by ordinary to accept or reject the office.

An executor cannot in part refuse.

5. RENUNCIATION OF EXECUTORSHIP.

By stats. 21 Hen. 8. c. 5. and 53 Geo. 3. c. 127., an executor being a private officer, cannot be compelled, and may decline to act as executor; but such renunciation must be entered and recorded in the spiritual court before the ordinary, a mere verbal declaration not being sufficient. (8)

If an executor send a letter to the ordinary, by which he renounces, it will be sufficient (9); and the refusal to take the oaths of office amounts to a disclaimer. (10)

The ordinary can, however, summon an unwilling executor before him, “to the intent to prove or refuse the testament,” within any time, which he may think proper. (11)

An executor cannot in part refuse; he must refuse entirely, or not at all (12); and he has no power to assign the office. (13)

If there be several executors, they must all duly renounce, before the administration, with the will annexed, can be granted (14); and it is the

(1) *Pytt v. Fendall*, 1 C. T. Lee, 553.

(2) *Went. Off. Ex.* 92, 93.

(3) 3 *Bac. Abr. Executors* (E. 10.), 469. 1 *Roll. Abr. Executors* (B.), 917.

(4) 1 *Roll. Abr. Executors*, (B.), 917. 11 *Vin. Abr. Executors*, 206. [B. a.]. *Toller on Executors*, 43.

(5) *Williams on Executors*, 204. cit. 3 *Hagg.* 216.

(6) *Touchst. by Atherley*, 464.

(7) 4 *Burns' Eccl. Law*, 198. *Swinb. p. vi. s. 12.* *Wankford v. Wankford*, 1 *Salk.* 301. 304. 307.

(8) *Went. Off. Ex.* 38. 4 *Burns' Eccl.*

Law, 198. *Swinb. p. vi. s. 12.* 1 *Roll. Abr. Executors* (C.), 907. 3 *Bac. Abr. Executors* (E. 9.), 467, 468.

(9) *Broker v. Charter*, *Cro. Eliz.* 92. *Went. Off. Ex.* 88.

(10) 4 *Burns' Eccl. Law*, 213. *Rex v. Raines*, 1 *Ld. Raym.* 363.

(11) *Swinb. p. vi. s. 4.* *Williams on Executors*, 199.

(12) 11 *Vin. Abr. Executors*, 139. [S.]. *Anon. Brownl.* 82. *Footler v. Cooke*, 1 *Salk.* 297.

(13) 3 *Bac. Abr. Executors* (E. 9.), 467.

(14) 1 *Roll. Abr. Executors* (C.), 907.

practice of the prerogative office of Canterbury, not to receive the renunciation of a party," unless it be accompanied by the original will of the deceased, probate of which, it purports to renounce. (1)

RENUNCIATION
OF EXECUTOR-
SHIP.

Where, during the life of an acting executrix, an executor, who had not proved, interfered in the disposition of the testator's property as her friend and agent, he was held, under the circumstances, not chargeable as executor or trustee, because his conduct disclaimed the trust. (2)

Interference as
a friend.

If a party renounce in person, he takes an oath, that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with. (3)

Renouncing in
person or by
proxy.

If some of them renounce before the ordinary, and the rest prove the will, the renunciation is not peremptory; such as refused may, at any subsequent time, come in and administer, and although they never acted, may assume the execution of the will after the death of their co-executors, and shall be preferred before any executor appointed by them. (4) And if administration be committed before a refusal by the surviving executor, such administration will be void. (5)

When an ex-
ecutor after re-
nunciation may
assume the
executorship.

After refusal and administration granted, the party is incapable of assuming the executorship (6) during the lifetime of such administrator; but, after the death of the administrator, the executor may retract his renunciation, however formally made: but if administration be committed in consequence merely of his failure to appear on citation by the ordinary under stat. 21 Hen. 8. c. 5., he has a right, at any future time, even in the administrator's lifetime, to come in and prove the will. (7)

6. GENERAL RIGHTS, LIABILITIES, AND INCAPACITIES BEFORE PROBATE.

GENERAL
RIGHTS, LIA-
BILITIES, AND
INCAPACITIES
BEFORE PRO-
BATE.

The interest which executors have in the property of the deceased, either before or after probate, is not absolute; they have their estate as such *in autre droit*, merely under trust to be applied for the payment of the debts of the testator, and other legitimate purposes. (8) But, where a person entitled to take out administration, neglected to do so, and remained in possession of the goods for twelve years, when he became a bankrupt, it was held, that the goods passed to the assignees as property in the possession, order, and disposition of the bankrupt, with the consent of the true owner. (9)

Interest which
an executor
takes in the
property of the
deceased.

An executor, before the will is authenticated in the spiritual court, and a copy of it delivered to him, certified under the seal of the ordinary, may

ACTS WHICH
MAY BE PER-
FORMED BEFORE
PROBATE.

(1) *In re Fenton*, 3 Add. 35. Williams on Executors, 206.

(2) *Stacey v. Elph*, 1 Myl. & K. 195.

(3) Toller on Executors, 42.

(4) *Ibid.* 44. *Middleton's case*, 5 Co. 28. *Hensloe's case*, 9 *ibid.* 36. (b.) *Anon.* Dyer, 160. (b.) *House v. Petre (Lord)*, 1 Salk. 311. *Mead v. Orrery (Lord)*, 3 Atk. 239. *Robinson v. Pett*, 3 P. Wms. 251., vide etiam *Rex v. Simpson (Knt.)*, 3 Burr. 1463. 1 W. Black. 456. 11 Vin. Abr. Executors, 55—66. [B. 2.].

(5) *Wankford v. Wankford*, 1 Salk. 808.

(6) Swinb. p. vi. s. 12. 3 Bac. Abr. Executors (E. 9.), 468. Went. Off. Ex. 87. 498.

(7) Went. Off. Ex. 87. 498. Com. Dig. Administration (B. 4.).

(8) *Pinchon's case*, 9 Co. 88. (b.) 2 Inst. 236. Per Ashhurst J. in *Farr v. Newman*, 4 T. R. 645.

(9) *Fox v. Fisher*, 3 B. & A. 135.

**GENERAL
RIGHTS, &c. BE-
FORE PROBATE.**

Interest of executor vests on death of the testator.

If an executor have elected to administer, he may be sued at law or in equity.

Can maintain actions for causes of action, which arose subsequent to testator's death.

Can maintain actions on contracts.

Quare impedit may be maintained.

perform almost every act incident to the office, because the interest of an executor is vested on the death of the testator (1); and the probate is merely operative, as the authenticated evidence, and not as the foundation of the executor's title. Hence the probate, when produced, is said to have relation to the time of the testator's death.

If an executor have elected to administer, he may also, before probate, be sued at law or in equity by the deceased creditors, whose rights will not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible. (2)

An executor can maintain actions on his actual possession, as trespass, detinue, or replevin for goods or cattle of the testator, taken after the testator's death (3), and bring trespass or trover for such of the effects as never came into his actual possession, taken or converted after the testator's decease. (4)

He can commence actions on contracts, either actually made with him subsequent to that event, or arising by legal implication; as *assumpsit* for the goods sold by him (5), or for money due to the testator, received by the defendant after the testator's death. (6)

If an executor be entitled as executor to the next presentation to a living, and it become void, he or his grantee may maintain a *quare impedit* for it before probate. (7)

Where reversion for years is vested in him in that character, he may avow without probate for the rent, which accrued after the testator's death, but not for such, as accrued before. (8)

An executor before probate can give directions respecting the funeral; make an inventory; possess himself of the testator's effects (9); enter peaceably into the house of the heir, take specialties, and other securities for the debts due to the deceased (10), or remove his goods (11); he can pay or take releases of debts owing from the estate; receive or release debts which are owing to it (12); sell, give away, or otherwise dispose, at his discretion, of the goods and chattels of the testator (13); assent to or pay legacies (14); enter on the testator's term for years (15); commence actions in right of the testator, as for trespass committed, or goods taken, or on a contract made in the testator's lifetime; although he cannot declare before probate, since, in order to assert such claims in a court of justice, he must produce the copy

(1) Com. Dig. Administration (B. 9.). Plowd. Com. 280. *Smith v. Milles*, 1 T. R. 480. 3 Bac. Abr. Executors (E. 14.), 477. Went. Off. Ex. 192. 199. 11 Vin. Abr. Executors, 202. [A. a.]. *Wankford v. Wankford*, 1 Salk. 299.

(2) Com. Dig. Administration (B. 9.). Plowd. Com. 280. (b.) 11 Vin. Abr. Executors, 205. [A. a. 2.]. *Dulwich College v. Johnson*, 2 Vern. 49. Went. Off. Ex. 81, 82.

(3) 11 Vin. Abr. Executors, 203. [A. a.]. Went. Off. Ex. 81, 82.

(4) 3 Bac. Abr. Executors (E. 14.), 479. *Frederick v. Hook*, Carth. 154.

(5) Went. Off. Ex. 82, 83. *Anon.* Vent. 109. *Bollard v. Spencer*, 7 T. R. 358. *Harris v. Hanna*, C. T. H. 204. *Cockerill v. Kynaston*, 4 T. R. 277.

(6) *Nicolas v. Killigrew*, 1 Ld. Raym. 436. Toller on Executors, 48. When the cause

of action arises subsequent to the attaching of the plaintiff's right, he need not describe himself as executor. *Smith v. Barrow*, 2 T. R. 477.

(7) 3 Bac. Abr. Executors (E. 14.), 479. Went. Off. Ex. 84. Com. Dig. Pleader (O. 14.). *Smithley v. Chomeley*, Dyer, 135.

(8) *Wankford v. Wankford*, 1 Salk. 302. *Bollard v. Spencer*, 7 T. R. 359.

(9) Com. Dig. Administration (B. 9.). Plowd. Com. 280. *Smith v. Miles*, 1 T. R. 480. 3 Bac. Abr. Executors (E. 14.), 478. *Wankford v. Wankford*, 1 Salk. 299.

(10) Went. Off. Ex. 81.

(11) *Ibid.* 82.

(12) *Ibid.*

(13) *Ibid.*

(14) *Ibid.* 11 Vin. Abr. Executors, 204. [A. a.].

(15) 11 Vin. Abr. Executors, 203. [A. a.].

of the will, certified under seal; but when produced, it has relation to the time of suing out the writ. (1) So, if in the same right, he file a bill in equity, a subsequent probate will be equally available (2); and it is sufficient if it be obtained at any time before the hearing. (3)

GENERAL
RIGHTS, &C. BE-
FORE PROBATE.

If an executor die before probate, he is considered in point of law as intestate in regard to the executorship (4), although he have made a will and appointed executors, and although he die after taking the oath, if before the passing of the grant. (5)

Effect of ex-
ecutor's dying
before probate.

If A. be executor for a certain period, and B. be nominated executor for the time subsequent, and A. prove the will after the tenure is expired, B. may sue without another probate. (6)

Although an executor may before probate arrest a debtor to the estate, and shall be justified in that act by the relation of the subsequent grant (7), yet such relation shall not prejudice a third person; and therefore, where the debtor, after being arrested by the executors before probate paid a debt to J. S., and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest, so as to invalidate that payment (8); although an executor may before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to specific legacy, give a valid title to the assignee or legatee, yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to shew the right to make the assignment or to give the assent; which can only be effected by producing the probate, or other evidence of the admission of the will in the spiritual court. (9) If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead.

The acts of an
executor before
probate, cannot
prejudice the
acts of a third
person.

Where an executor having filed a bill in equity before probate, a plea that he had not proved the will was allowed, the hearing of the plea being considered the same as a hearing the cause upon bill and answer. (10)

7. PROBATE; AND HEREIN OF BONA NOTABILIA.

PROBATE; AND
HEREIN OF
BONA NOTA-
BILIA.

The jurisdiction of proving wills consequent on the power of granting administrations, regularly belongs to the bishop of the diocese (11), or the

(1) 11 Vin. Abr. Executors, 202. [A. a.] Com. Dig. Administration (B. 9.). Went. Off. Ex. 83. n. 3 Bac. Abr. Executors (E. 14.), 478. Harg. Co. Litt. 292. (b.)

(2) *Humphreys v. Ingledon*, 1 P. Wms. 752. *Humphreys v. Humphreys*, 3 ibid. 351.

(3) *Patten v. Panton*, 1793, cit. 3 Bac. Abr. Executors (E. 14.), 478.

(4) Went. Off. Ex. 82. n. 11 Vin. Abr. Executors, 68. [C. 2.], 90. [K. 2.].

(5) Toller on Executors, 48.

(6) Com. Dig. Administration (B. 9.). 11 Vin. Abr. Executors, 56. [B. 2.].

(7) Went. Off. Ex. 82, 83. n. 1 Rol. Abr. Executors (A.), 917.

(8) 11 Vin. Abr. Executors, 204. [A. a.] 3 Bac. Abr. Executors (E. 14.), 478. Com. Dig. Administration (B. 9.). *Duncomb v. Walter* (Knt.), 3 Lev. 57. Skin. 22, 87.

Cooke's Bank. Laws, 4th ed. 94. Toller on Executors, 46.

(9) *Pinney v. Pinney*, 8 B. & C. 335.

(10) *Simons v. Milman*, 2 Sim. 241.

(11) Probate is sometimes granted by special ordinaries: thus, a peculiar is a district exempt from the jurisdiction of the ordinary of the diocese in which it lies, and has a special ordinary of its own. (2 Gibs. Cod. 978. n. (b.) *Aughtie v. Aughtie*, 1 Phill. 201. n. (a.) *Denman v. Stephenson*, 1 Salk. 41. *Parham v. Templer*, 8 Phill. 245.) In such districts, such special ordinaries have respectively a power, even of common right, to grant probate of the testaments, and administration of the goods, of those who die within them, leaving no *bona notabilia* out of their limits. (1 Salk. 42. arg.)

PROBATE; AND
HEREIN OF BO-
NA NOTABILIA.

Jurisdiction of
granting pro-
bate.

Lords of
manors.

Mayors of
boroughs.

Bona notabilia
in two distinct
dioceses.

Canal situated
in the pro-
vinces of Can-
terbury and
York.

It will be as-
sumed, that the
cause of action
was *bonum nota-
bile* within the
letters of ad-
ministration.

metropolitan of the province in which the parties resided at the time of their death. (1) And if all the effects at the time of the testator's death lie within one diocese, the executor ought regularly to appear before the bishop, or his surrogate, and prove the will. But, if a testator die within some peculiar jurisdiction, which is either regal, archiepiscopal, episcopal, or archidiaconal, in each of these the owner hath of common right the power of granting probate. (2)

Courts baron can claim by prescription to have the probate of wills, if they have exercised the privilege from time immemorial, and have always continued that usage. (3) And by custom, also, the probate of wills of burgesses belongs to the mayors of some boroughs in respect of lands devisable within the same; yet, as to personal property, the will must be proved before the ordinary. (4)

But if the testator have left *bona notabilia*, or effects to the value established by the 92d canon of Jac. 1., namely, a hundred shillings in two distinct dioceses, or in several peculiars within the same province, then the will must be proved before the metropolitan by way of special prerogative (5); whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court and the prerogative office of the provinces of Canterbury and York. (6) So if there be *bona notabilia* in those several provinces, the archbishops shall, in each of them, grant a probate according to the *bona notabilia* in their respective provinces. Each of them hath supreme jurisdiction, and neither can act within the province of the other. (7) If there be *bona notabilia* in different dioceses of one province, and in one diocese only of the other, in respect to the former, the archbishop shall have the probate; in respect to the latter, the particular bishop. (8)

Where a canal was situated in the provinces of Canterbury and York, but the office for transacting the business of the canal was in the former province: — It was held sufficient to prove the will of a shareholder in the prerogative court of Canterbury. (9)

A plaintiff sued out Irish letters of administration, to which the defendant being under terms to plead issuably, pleaded that the deceased was an inhabitant and commorant of the city of Dublin, and died possessed of *bona notabilia* within the diocese of London; the court held, that they ought to assume, that the cause of action, was *bonum notabile* within the letters of administration, where the contrary was not alleged, and that the plea was not an issuable plea, but allowed an amendment, to the effect, that the debt was *bonum notabile* in London, that fact being verified by affidavit. (10)

If the testator, not in *itinere*, die in one diocese, not having any goods

(1) 3 Bac. Abr. Executors (E. 1.), 458. Com. Dig. Administration (B. 6.).

(2) *Denham v. Stephenson*, 1 Salk. 40, 41. 11 Vin. Abr. Executors, 77. [G.].

(3) 3 Bac. Abr. Executors (E. 6.), 464. Went. Off. Ex. 97, 100. *Denham v. Stephenson*, 1 Salk. 41. *Atkins v. Hill*, Cowp. 286.

(4) 3 Bac. Abr. Executors (E. 7.), 464. Went. Off. Ex. 101, 102.

(5) 2 Black. Com. 509. 3 Bac. Abr. Executors (E. 3.), 460. Com. Dig. Administration (B. 3.). Went. Off. Ex. 104, 107.

1 Rol. Abr. Executors (H. 1.), 909. 11 Vin. Abr. Executors, 79, 80. [H.], *post*, 1838.

(6) 2 Black. Com. 509. 11 Vin. Abr. Executors, 55, 56. [B. 2.].

(7) 3 Bac. Abr. Executors (E. 3.), 460. *Burston v. Ridley*, 1 Salk. 39. *Shaw v. Stoughton*, 2 Lev. 86. 11 Vin. Abr. Executors, 76. [G.]. Went. Off. Ex. 105, 106.

(8) Went. Off. Ex. 105, 106.

(9) *Smith v. Stafford*, 2 Wils. C. C. 166.

(10) *Huthwaite v. Phaire*, 8 Dowl. P. C. 541.

there, but having *bona notabilia* in another diocese, the archbishop shall grant the probate. (1)

If the goods be in several peculiars of a bishop's diocese, in that case probate shall not be granted by him, but by the metropolitan, inasmuch as peculiars are exempt from ordinary jurisdiction. (2) But where the testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be several probates: the archbishop has no prerogative, because the peculiar was derived out of his episcopal jurisdiction. (3) By the 92d canon of Jac. 1., goods which a man has with him, who dies in *itinere*, do not make *bona notabilia* (4); but if a man have two houses in different dioceses, and resides chiefly at one, but sometimes goes to the other, and being there for a day or two dies, leaving no *bona notabilia* in the first mentioned house, probate will be granted by the bishop of the diocese in which the testator died, for he was commorant there, and not there as a traveller. (5)

PROBATE; AND
HEREIN OF BO-
NA NOTABILIA.

Goods in
several pecu-
liars of a
bishop's dio-
cese.

Where a person, whose residence and property were in the diocese of Gloucester, went on temporary business to Bristol, and in the way met with an accident, in consequence of which he was taken to the Bristol infirmary, which is within the diocese of Bristol, and died there a few days after:—It was held, that probate from the bishop of Gloucester was regular; and that the case fell within the principle of the 92d canon of Jac. 1., viz. that the goods which a party, who dies in *itinere*, has with him at the time of his death, are supposed to be, for the purposes of the jurisdiction of the ordinary, in the place where he is domiciled, notwithstanding his personal absence. (6)

If there be *bona notabilia* in England and Ireland, several probates shall be granted by the archbishop or bishop in England, and the archbishop or bishop in Ireland, as the case may require. (7) The probate of a bishop's will, although he had goods only in his own jurisdiction, belongs to the archbishop of the province. (8) If the testator died beyond sea, although the goods be in one diocese only, the archbishop is to grant the probate. (9) If the probate be granted by a bishop, or inferior judge, when it does not belong to him, it is void; but if it be granted by the metropolitan when it does not belong to him, it is only voidable, and is of force till reversed by sentence, because he has jurisdiction over all the dioceses within his province. (10)

Bona notabilia
in England and
Ireland.

Testator dying
beyond sea.

Void and void-
able probate.

Respecting the value of which the goods must be, to be treated as *notabilia*, The value of

(1) 3 Bac. Abr. Executors (E. 3.), 460. 1 Rol. Abr. Executors (I.), 909. 11 Vin. Abr. Executors, 80. [H.].

(2) 11 Vin. Abr. Executors, 80. [H.]. Gibs. Cod. 472. Swinb. p. vi. s. 11.

(3) Gibs. Cod. 472. Price v. Simpson, Cro. Eliz. 719. 1 Black. Com. 380.

(4) Went. Off. Ex. 108.

(5) Hilliard v. Cox, 1 Salk. 37.

(6) Doe d. Allen v. Owens, 2 B. & Ad. 423.

(7) 3 Bac. Abr. Executors (E. 3.), 460. Daniel v. Luker, Dyer, 305. 1 Rol. Abr. Executors (G.), 908. Gibs. Cod. 472.

(8) 3 Bac. Abr. Executors (E. 3.), 461. 4 Inst. 335.

(9) 3 Bac. Abr. Executors (E. 3.), 460. 1 Rol. Abr. Executors (G.), 908.

(10) Toller on Executors, 52. 3 Bac.

Abr. Executors (E. 3.), 460, 461. Went. Off. Ex. 110. 11 Vin. Abr. Executors, 75. [G.], 80. [H.]. Gibs. Cod. 472. The ordinary may either exercise his jurisdiction as to granting probates and administration himself, or it may be done by his official; for the act in no way concerns him in his spiritual capacity, but is a mere ministerial act. 3 Bac. Abr. Executors (E. 4.), 463.

The power of granting probates or administration, is annexed to the person of the ordinary, and is not local, like the authority of a justice of the peace. Barnes v. Mor-dant (Lord), Noy, 112.

If a bishopric be vacant, the dean and chapter are to grant probate and administration. 1 Rol. Abr. Executors (G. 2.), 908. 3 Bac. Abr. Executors (E. 4.), 463. Jenk. 5 Cent. Cas. 23.

PROBATE; AND
HEREIN OF *Bona Notabilia*.

which goods must be, to be treated as *bona notabilia*.

Canon 92.

All chancellors, officials, &c. shall charge with an oath persons cited or coming to take probate, &c. whether the deceased had goods, &c. out of the diocese in which he died, to the amount of 5*l*.

If such persons shall affirm on oath that he had, they shall be dismissed.

Canon 93.

No judge of prerogative shall cite any person to take probate, &c. unless the deceased possessed goods, &c. in some other diocese or dioceses, &c. than that wherein he died, to the value of 5*l*.

the 92d canon of Jac. 1. (which is intituled, "None to be cited into divers courts for probate of the same will"), after reciting that, "forasmuch as many heretofore have been by apparitors both of inferior courts, or of the courts of archbishop's prerogative, much distracted and diversely summoned for probates of wills, or to take administrations of the goods of persons dying intestate, and are thereby vexed," constitutes and appoints, "that all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall, at the first, charge with an oath all persons called, or voluntarily appearing before them, for the probate of any will or the administration of any goods, whether they know or (moved by any special inducement) do firmly believe that the party deceased (whose testament or goods depend now in question), had at the time of his or her death any goods or good debts in any other diocese or peculiar jurisdiction within that province, than in that wherein the said party died, amounting to the value of 5*l*. And if the said person cited or voluntarily appearing before him, shall upon his oath affirm, that he knoweth, or (as aforesaid) firmly believeth, that the said party deceased had goods or good debts in any other diocese or dioceses, or peculiar jurisdiction within the said province, to the value aforesaid, and particularly specify and declare the same, then shall he presently dismiss him, not presuming to intermeddle with the probate of the said will, or to grant administration of the goods of the party so dying intestate."

And by the 93d canon of Jac. I. (which is headed, "The rate of *bona notabilia* liable to the prerogative court"), "No judge of the archbishop's prerogative shall henceforward cite, or cause to be cited *ex officio*, any person whatsoever to any of the aforesaid intents (namely, for the probate of wills or grant of administrations), unless he have knowledge, that the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5*l* at the least; decreeing and declaring, that whoso hath not goods to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses, where, by composition (1) or custom, *bona notabilia* are rated at a greater sum." (2)

It is not requisite, that the deceased should have left effects to the value of 5*l*. in each of the several dioceses where they are dispersed; if there be effects in any diocese, other than that in which he died, to the amount of 5*l*, they constitute *bona notabilia*. (3) But if the goods in the diocese where he died be of the value of 10*l*. or upwards, and he have not left goods amounting to 5*l*. in another diocese, they shall not be denominated *bona notabilia*. (4) If goods be left in two dioceses to the amount of 5*l*. in the whole, they shall be *bona notabilia*, and consequently subject to the archbishop's jurisdiction (5), for in that case neither of the bishops has an exclusive authority.

Bona notabilia may consist of goods to the value of 5*l*. in one diocese,

WHAT ARE

(1) In London the composition amounts to 10*l*. Went. Off. Ex. 105.

(2) These canons do not bind the laity *proprio vigore*, not having been confirmed by parliament; but are prescriptions to the ecclesiastical courts.

(3) Toller on Executors, 53.

(4) Ibid.

(5) 4 Burns' Eccl. Law, 189. 1 Rol. Abr. Executors (G.), 908, 909.

and a lease or term for years of that value in another in which the lands lie (1); debts due to the deceased, however difficult to be collected, or however desperate (2); and, a debt due from the king, for which there is no remedy but by petition. (3)

Where it appeared that the deceased, in his lifetime, had sold an estate, and had a *claim* on that account against the purchaser for a sum exceeding 5*l.*, Sir John Nicholl held this sufficient evidence of *bona notabilia* to warrant the courts compelling a party who held the will to give it up, although it was objected by him, that the testator had assigned over the estate to trustees for the benefit of his creditors previous to the sale, and could therefore have no just demand against the purchaser. (4)

If there be a bond in the penalty of 5*l.* to secure the payment of a less sum, and the same be forfeited, it cannot be classed among *bona notabilia*. (5)

Nor will lands devised to executors for payment of debts and legacies, although they become assets, be considered as such goods. (6)

But a distinction exists between debts by specialty and debts by simple contract. It regards debts by specialty, as the deceased's goods in that diocese, where the securities are found at the time of his death, although they were entered into in another, or the debtor or creditor, at the time when they were executed, lived in a different diocese. (7) But debts by simple contract follow the person of the debtor, and therefore are esteemed the deceased's effects in that diocese where the debtor resided at the creditor's death. (8) On this principle it hath been holden, that a judgment obtained in one of the courts at Westminster, although in an action laid in Dorsetshire, made *bona notabilia*, because the record was at Westminster; but that a debt on a bill of exchange followed the person of the debtor. (9)

An annuity out of a parsonage shall be reputed to be property in the diocese where the parsonage lies (10); and leases for years where the land lies, not where the lease is merely found. (11)

Debts on recognisances, statutes, or judgments, shall be *bona notabilia*, where they were acknowledged or given. (12)

And by stat. 4 Anne, c. 16. s. 26. salary, wages, or pay, due to persons for work in any of her majesty's yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative courts.

But to obtain an order of the court of Chancery for the payment of money out of court, however small the amount, a prerogative probate is held to be indispensable. (13)

PROBATE; AND
HEREIN OF BO-
NA NOTABILIA.

CONSIDERED
BONA NOTA-
BILIA.

Claim by ven-
dor against
vendee.

Forfeited bond.

Devised lands
for payment of
debts.

Debts by spe-
cialty, and
debts by simple
contract.

Annuity.

Judgments, &c.

Stat. 4 Anne,
c. 16. s. 26.

Seamens'
wages, &c.

Payment of
money out of
court.

(1) 3 Bac. Abr. Executors (E. 1.), 461. Com. Dig. Administration (B. 4.).

(2) Ibid.

(3) Went. Off. Ex. 108. 11 Vin. Abr. Executors, 80. [H.].

(4) *Coates v. Brown*, 1 Add. 345. n. (a.) As to whether naked trusts create *bona notabilia* vide *Crossley v. Sudbury* (Archdeacon of), 3 Hagg. 201. Williams on Executors, 412.

(5) Went. Off. Ex. 108. Stat. 4 Anne, c. 16. s. 13.

(6) 3 Bac. Abr. Executors (E. 1.), 461. Went. Off. Ex. 108, 109. 11 Vin. Abr. Executors, 80. [H.], *vide post*, 1889.

(7) 3 Bac. Abr. Executors (E. 1.), 461. Went. Off. Ex. 108, 109. 1 Rol. Abr.

Executors (H.), 909. Touchst. by Atherley, 462.

(8) 3 Bac. Abr. Executors (E. 2.), 461, 462. Went. Off. Ex. 109.

(9) *Gold v. Strode*, Carth. 149. *Denham v. Stephenson*, 1 Salk. 40. *Adams v. Savage*, 2 Ld. Raym. 854. 11 Vin. Abr. Executors, 77. [G.], 80. [H.].

(10) Com. Dig. Administration (B. 4.). *Daniel v. Luker*, Dyer, 305. n. 11 Vin. Abr. Executors, 80. [A.].

(11) Com. Dig. Administration (B. 4.).

(12) Ibid. *Daniel v. Luker*, Dyer, 305. n.

(13) *Newman v. Hodgson*, 7 Vea. 409. *Thomas v. Davies*, 12 ibid. 417. Toller on Executors, 55.

INTEREST
WHICH EX-
ECUTORS OR
ADMINISTRA-
TORS TAKE
AFTER PRO-
BATE.

TIME WHEN
PROPERTY
VESTS.

Administra-
tors.

Stat 3 & 4
Will. 4. c. 27.
s. 6.
Adminis-
trators' claim,
as if they ob-
tained the
estate without
interval.

NATURE OF
THE ESTATE.

8. INTEREST WHICH EXECUTORS OR ADMINISTRATORS TAKE AFTER PROBATE.

The interest of an executor in the estate of the deceased vests from the instant of the testator's death. (1)

Generally, an administrator cannot act until the letters of administration are issued; thus, a release by an administrator before letters of administration, is not binding: and an assignment of a term of years, or a surrender of a leasehold interest, are of no validity. (2)

Though an administrator derives his right from the letter of administration, yet, for some purposes, his interest relates back to the death of the intestate: thus, he may have an action of trespass or trover for the goods of the intestate, taken by one, before the letters be granted to him. (3) If a man take the goods of the intestate as executor *de son tort* and sell them, and afterwards obtain letters of administration, it seems the sale is good. (4) So he may bring actions in respect of matters affecting leaseholds subsequent to the death of the intestate, and he will be liable to account for the rents and profits from that period (5); and in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted.

By stat. 3 & 4 Will. 4. c. 27. s. 6. "an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim, as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

All movable goods, though in different and distant places from the executor, vest in the executor in possession, upon the testator's death (6); for it is a rule of law, that the property of *personal* chattels draws to it the possession. (7) But it is otherwise of things immovable, as leases for years of land or houses; for of these the executor or administrator is not deemed to be in possession before entry. (8) So of leases for years of a rectory, consisting of glebe land and tithes for years, it may be doubtful if actual possession can be acquired without actual entry into the glebe land (9); but in case of a lease for years of tithes only, the executor, though in never so remote a place, shall instantly, upon the setting out thereof, be in actual possession to maintain an action of trespass for taking them away. (10)

An executor or administrator has his estate as such, in *autre droit* merely, viz. as the minister or dispenser of the goods of the dead (11); in fact, as

(1) Com. Dig. Administration (B. 10.).
Woolley v. Clark, 5 B. & A. 745, 746.

(2) *Harrison's case*, 5 Co. 28. (b.) 3
Preston on Abst. 146.

(3) *Anon.* Comb. 451. 2 Rol. Abr. Re-
lation (A.), 399.

(4) *Kenrick v. Burgess*, Sir F. Moore, 126.,
vide etiam *Whitehall v. Squire*, 1 Salk. 295.

(5) *Rex v. Horsley (Inhab. of)*, 8 East,
410.

(6) Went. Off. Ex. 228. 11 Vin. Abr.
Executors, 240. [G. a. 2.].

(7) 2 Saund. 47. (a.) n. 1. to *Wilbraham*
v. Snow.

(8) Went. Off. Ex. 228.

(9) Ibid. 229. 11 Vin. Abr. Executors,
240. [G. a. 2.].

(10) Ibid.

(11) *Pinchon's case*, 9 Co. 88. (b.) 2 Inst.
236.

observed by Mr. Justice Ashhurst (1), "An executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in the course of his office as executor." Therefore, the goods of a deceased are not forfeited by attainder of the executor (2), neither are they applicable to the debts which the executor owes the crown (3); and if the executor become bankrupt, the goods of the testator, if distinguishable, do not pass. (4)

If the testator were a lessee for years, and the lease contained a proviso, that "if the lessee or his executors, administrators, or assigns, shall become bankrupt, the lease shall become void," the bankruptcy of the executor will operate as a forfeiture of the lease, notwithstanding the lease itself does not pass to his assignees; because, as observed by Mr. Baron Alderson, "words are to receive their natural meaning, unless some strong reason can be shewn to give them another sense." (5)

The goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (6):—and so if an executor die indebted, leaving to his executor goods, which he had as executor, these are not assets liable to the payment of his debts, but only for the payment of the first testator's debts or legacies. (7)

But where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the property of her husband, it was held, that she could not be allowed to object to their being taken in execution for her husband's debt; for where an executrix or her husband have *converted* the goods, neither of them can take advantage of their own wrong, and say, as against the creditors of the husband, that they are not his property. (8)

But, where the goods of an intestate had been taken possession of, and used by an administrator in the house of the intestate for three months after the death of the intestate, Lord Tenterden held, that they could not be taken in execution for the administrator's own debt, the time in that case, not being sufficient, to make the goods the administrator's property. (9)

Where P. by his will directed, that his debts and funeral expenses should be paid by his executor thereafter named; and, after giving two life annuities of 2*l.* 10*s.* each, and a bequest of 5*s.* to J. P. his heir at law, appointed W. P. sole executor of his houses and land situate at F., it was held, that the houses and land at F. passed to W. P., and that he took an estate in fee. (10)

Where, by a will apparently drawn by an illiterate person, the testator bequeathed to his wife, her heirs and assigns for ever, all the residue of his goods, chattels, and personal estate; and likewise made her full and sole executrix of the freehold house situate in, &c.; no other person or property being specified in the will, nor any executor appointed, except as above:—It was held, that the wife took a fee in the house. (11)

INTEREST
WHICH EXECU-
TORS OR AD-
MINISTRATORS
TAKE AFTER
PROBATE.

Testator's pro-
perty not for-
feited by at-
tainer of ex-
ecutor.

Bankruptcy of
executor.

Goods of tes-
tator cannot be
seized in exe-
cution of a
judgment,
against the
executor in his
own right.
Executrix
treating the
goods of her
testator as her
own.

Where ex-
ecutor takes an
estate in fee.

(1) *Farr v. Newman*, 4 T. R. 645.

(2) 1 Hale's P. C. 251. *Smith v. Wheeler*,
Freem. 10.

(3) Went. Off. Ex. 194.

(4) *Ludlow v. Browning*, 11 Mod. 138.
Exp. *Ellis*, 1 Atk. 101. Exp. *Marsh*, *ibid.*

159. *Viner v. Cadell*, 3 Esp. N. P. C. 88.
Serle v. Bradshaw, 2 C. & M. 148.

(5) *Doe d. Bridgman v. David*, 1 C. M.
& R. 405.

(6) *Farr v. Newman*, 4 T. R. 621.

(7) Went. Off. Ex. 194. Williams on
Executors, 499.

(8) *Quick v. Staines (Knt.)*, 1 B. & P.
293., vide *Gaskell v. Marshall*, 1 M. & Rob.
132.

(9) *Gaskell v. Marshall*, 1 M. & Rob. 132.

(10) *Doe d. Pratt v. Pratt*, 6 A. & E. 180.

(11) *Doe d. Hickman v. Haslewood*, *ibid.*
167.

**INTEREST.
WHICH EXECU-
TORS OR AD-
MINISTRATORS
TAKE AFTER
PROBATE.**

Where execu-
tors take a
power, not a
legal estate.

Stat. 11 Geo. 4.
and 1 Will. 4.
c. 40.

Where execu-
tors deemed to
be trustees for
persons entitled
under the Sta-
tute of Distri-
butions.

Where charac-
ter of execu-
tor or adminis-
trator ceases,
and ownership
independent of
that character
commences.

Tenant for
years appoint-
ing him who
has the rever-
sion in fee
executor.

Executor can-
not bequeath
the goods of
his testator.

Executor or
administrator
granting *omnia
bona sua*.

Where freehold lands were devised to testator's wife during her life, and after her decease "my will is, that my said freehold shall be then sold by my executors in trust" (parties before named), "and all the money to be equally divided between all my children or their heirs" "by my said executors:" — It was held, that the executors took a power, not a legal estate, because the testator merely devised in substance, that the lands should be sold by the executors. (1)

By stat. 11 Geo. 4. and 1 Will. 4. c. 40., when any person shall die (after September 1st, 1830), having by his will, or any codicil thereto, appointed executors, such executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, that the executors were intended to take such residue beneficially; but the rights of the executors will not be affected, where there is not any person entitled to the residue under the Statute of Distributions.

Generally speaking, it is difficult to ascertain, where the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger. (2)

Respecting the doctrine of merger, it has been laid down, that with respect to land, no merger can take place of the estate held by a man as executor, in that, which he holds in his own right. (3)

But it seems, that where either of the two estates is an accession to the other by *act of law*, there will not be any merger; but that where the accession is by the *act of the party*, the less estate will merge. (4)

Thus, if tenant for years die, having made him who has the reversion in fee his executor, whereby the term for years vests also in him; or if the lessee make the lessor his executor (5), the term will not merge (6), because the accession of the estate for years, is by the act of law. But if an executor or administrator have a term for years in right of the deceased, and *purchase* the reversion, the exemption will not prevail, but the term will merge, because the reversion is acquired by the absolute act of the party.

An executor cannot bequeath the goods of his testator to a legatee (7); but, generally speaking, an executor or administrator in his own lifetime, may dispose of and alien the assets of their testator, and they cannot be followed by the creditors of the deceased, for "if it were otherwise, no one would deal with an executor." (8)

If an executor or administrator grant *omnia bona sua*, the goods of the deceased will not pass, unless the grantor have no goods, but as executor or administrator. (9) So, if an executor release all actions, suits, and demands

(1) *Doe d. Hampton v. Shatter*, 8 A. & E. 905. Executors make a lease of a term specifically bequeathed, and afterwards assent to the bequest; *quare*, In whom is the legal title to the rent and reversion? *Ran-kin v. Newsam*, 1 Hudson & Brooke (Irish), 70.

(2) 3 Preston on Convey. 311.

(3) 2 Black. Com. 177.

(4) Williams on Executors, 500.

(5) Co. Litt. 338. (b.)

(6) 2 Black. Com. 177.

(7) *Bransby v. Grantham*, 2 Plowd. 525. (b.)

(8) *Per Lord Mansfield in Whale v. Booth*, 4 T. R. 625. n. Williams on Executors, 503.

(9) *Hutchinson v. Savage*, 2 Ld. Raym. 1307. Went. Off. Ex. 193.

whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor. (1)

By stat. 3 & 4 Will. 4. c. 74. s. 27. "no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement."

The property which an executor or administrator has at first in his representative character, may become as absolutely his own, as his other goods, which he has not as executor or administrator.

In regard to the ready money left by the testator, on its coming into the hands of the executor, the property in the specific coin must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he is accountable for its value; and therefore, a creditor of the testator cannot, by a *fiery facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution. (2)

If the testator die indebted to the executor, or the executor, not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election will become his own. (3)

If the debt due from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favour of the executor, by the mere act and operation of law; in the former case his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution, for he is incapable of suing himself. (4)

So in the case of a lease of the testator devolved on the executor, such profits only, as exceed the yearly value shall be held to be assets: it therefrom follows, that if the executor pay the rent out of his own purse, the profits to the same amount shall be his. (5)

If the testator's goods be sold under a *fiery facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he do so, the property which was vested in him as executor, will be turned into a property *in jure proprio*. (6)

If an executor or administrator make an underlease of a term of years of the deceased, rendering rent to himself, his executors, &c. though he has the term wholly in right of his intestate, yet, when he makes this lease, he has power to dispose of the whole, or part, and has the rent in his own right. (7)

By stat. 19 Geo. 2. c. 37. s. 4. in case an assurer shall die, "his executors or administrators may make re-assurance to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance;" and thus a fund may be secured to satisfy the insured in case of a loss, without its falling on the estate of the deceased.

INTEREST
WHICH EXECU-
TORS OR AD-
MINISTRATORS
TAKE AFTER
PROBATE.

Stat. 3 & 4
Will. 4. c. 74.
s. 27.

Executor can-
not be protec-
tor.

WHERE THE
PROPERTY
WHICH AN EX-
ECUTOR TAKES
AS SUCH, MAY
BECOME HIS
OWN.

Ready money.

Testator dying
indebted to his
executor.

Payment of
rent.

Testator's pro-
perty sold
under a *fiery*
facias.

Effect of un-
derleasing.

Stat. 19 Geo. 2
c. 37. s. 4.

INSURANCE
AND ASSUR-
ANCE.

(1) *Knight v. Cole*, 1 Show. 153.

(2) *Went. Off. Ex.* 196—198.

(3) *Ibid. Woodward v. Darcy (Lord)*,
Plowd. 185.

(4) *Ibid. Toller on Executors*, 238.

(5) *Went. Off. Ex.* 200.

(6) *Ibid. Toller on Executors*, 239.

(7) *Williams on Executors*, 507.

INTEREST
WHICH EXECU-
TORS OR AD-
MINISTRATORS
TAKE AFTER
PROBATE.

In case of the death of a person insured against fire, "the policy of insurance and interest therein continues to his heir, executor, or administrator respectively, to whom the property insured shall belong, provided, before any new payment be made, such heir, executor, or administrator do procure his or her right to be indorsed on the policy at the insurance office, or the premium be paid in the name of the said heir, executor, or administrator." (1)

STAMP DUTIES.

9. STAMP DUTIES.

Stat. 55 Geo. 3. c. 184. By the stat. 55 Geo. 3. c. 184. the stamp duties imposed by the 48 Geo. 3. c. 149., the 44 Geo. 3. c. 98., and the 45 Geo. 3. c. 28. are repealed, and the following stamp duties are imposed :—

- Probate of a will, and letters of administration with a will annexed, to be granted in England ;
- Confirmation of any testament testamentary, or eik thereto, to be expeded in any commissary court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804 ;
- Inventory to be exhibited and recorded in any commissary court in Scotland, of the estate and effects of any person deceased, who shall have died after the 10th day of October, 1808, and have left any testament or testamentary disposition of his or her personal or moveable estate and effects, or any part thereof ;
- Where the estate and effects for or in respect of which such probate, letters of administration, confirmation, or eik respectively shall be granted or expeded, or whereof such inventory shall be exhibited and recorded, *exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially,* shall be

				£	s.	d.
above the value of	20 <i>l.</i> and under the value of	100 <i>l.</i>	-	-	0	10 0
of the value of	100 <i>l.</i> and under the value of	200 <i>l.</i>	-	-	2	0 0
of the value of	200 <i>l.</i> and under the value of	300 <i>l.</i>	-	-	5	0 0
of the value of	300 <i>l.</i> and under the value of	450 <i>l.</i>	-	-	8	0 0
of the value of	450 <i>l.</i> and under the value of	600 <i>l.</i>	-	-	11	0 0
of the value of	600 <i>l.</i> and under the value of	800 <i>l.</i>	-	-	15	0 0
of the value of	800 <i>l.</i> and under the value of	1,000 <i>l.</i>	-	-	22	0 0
of the value of	1,000 <i>l.</i> and under the value of	1,500 <i>l.</i>	-	-	30	0 0
of the value of	1,500 <i>l.</i> and under the value of	2,000 <i>l.</i>	-	-	40	0 0
of the value of	2,000 <i>l.</i> and under the value of	3,000 <i>l.</i>	-	-	50	0 0
of the value of	3,000 <i>l.</i> and under the value of	4,000 <i>l.</i>	-	-	60	0 0
of the value of	4,000 <i>l.</i> and under the value of	5,000 <i>l.</i>	-	-	80	0 0
of the value of	5,000 <i>l.</i> and under the value of	6,000 <i>l.</i>	-	-	100	0 0
of the value of	6,000 <i>l.</i> and under the value of	7,000 <i>l.</i>	-	-	120	0 0
of the value of	7,000 <i>l.</i> and under the value of	8,000 <i>l.</i>	-	-	140	0 0
of the value of	8,000 <i>l.</i> and under the value of	9,000 <i>l.</i>	-	-	160	0 0
of the value of	9,000 <i>l.</i> and under the value of	10,000 <i>l.</i>	-	-	180	0 0
of the value of	10,000 <i>l.</i> and under the value of	12,000 <i>l.</i>	-	-	200	0 0
of the value of	12,000 <i>l.</i> and under the value of	14,000 <i>l.</i>	-	-	220	0 0
of the value of	14,000 <i>l.</i> and under the value of	16,000 <i>l.</i>	-	-	250	0 0
of the value of	16,000 <i>l.</i> and under the value of	18,000 <i>l.</i>	-	-	280	0 0
of the value of	18,000 <i>l.</i> and under the value of	20,000 <i>l.</i>	-	-	310	0 0
of the value of	20,000 <i>l.</i> and under the value of	25,000 <i>l.</i>	-	-	350	0 0
of the value of	25,000 <i>l.</i> and under the value of	30,000 <i>l.</i>	-	-	400	0 0
of the value of	30,000 <i>l.</i> and under the value of	35,000 <i>l.</i>	-	-	450	0 0
of the value of	35,000 <i>l.</i> and under the value of	40,000 <i>l.</i>	-	-	525	0 0
of the value of	40,000 <i>l.</i> and under the value of	45,000 <i>l.</i>	-	-	600	0 0
of the value of	45,000 <i>l.</i> and under the value of	50,000 <i>l.</i>	-	-	675	0 0

(1) Park on Insurance, 662., *vide post*, tit. INSURANCE.

					£	s.	d.	STAMP DUTIES.
of the value of	50,000 <i>l.</i>	and under the value of	60,000 <i>l.</i>	-	750	0	0	— — —
of the value of	60,000 <i>l.</i>	and under the value of	70,000 <i>l.</i>	-	900	0	0	Stat. 55 Geo. 3.
of the value of	70,000 <i>l.</i>	and under the value of	80,000 <i>l.</i>	-	1,050	0	0	c. 184.
of the value of	80,000 <i>l.</i>	and under the value of	90,000 <i>l.</i>	-	1,200	0	0	
of the value of	90,000 <i>l.</i>	and under the value of	100,000 <i>l.</i>	-	1,350	0	0	
of the value of	100,000 <i>l.</i>	and under the value of	120,000 <i>l.</i>	-	1,500	0	0	
of the value of	120,000 <i>l.</i>	and under the value of	140,000 <i>l.</i>	-	1,800	0	0	
of the value of	140,000 <i>l.</i>	and under the value of	160,000 <i>l.</i>	-	2,100	0	0	
of the value of	160,000 <i>l.</i>	and under the value of	180,000 <i>l.</i>	-	2,400	0	0	
of the value of	180,000 <i>l.</i>	and under the value of	200,000 <i>l.</i>	-	2,700	0	0	
of the value of	200,000 <i>l.</i>	and under the value of	250,000 <i>l.</i>	-	3,000	0	0	
of the value of	250,000 <i>l.</i>	and under the value of	300,000 <i>l.</i>	-	3,750	0	0	
of the value of	300,000 <i>l.</i>	and under the value of	350,000 <i>l.</i>	-	4,500	0	0	
of the value of	350,000 <i>l.</i>	and under the value of	400,000 <i>l.</i>	-	5,250	0	0	
of the value of	400,000 <i>l.</i>	and under the value of	500,000 <i>l.</i>	-	6,000	0	0	
of the value of	500,000 <i>l.</i>	and under the value of	600,000 <i>l.</i>	-	7,500	0	0	
of the value of	600,000 <i>l.</i>	and under the value of	700,000 <i>l.</i>	-	9,000	0	0	
of the value of	700,000 <i>l.</i>	and under the value of	800,000 <i>l.</i>	-	10,500	0	0	
of the value of	800,000 <i>l.</i>	and under the value of	900,000 <i>l.</i>	-	12,000	0	0	
of the value of	900,000 <i>l.</i>	and under the value of	1,000,000 <i>l.</i>	-	13,500	0	0	
of the value of	1,000,000 <i>l.</i>	and upwards	-	-	15,000	0	0	

Letters of administration, without a will annexed, to be granted in England :

Confirmation of any testament dative, to be expedited in any commissary court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804 ;

Inventory to be exhibited and recorded in any commissary court in *Scotland*, of the estate and effects of any person deceased who shall have died after the 10th day of October, 1808, without leaving any testament or testamentary disposition of his or her personal or moveable estate or effects, or any part thereof ;

Where the estate and effects for or in respect of which such letters of administration or confirmation respectively shall be granted or expedited, or whereof such inventory shall be exhibited and recorded, *exclusive of what the deceased shall have been possessed of or entitled to as a trustee (1) for any other person or persons, and not beneficially*, shall be

					£	s.	d.
above the value of	20 <i>l.</i>	and under the value of	50 <i>l.</i>	-	0	10	0
of the value of	50 <i>l.</i>	and under the value of	100 <i>l.</i>	-	1	0	0
of the value of	100 <i>l.</i>	and under the value of	200 <i>l.</i>	-	3	0	0
of the value of	200 <i>l.</i>	and under the value of	300 <i>l.</i>	-	8	0	0
of the value of	300 <i>l.</i>	and under the value of	450 <i>l.</i>	-	11	0	0
of the value of	450 <i>l.</i>	and under the value of	600 <i>l.</i>	-	15	0	0
of the value of	600 <i>l.</i>	and under the value of	800 <i>l.</i>	-	22	0	0
of the value of	800 <i>l.</i>	and under the value of	1,000 <i>l.</i>	-	30	0	0
of the value of	1,000 <i>l.</i>	and under the value of	1,500 <i>l.</i>	-	45	0	0
of the value of	1,500 <i>l.</i>	and under the value of	2,000 <i>l.</i>	-	60	0	0
of the value of	2,000 <i>l.</i>	and under the value of	3,000 <i>l.</i>	-	75	0	0
of the value of	3,000 <i>l.</i>	and under the value of	4,000 <i>l.</i>	-	90	0	0
of the value of	4,000 <i>l.</i>	and under the value of	5,000 <i>l.</i>	-	120	0	0
of the value of	5,000 <i>l.</i>	and under the value of	6,000 <i>l.</i>	-	150	0	0
of the value of	6,000 <i>l.</i>	and under the value of	7,000 <i>l.</i>	-	180	0	0
of the value of	7,000 <i>l.</i>	and under the value of	8,000 <i>l.</i>	-	210	0	0
of the value of	8,000 <i>l.</i>	and under the value of	9,000 <i>l.</i>	-	242	0	0
of the value of	9,000 <i>l.</i>	and under the value of	10,000 <i>l.</i>	-	270	0	0
of the value of	10,000 <i>l.</i>	and under the value of	12,000 <i>l.</i>	-	300	0	0
of the value of	12,000 <i>l.</i>	and under the value of	14,000 <i>l.</i>	-	330	0	0
of the value of	14,000 <i>l.</i>	and under the value of	16,000 <i>l.</i>	-	375	0	0
of the value of	16,000 <i>l.</i>	and under the value of	18,000 <i>l.</i>	-	420	0	0
of the value of	18,000 <i>l.</i>	and under the value of	20,000 <i>l.</i>	-	465	0	0
of the value of	20,000 <i>l.</i>	and under the value of	25,000 <i>l.</i>	-	525	0	0
of the value of	25,000 <i>l.</i>	and under the value of	30,000 <i>l.</i>	-	600	0	0
of the value of	30,000 <i>l.</i>	and under the value of	35,000 <i>l.</i>	-	675	0	0
of the value of	35,000 <i>l.</i>	and under the value of	40,000 <i>l.</i>	-	785	0	0
of the value of	40,000 <i>l.</i>	and under the value of	45,000 <i>l.</i>	-	900	0	0
of the value of	45,000 <i>l.</i>	and under the value of	50,000 <i>l.</i>	-	1,010	0	0
of the value of	50,000 <i>l.</i>	and under the value of	60,000 <i>l.</i>	-	1,125	0	0

(1) *Carr v. Roberts*, 2 B. & Ad. 905.

STAMP DUTIES.

Stat. 55 Geo. 3.
c. 184.

					£	s	d
of the value of	60,000 <i>l.</i>	and under the value of	70,000 <i>l.</i>	-	-	1,350	0 0
of the value of	70,000 <i>l.</i>	and under the value of	80,000 <i>l.</i>	-	-	1,575	0 0
of the value of	80,000 <i>l.</i>	and under the value of	90,000 <i>l.</i>	-	-	1,800	0 0
of the value of	90,000 <i>l.</i>	and under the value of	100,000 <i>l.</i>	-	-	2,025	0 0
of the value of	100,000 <i>l.</i>	and under the value of	120,000 <i>l.</i>	-	-	2,250	0 0
of the value of	120,000 <i>l.</i>	and under the value of	140,000 <i>l.</i>	-	-	2,700	0 0
of the value of	140,000 <i>l.</i>	and under the value of	160,000 <i>l.</i>	-	-	3,150	0 0
of the value of	160,000 <i>l.</i>	and under the value of	180,000 <i>l.</i>	-	-	3,600	0 0
of the value of	180,000 <i>l.</i>	and under the value of	200,000 <i>l.</i>	-	-	4,050	0 0
of the value of	200,000 <i>l.</i>	and under the value of	250,000 <i>l.</i>	-	-	4,500	0 0
of the value of	250,000 <i>l.</i>	and under the value of	300,000 <i>l.</i>	-	-	5,625	0 0
of the value of	300,000 <i>l.</i>	and under the value of	350,000 <i>l.</i>	-	-	6,750	0 0
of the value of	350,000 <i>l.</i>	and under the value of	400,000 <i>l.</i>	-	-	7,875	0 0
of the value of	400,000 <i>l.</i>	and under the value of	500,000 <i>l.</i>	-	-	9,000	0 0
of the value of	500,000 <i>l.</i>	and under the value of	600,000 <i>l.</i>	-	-	11,250	0 0
of the value of	600,000 <i>l.</i>	and under the value of	700,000 <i>l.</i>	-	-	13,500	0 0
of the value of	700,000 <i>l.</i>	and under the value of	800,000 <i>l.</i>	-	-	15,750	0 0
of the value of	800,000 <i>l.</i>	and under the value of	900,000 <i>l.</i>	-	-	18,000	0 0
of the value of	900,000 <i>l.</i>	and under the value of	1,000,000 <i>l.</i>	-	-	20,250	0 0
of the value of	1,000,000 <i>l.</i>	and upwards	-	-	-	22,500	0 0

Exemption from all Stamp Duties.

Probate of will, letters of administration, confirmation of testament, and eik thereto, and inventory of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of his majesty, his heirs or successors ;
Additional inventory to be exhibited and recorded in any commissary court in Scotland, where the same shall not be liable to a duty of greater amount than the duty already paid upon any former inventory exhibited and recorded of the estate and effects of the same person.

Legacies and Successions to personal or moveable Estate upon Intestacy.

1. Where the testator, testatrix, or intestate died before or upon the 5th day of April, 1805. For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 (1) ;
- Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the thirty-first day of August, 1815 ;
- Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased*, a duty at and after the rate of 2*l.* 10*s.*, *per centum*, on the amount or value thereof.
- Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*, a duty at and after the rate of 4*l.* *per centum* on the amount or value thereof.
- Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*, a duty at and after the rate of 5*l.* *per centum* on the amount or value thereof.
- And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person in *any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased* (2), a duty at and after the rate of 8*l.* *per centum* on the amount or value thereof.

(1) *Att. Gen. v. Manners (Lady Louisa)*, 1 Price, 411. (2) *Att. Gen. v. Bacchus*, 9 Price, 30.
Att. Gen. v. Burnie, 3 Y. & J. 531.

2. Where the testator, testatrix, or intestate shall have died after the 5th day of April, 1805 (1): STAMP DUTIES.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any will or testamentary instrument, of any person, who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate (2), or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815;

Stat. 55 Geo. 3.
c. 184.

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815;

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed (3) to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any) where such residue, or share of residue shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 21st day of August, 1815;

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased*, a duty at and after the rate of 1*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased*, a duty at and after the rate of 3*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*, a duty at and after the rate of 5*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*, a duty at and after the rate of 6*l.* per centum on the amount or value thereof.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, in *any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*, a duty at and after the rate of 10*l.* per centum on the amount or value thereof.

And all gifts of annuities, or by way of annuity (4), or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

Exemptions.

Legacies, and residues, or shares of residue of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.

And all legacies which were exempted from duty by the act passed in the 39th year of his majesty's reign (c. 73.) for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.

(1) Gwynne on Legacy Duties, 59.
(2) *Att. Gen v. Holford*, 1 Price, 426.

(3) *In re Evans*, 2 C. M. & R. 206.
(4) *Att. Gen. v. Jackson*, 2 C. & J. 101.

STAMP DUTIES.

Schedule to
Stat. 2 Will. 4.
c. 40.

SCHEDULE TO WHICH STAT. 2 WILL. 4. C. 40. REFERS.

TABLE of Fees to be taken for Probates of Wills, Letters of Administration, and Letters of Administration with Will annexed, of Warrant and Petty Officers, and Non-commissioned Officers of Marines, and also of Common Seamen and Marines, in pursuance of this Act.

PROBATE.					
	Under what Sum the Effects sworn.	Where the Deceased was a Warrant or Petty Officer in the Navy, or a Non-commissioned Officer of Marines.		Where the Deceased was a Common Seaman or Marine.	
		If the Executor be a Wife, Child, Parent, Brother, or Sister, of the deceased.	If the Executor be more remotely related, or a Stranger in Blood to him.	If the Executor be a Wife, Child, Parent, Brother, or Sister, of the Deceased.	If the Executor be more remotely related, or a Stranger in Blood to him.
If the Executor sworn in London.	£ 30	£ s. d. 0 7 0	£ s. d. 0 16 6	£ s. d. 0 7 0	£ s. d. 0 16 6
	50	1 0 6	1 10 6	0 11 0	1 1 0
	100	1 8 6	1 15 6	0 19 0	1 6 0
If the Executor sworn in the Country by Commission.	20	0 19 0	1 12 0	0 19 0	1 12 0
	50	1 17 0	2 12 6	1 7 6	2 3 0
	100	2 8 0	2 17 6	1 18 6	2 8 0

TABLE OF FEES—continued.

ADMINISTRATIONS, AND ADMINISTRATIONS WITH WILL ANNEXED.									
	Under what Sum the Effects sworn.	Where the Deceased was a Warrant or Petty Officer in the Navy, or a Non-commissioned Officer of Marines.				Where the Deceased was a Common Seaman or Marine.			
		If the Administrator be a Wife, Child, Parent, Brother, or Sister of the Deceased.		If the Administrator be more remotely related, or a Stranger in Blood to him.		If the Administrator be a Wife, Child, Parent, Brother, or Sister of the Deceased.		If the Administrator be more remotely related, or a Stranger in Blood to him.	
		Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.
If the Administrator sworn in London.	£ 30	£ s. d. 0 12 6	£ s. d. 0 15 0	£ s. d. 1 3 0	£ s. d. 1 8 0	£ s. d. 0 12 6	£ s. d. 0 15 0	£ s. d. 1 3 0	£ s. d. 1 8 0
	50	2 5 6	2 9 0	2 16 0	3 2 0	0 16 0	0 19 6	2 6 6	3 12 6
	100	3 2 6	3 18 6	3 19 0	3 16 6	1 4 0	1 9 0	2 19 6	3 7 0
If the Administrator sworn in the Country by Commission.	20	0 19 6	1 2 0	1 13 6	1 18 6	0 19 6	1 2 0	1 13 6	1 18 6
	50	2 17 0	2 0 6	2 13 0	3 19 0	1 7 6	1 11 0	3 2 6	3 9 6
	100	3 18 0	3 13 0	4 15 0	4 12 6	1 16 6	2 3 6	3 15 6	4 12 0

10. PAYMENT OF DEBTS ACCORDING TO LEGAL PRIORITY.

When the executors have collected the property of the deceased, it is called assets, after which they must pay the debts of the deceased according to their legal priority.

PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.
GENERALLY.

With respect to assets, they are thus defined in Sheppard's Touchstone (1), "All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executors or administrators, to make him chargeable to a creditor or legatee."

ASSETS DE-
FINED.

In *Smedley v. Philpot* (2) it appeared, that A. had commenced a suit in Chancery for an account under a will, in which she employed as her solicitors first B. then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death E., her executor, filed a bill of revivor, and D. continued to conduct the suit for him. In 1833 a decree was made, whereby it was ordered, that the master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in the following manner: viz. the plaintiff's costs (consisting of the costs both A. and E.) to D. his solicitor, and the costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were paid to D.; C. sued E. as executor of A. for the amount of his bill, and had judgment of assets, *quando acciderint*. He afterwards brought another action on the judgment, and had given notice of trial; and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100*l.* on account of his bill, and the remainder out of the assets which should first come to his hands as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the court of Chancery to D. in respect of the same costs:—It was held (3), that this sum was assets in the hands of E. within the meaning of the agreement.

Money paid
out of Chancery
in respect of
costs

Executors and administrators are liable, in their representative character, to the payment of all debts and covenants of the testator, to the extent of the assets which come into their possession; but where no default is in them, their liability on account of the deceased, does not exceed the amount of assets. (4)

Executors
liable to the
payment of
debts, to the
extent of the
assets which
come into their
possession.

If an executor or administrator voluntarily pay an inferior debt before a superior debt, of the existence of which he had notice, on a deficiency of assets he must answer for the superior debt out of his own estate; and he is bound to plead a debt of a higher nature in bar of an action for a debt of an inferior nature, and *riens ultra*, if he have not assets for both, otherwise it will be an admission of assets to satisfy both debts. (5)

DEBTS MUST BE
PAID ACCORD-
ING TO THEIR
LEGAL PRI-
ORITY.

(1) Touchst. by Atherley, 496.

(2) 3 M. & W. 578.

(3) *Per Parke and Alderson B.*, Lord Abinger *dissentiente*.

(4) Went. Off. Ex. c. 12. 1 Inst. 209.

(5) *Rock v. Leighton*, 1 Salk. 310. *Brit-*

ton v. Batthurst, 3 Lev. 114. 1 Saund. 333. (a.)

**PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.**

An executor or administrator is bound at his peril to take cognizance of debts upon record (1); and so of decrees in equity. (2) But of other specialty debts there must be actual notice, to render him liable *de bonis propriis* in case of a deficiency of assets, by reason of having paid debts of an inferior nature. (3) If the defendant have paid debts to the amount, after the suing out and before notice of the plaintiff's writ or debt, he must plead such defence specially, and cannot give it in evidence under *plea administravit*, under which no payments, after the action commenced, can be given in evidence. (4)

**FESTIVAL EX-
PENSES.**

Festival expenses, at funerals, as against creditors, have never been allowed, "for dead debtors must not feast to make their living creditors fast." (5)

**FUNERAL EX-
PENSES.**

Necessary funeral expenses are allowed previous to all other debts and charges; and an executor will be liable to reasonable expenses, although he did not actually order the funeral, if the credit were not given to another (6); but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and will only be prejudicial to himself, and not to the creditors or legatees of the deceased (7); in fact, as against creditors, no expenses are allowed, except such, as are absolutely necessary (8); and if unreasonable, the executor will be personally liable where he has sanctioned them, even before he took out letters of administration. (9)

No precise sum
can be fixed to
govern execu-
tors in all cases.

In *Edwards v. Edwards* (10) Mr. Baron Parke stated, "I take the rule to be, that the executor is entitled to be allowed reasonable expenses [according to the testator's condition in life]; and if he exceeds those, he is to take the chance of the estate turning out insolvent." No precise sum can be fixed to govern executors in all cases. It must vary, as observed by Mr. Baron Alderson in the foregoing case, "with the circumstances of each particular case, and the price of the requisite articles at the particular place."

What are not
extravagant ex-
penses.

A payment of 93*l.* 12*s.* 6*d.* for mourning rings distributed among the relations and friends of the deceased was allowed by Lord Eldon to the executors, though the will gave no directions on the subject, but left it to the discretion of the executors. (11)

Where the deceased was a small tradesman, 10*l.* was held to be a reasonable allowance to the executrix for funeral expenses, as against a creditor. (12)

Where 600*l.* had been expended on the funeral of a man of *great estate* and reputation in his county, the court allowed that sum as a debt to affect the trust estate (13)

Insolvent
estate.

"In strictness, no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall or ornaments." (14)

(1) *Littleton v. Hibbins*, Cro. Eliz. 793. recog. in *Hickey v. Hayter*, 6 T. R. 388. Dyer, 32. (a.) marg.

(2) *Searle v. Lane*, Freem. Ch. Ca. 104. *Sorrell v. Carpenter*, 2 P. Wms. 483.

(3) Williams on Executors, 825—828. *Harman v. Harman*, 2 Show. 478. *Hawkins v. Day*, 1 Dick. 155. Amb. 162.

(4) Dyer, 32. (a.) marg. Com. Dig. Administration (C. 2.).

(5) Went. Off. Ex. 259.

(6) *Brice v. Wilson*, 3 N. & M. 512. 8 A. & E. 349. n.

(7) 2 Black. Com. 508. *Griffith v. Harrison*, 1 Salk. 196. Godolph. pt. ii. c. 26. s. 2.

(8) *Edwards v. Edwards*, 4 Tyrw. 438.

(9) *Lucy v. Walrond*, 3 Bing. N. C. 841.

(10) 2 C. & M. 612. Williams on Executors, 775.

(11) *Paice v. Canterbury* (Archbishop of) 14 Ves. 364.

(12) *Reeves v. Ward*, 2 Bing. N. C. 235.

(13) *Offley v. Offley*, Pr. Ch. 261.

(14) Per Holt C. J. in *Shelley's case*, 1 Salk. 296.

In *Stag v. Punter* (1) Lord Hardwicke said, "At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40s., then 5*l.*, and at last 10*l.*;" "but this court is not bound down by such strict rules, especially where a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent;" "and as the testator directed his corpse should be buried at a church thirty miles from the place of his death," "and as it is not clear there will be any deficiency," 60*l.* is not too much for the funeral expenses.

PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.

Where 79*l.* were expended on the funeral of a person who had been a captain in the army, and who at the time of his death was on half-pay, and it appeared, that assets to the amount of 129*l.* had come into the hands of the executrix; in an issue taken on a plea of *plene administravit*, the court held, that 79*l.* was a larger sum than ought to be allowed as against a creditor. "The rule," said Mr. Justice Bayley, "as against a creditor is, that no more shall be allowed for a funeral than is necessary. In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party." The learned judge then intimated that 10*l.*, the sum mentioned by Lord Hardwicke (2), was at the present day less than what reasonably should be allowed, and that 20*l.* was a proper allowance for the funeral under the circumstances of the case then under consideration. (3)

But the court of Chancery refused to allow 2210*l.* for the funeral expenses of a nobleman, whose personal estate was believed to be solvent at his death, but ultimately proved to be insolvent. (4)

A demand for mourning furnished to the widow and family of the testator is not such a funeral expense, as can be claimed against the estate by the executor, who gave the order for it. (5)

Mourning to
the widow and
family.

If an executor ratify orders given by another person for an extravagant funeral, he may be sued by the undertaker individually, and not as executor, for the whole expense (6); but, where a defendant, before taking out letters of administration, sanctioned an expensive funeral, which a relation had ordered for the deceased, it was held, that, after taking out administration, defendant was liable in the capacity of administrator for this expense. (7)

Executor rati-
fying the orders
given by an-
other person
for an extra-
vagant funeral.

An executor must first pay the expenses of proving the will, and the like, in which the costs of a suit in equity would be included, being considered as expenses in administering the estate (8):—and he may shew that he has retained money in his hands to pay the expenses of administration, to which he has made himself liable, without proving that he has paid them. (9)

Expenses of
proving the
will.

The other debts which an executor is bound to pay, may be thus classified according to their priority:—1. debts due to the crown by record or specialty; 2. debts created by particular statutes; 3. debts by judgment in courts of record; 4. debts by specialty; 5. debts by simple contract, first to the king, and secondly to the subject.

The king is preferred before other creditors, because the royal revenue is

DEBTS DUE TO

(1) 3 Atk. 119.

(2) *Stag v. Punter*, 3 Atk. 119.

(3) *Hancock v. Podmore*, 1 B. & Ad. 260.
Edwards v. Edwards, 2 C. & M. 612. 4 Tyrw.
438.

(4) *Bissett v. Antrobus*, 4 Sim. 512.

(5) *Johnson v. Baker*, 2 C. & P. 207.

(6) *Brice v. Wilson*, 8 A. & E. 349. n.

(7) *Lucy v. Walrond*, 3 Bing. N. C. 841.

(8) *Loomes v. Stotherd*, 1 S. & S. 461.

(9) *Gillies v. Smither*, 2 Stark. 528.

**PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.**

**THE CROWN BY
RECORD OR
SPECIALTY.**

considered as of more importance than any private interest (1): and by the stat. 33 Hen. 8. c. 39. all obligations and specialties taken to the use of the king, shall be of the same nature as a statute staple. (2) But the debts so privileged must be such, as are due by matter of record, or by specialty (3); therefore, sums of money owing to the king on wood sales, sales of tin, or of other his materials, for which no specialty is given; amercements in the king's courts baron (4), or courts of his honours (which are not of record); fines for copyhold estates; money arising from the sale of estrays within his manors or liberties; forfeitures by attainder or outlawry, before office found (5); outlawry of the king's debtor by simple contract on mesne process (6); debts assigned to the king (7); the arrears of rent due to the crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, are not entitled to such preference.

**DEBTS CREATED
BY PARTICULAR
STATUTES.**

Money due for letters to the post office by stat. 9 Anne, c. 10.; money due from the overseers of the poor by stat. 17 Geo. 2. c. 38. (8); regimental debts under stat. 58 Geo. 3. c. 73. s. 1.; money due from deceased as treasurer or collector to paving commissioners under act 57 Geo. 3. c. xxix. s. li.; money, effects, or securities belonging to a friendly society, remaining in the hands of any of its officers at the time of his death (9), are next entitled to a preference. But money lent to an officer, or supposed to remain in his hands on giving security, has been held not to be entitled to a preference, which is given only in respect of money, acquired independent of contract. (10)

**JUDGMENTS IN
COURTS OF
RECORD.**

Judgments recovered on judicial proceedings in litigated cases, and in a regular course of justice (11), are in a precedent degree to statutes and recognisances; and an executor is obliged to discharge a later judgment, in preference to a statute or recognisance prior in point of time. (12)

Priority of judgment does not depend on the original cause of action.

As between one judgment and another, priority of time is immaterial.

This privilege is not confined to judgments in the superior courts of Westminster, but extends itself to judgments in all other courts of record, having power by charter or prescription to hold pleas of debt above 40s., and applies even to the court of Pie Poudre. The priority of a judgment does not depend on the original cause of action; and a judgment against the testator on a debt by simple contract is of the same nature, as a judgment on a specialty (13); nor, as between one judgment and another, is priority of time material.

The judgment creditor, who first sues out a *scire facias*, must be preferred; but, before such writ be sued out, the executor has it in his election, where there are two judgment creditors, to pay which of them he pleases first; and if each bring a *scire facias* on his judgment, yet the executor may confess

(1) 3 Bac. Abr. Executors (L.), 514. Went. Off. Ex. 261.

(2) Went. Off. Ex. 262.

(3) 3 Bac. Abr. Executors (L.), 514. Went. Off. Ex. 262.

(4) 3 Black. Com. 25.

(5) 3 Bac. Abr. Executors (L.), 515. Went. Off. Ex. 262, 263. Com. Dig. Administration (C. 2.).

(6) Com. Dig. Administration (C. 2.). *Erby v. Erby*, 1 Salk. 80. 11 Vin. Abr. Executors, 291. [Q. a.].

(7) Com. Dig. Administration (C. 2.). 11 Vin. Abr. Executors, 301. [S. a.]. *Sir Edward Dimock's case*, Lane, 65.

(8) 3 Bac. Abr. Executors (L.), 515. 2 Black. Com. 511.

(9) Stat. 33 Geo. 3. c. 54. s. 10.

(10) Exp. *Stamford Friendly Society*, 15 Ves. 280.

(11) 3 Bac. Abr. Executors (L.), 515. Went. Off. Ex. 265—267. Com. Dig. Administration (C. 2.). 1 Rol. Abr. Executors (R.), 926. *Littleton v. Hibbins*, Cro. Eliz. 793.

(12) Went. Off. Ex. 265—267. Com. Dig. Administration (C. 2.).

(13) 3 Black. Com. 158. 11 Vin. Abr. Executors, 299. [R. a.]. Com. Dig. Administration (C. 2.).

either action, at his option, although the *scire facias* were brought by the one creditor before the other. (1) But where the defendant, in an action on simple contract, after an interlocutory judgment, died, and on *scire facias* against his administrator, a writ of inquiry issued, and damages assessed, judgment was entered up against the intestate, the court inclined to the opinion, that the judgment, pursuant to the stat. 8 & 9 Will. 3. c. 11., ought to have been entered up, not against the intestate himself, but against the representative, and was therefore not pleadable by the administrator to an action brought against him on a bond. (2)

PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.

If a judgment be preserved merely to defraud other creditors, or if there be any defeasance of it in force, such judgment will not avail to preclude them from their debts. (3)

Judgment
fraudulently
preserved.

A judgment *quod computet*, in the obsolete action of account, is of a nature too incomplete to be privileged like other judgments. (4)

Quod computet.

A judgment in a foreign country is regarded, in England, merely as a debt by simple contract. (5)

Foreign judg-
ment.

Nor are judgments against an executor comprehended within the same class as those, which are recovered against the testator. (6)

Judgments
against an
executor.

By stat. 4 & 5 Will. & M. c. 20. s. 3. "no judgment, not docketed and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates."

Stat. 4 & 5
Will. & M.
c. 20. s. 3.

The law, however, appears to have been materially altered in this respect by stat. 2 & 3 Vict. c. 11.; for, since that statute, judgments cannot be docketed under the foregoing statute; and it may be questioned, whether, notwithstanding they be not registered pursuant to stat. 1 & 2 Vict. c. 110. s. 19., an executor or administrator is not bound to take notice of them, at his peril, as at common law. (7)

Stat. 2 & 3
Vict. c. 11.
Judgments not
docketed.

According to stat. 4 & 5 Will. & M. c. 20. a judgment not docketed is put on a level with simple contract debts (8); and if the executor have notice of the judgment, although not docketed, he may perhaps be warranted in giving it a preference as a judgment; but if he in that case pay other debts first, he is not liable, as on a *devastavit*: and to charge him, it seems, that no other, than the notice prescribed by the statute would be sufficient. (9)

So, also, a judgment not docketed according to the directions of the statute, cannot be pleaded to an action on simple contract. (10) But of such judgments, when docketed, an executor will be presumed to have cognisance. (11)

The provisions of the statute do not extend to judgments in inferior courts of record; and the executor is still bound to take notice of them at

(1) Went. Off. Ex. 269. Com. Dig. Administration (C. 2.), vide etiam *Gomarsal v. Aske*, Yelv. 133.

(2) 11 Vin. Abr. Executors, 279. [P. a.]. *Weston v. James*, 1 Salk. 42. Com. Dig. Pleader (D. 9.).

(3) 3 Bac. Abr. Executors (L.), 516. Went. Off. Ex. 267, 268.

(4) 11 Vin. Abr. Executors, 297. [Q. a. 2.], n. *Searle v. Lane*, Freem. Ch. Ca. 103.

(5) 11 Vin. Abr. Executors, 291. [Q. a.]

Duplein v. De Roven, 2 Vern. 540. *Walker v. Witter*, Doug. 1.

(6) Went. Off. Ex. 269, 270.

(7) Williams on Executors, 828.

(8) *Hickey v. Hayter*, 6 T. R. 384.

(9) Per Lord Kenyon, *ibid.* 387, 388., vide *Oxenham v. Clapp*, 2 B. & Ad. 314, 315.

(10) *Steel v. Rorke*, 1 B. & P. 307.

(11) 3 Bac. Abr. Executors (L.), 518. n. *Littleton v. Hibbins*, Cro. Eliz. 793., vide *Harman v. Harman*, 3 Mod. 115. 11 Vin. Abr. Executors, 274. [P. a.], 291. [Q. a.]

**PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.**

Decrees in
equity.

his peril (1), as he was, before that act, of the judgments of the courts at Westminster. (2)

A decree in a court of equity is, in respect to the course of administering assets, equivalent to a judgment at law, and stands in the same order of payment (3); but a judgment in a foreign court is considered as a debt by single contract. (4)

An executor will be affected with implied notice of a decree obtained against the testator; therefore, where an executor paid a debt due by specialty before a debt due by a decree, of which he had no actual notice, he was decreed to pay it over again out of his own estate. (5)

Therefore it has been holden, that, pending a bill in equity, and after such decree, an executor may pay any other debt of a higher or an equal nature, in case the assets be legal, although he has no power of so doing, as against a final decree. (6)

**RECOGNIS-
ANCES AND
STATUTES.**

Recognisances and statutes take precedence next after judgments. (7)

A recognisance is an obligation of record, and is in most respects like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*; the former an acknowledgment, on record, of a prior debt.

Of securities by statute there are three species,—statute merchant, statute staple, and recognisances in the nature of statutes staple.

Although recognisances are entered on the rolls of the king's courts, while statutes are consigned to the custody of the party (8), yet both species of securities having been entered into voluntarily and privately, are regarded as equal in their nature, and payable in the same order. (9) Nor is it material in regard to payment by the executor, which of them are prior or subsequent in point of date. But if the testator in his lifetime enter into a statute for performance of covenants, and none of them are broken, to an action of debt on specialty, the executor cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow him to elude a just debt on a contingency, which may never happen. (10) So if it be for payment of money, when an infant shall come of age, it will be no bar to other debts, for the infant may die before that time. (11)

A recognisance not enrolled is considered as a bond, and payable accordingly (12), the sealing and acknowledgment of it, supplying the want of a delivery.

(1) 11 Vin. Abr. Executors, 294. [Q. a.]. *Herbert's case*, 3 P. Wms. 116. Went. Off. Ex. 270, 271.

(2) *Littleton v. Hibbins*, Cro. Eliz. 793.

(3) 11 Vin. Abr. Executors, 301. [S. a.]. 3 Bac. Abr. Executors (L.), 516. *Shafte v. Powel*, 3 Lev. 355. *Astley v. Powis*, 1 Ves. sen. 496. *Bligh v. Darnley (Earl of)*, 2 P. Wms. 621. 3 ibid. 401. n. (f.) *Morris v. England (Bank of)*, C. T. T. 217. *Peploe v. Swinburn*, Bunb. 48.

(4) *Duplein v. De Roven*, 2 Vern. 540. *Walker v. Witter*, Doug. 1.

(5) 3 Bac. Abr. Executors (L.), 516. *Buckle v. Atleo*, 2 Vern. 37. *Searle v. Lane*, ibid. 88. *Sorrell v. Carpenter*, 2 P. Wms. 483.

(6) *Buxton v. Lister*, 3 Atk. 385. *Worsley*

v. Scarborough (Earl of), ibid. 392. *Mason v. Williams*, 2 Salk. 507. 11 Vin. Abr. Executors, 297. [Q. a. 2.]. 3 Bac. Abr. Executors (L.), 519.

(7) Went. Off. Ex. 272. 2 Black. Com. 511. Com. Dig. Administration (C. 2.). *Philips v. Echard*, Cro. Jac. 8. 35.

(8) *Harrison's case*, 5 Co. 28. (b.), vide stats. 13 Edw. 1. s. iii. (*De Mercatoribus*), 27 Edw. 3. s. ii. (Staple), 23 Hen. 8. c. 6.

(9) Went. Off. Ex. 272, 273.

(10) 3 Bac. Abr. Executors (L.), 516. *Harrison's case*, 5 Co. 28. Swinb. p. vi. s. 16.

(11) 1 Rol. Abr. Executors (Q.), 925.

(12) *Bothomly v. Fairfax (Lord)*, 1 P. Wms. 334. 2 Vern. 750.

A statute not regularly taken may be good as an obligation. (1)

The other inferior debts of record are issues forfeited; fines imposed by the judges at Westminster or at the assizes, by the justices at quarter sessions, by commissioners of sewers or of bankrupts, or by stewards of leets, and the like; for all these are debts of record, and so payable by the executor. (2)

A debt by obligation, and a debt by covenant for a sum certain, or for damages on a breach of covenant, and a debt for rent, are all debts of the same degree. (3) Nor does it make any difference, whether the rent be reserved by lease in writing, or by parol; for, in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty. Nor is the nature of the debt changed by the determination of the lease; the contract remains in the realty, although the right of distress be gone. (4)

For rent, which was in arrear in the testator's lifetime, the executor is liable merely in that character; as the testator's debt, he can be sued for it in the *detinet* only, and to such action may plead, that he has fully administered (5); whereas, for the subsequent rent, the executor is in general regarded as personally responsible; and if he enter on the demised premises, as by his office he is bound to do, the lessor may charge him as assignee in the *debet* and *detinet* for the rent incurred subsequently to his entry. (6)

The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund should prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty. (7)

Debts by bond and other instruments, under the seal of the party, are of the same class with debts for rent (8); and an executor is bound to pay a debt on specialty, before a debt by simple contract. But in the distribution of separate property of a married woman, as assets after her death, a bond debt is not entitled to priority, for the bond, merely as a bond, is void. (9) An executor is bound to pay a debt on specialty, before a debt by simple contract, although the bond be not yet due. For the obligation is a present duty, and the condition is but a defeasance of it. (10) But if the testator die indebted to A. in one specialty, and to B. in another, and of A.'s debt, the day of payment is past, and of B.'s debt the day of payment is to come, the executor has no right to pay B. in preference to A.: yet if A. forbear to demand or sue for his debt, till the debt of B. become payable, then it is in the election of the executor to pay which of them he thinks proper. (11)

PAYMENT OF
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OTHER INFE-
RIOR DEBTS OF
RECORD.

DEBTS BY
SPECIALTY, AND
HEREIN OF
RENT.

DEBTS BY
BOND.

(1) *Hollingworth v. Ascue*, Cro. Eliz. 355. 461. 544. 2 Rol. Abr. Obligation (I.), 149.

(2) 11 Vin. Abr. Executors, 277, 278. [P. a.]. Went. Off. Ex. 270—273. *Bottomly v. Fairfax* (Lord), 2 Vern. 750.

(3) Went. Off. Ex. 276. 2 Black. Com. 465. 511. Com. Dig. Administration (C. 2.). *Plumer v. Marchant*, 3 Burr. 1384., vide etiam *Gage v. Acton*, 1 Salk. 326.

(4) 3 Bac. Abr. Executors (L.), 517. *Newport v. Godfrey*, 3 Lev. 267. 2 Vent. 184. *Gage v. Acton*, Com. 67. *Stonehouse v. Ilford*, ibid. 145. *Godfrey v. Newport*, Comb. 183. 11 Vin. Abr. Executors, 289. [P. a. 2.], n., vide 2 Black. Com. 11. Stat. 8 Anne, c. 14.

(5) *Lyddall v. Dunlapp*, 1 Wils. 4. Com. Dig. Administration (B. 14.).

(6) *Billingham v. Speerman*, 1 Salk. 297. 317. Went. Off. Ex. 285, 286.

(7) *Buckley v. Pirk*, 1 Salk. 317. Went. Off. Ex. 149.

(8) Went. Off. Ex. 292, 293.

(9) *Anon.* 18 Ves. 258.

(10) 11 Vin. Abr. Executors, 304. [X. a.]. 3 Bac. Abr. Executors (L.), 516. *Buckland v. Brooke*, Cro. Eliz. 315. *Leman v. Fooke*, 3 Lev. 57. *Goldsmith v. Sydnor*, Cro. Car. 362. *England (Bank of) v. Morrice*, C. T. H. 228.

(11) Went. Off. Ex. 277—279. Com. Dig. Administration (C. 2.). Swinb. p. vi. s. 16.

**PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.**

Contingent
security.

In the administration of assets, a contingent security, as for example a bond to save harmless, will not stand in the way of a debt by simple contract. (1) And if, subsequently to the payment of the simple contract debt, the contingency should happen, it seems reasonable, that evidence of such payment should be admitted on the executor's plea of *plene administravit* to an action by the specialty creditor. (2)

But where the contingency has taken place, although the debt consequent upon it has not yet been paid, it may be pleaded to an action by a simple contract creditor. (3)

Voluntary
bonds.

A voluntary bond shall be postponed to simple contract debts *bond fide* contracted; and such bond, if not to the prejudice of creditors, must be paid in preference to legacies; because a bond transfers a right in the lifetime of the obligor, whereas legacies arise from the will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his lifetime. (4) But an executor has no authority to pay a bond founded on an usurious contract, or a bond *ex turpi causa*; because such payments amount to a *devastavit*, as well against legatees, as against creditors. (5)

Joint and
several obliga-
tion.

If the testator was bound by a joint and several obligation, an executor or administrator may pay it out of the estate of the testator, and plead it to other actions by creditors or specialties. But if the obligation be joint only, the executors of the deceased obligor are not liable on the instrument, the obligation devolving on the surviving obligor. (6)

Covenant.

A demand arising from a covenant is of the same nature, whether it be for a specific sum, or whether it sound merely in damages. (7)

Mortgages.

Of this class also are debts by mortgage; and although there be neither bond nor covenant for the payment of the mortgage money, yet it is payable out of the personal assets. (8) But if such debt be paid out of those assets, the other creditors, as well by specialty as on simple contract, and even legatees, are, in case of a deficiency of that fund, entitled in equity to the advantage of the mortgage, to the extent of what was applied in discharge of it, out of the personal estate. (9)

DEBTS ON
SIMPLE CON-
TRACT.

Last in the order of payment are debts on simple contract, as on bills and notes not under seal, and verbal promises (10), or such as are implied in law. (11) On contracts of this nature, debts due to the king must, it seems, be satisfied before debts which are due to subjects (12); the wages also of domestic servants and of labourers appear, with great reason, entitled to a

(1) 11 Vin. Abr. Executors, 395. [G. b.]. *Lancy v. Fairechild*, 2 Vern. 101. *Hawkins v. Day*, Ambl. 160.

(2) 11 Vin. Abr. Executors, 307. [X. a. 5.]. *Eeles v. Lambert*, Aleyn, 40., *sed vide* Goldsb. 142.

(3) *Cox v. Joseph*, 5 T. R. 307.

(4) 11 Vin. Abr. Executors, 304, 305. [X. a. 3.]. 3 Bac. Abr. Executors (L.), 516, 517. *Cray v. Rooke*, C. T. T. 156. *Croft v. Pyke*, 3 P. Wms. 182. *Lechmere v. Carlisle (Earl of)*, *ibid.* 222. *Lady Cox's case*, *ibid.* 339. *Lassels v. Cornwallis (Lord)*, C. T. F. 232.

(5) *Winchcombe v. Winchester (Bishop of)*, Hob. 167. *Robinson v. Gee*, 1 Ves. sen. 254.

(6) 11 Vin. Abr. Executors, 288. [Q. a.]. *Rogers v. Danvers*, 1 Mod. 165.

(7) *Plumer v. Marchant*, 3 Burr. 1380. *Freemoult v. Dedire*, 1 P. Wms. 429.

(8) *Vide Bristol (Sheriff of) v. Hungerford*, 2 Vern. 524. *Powell on Mortgages*, 813. *Howel v. Price*, 1 P. Wms. 291. 294. *King v. King*, 3 *ibid.* 358.

(9) Com. Dig. Chancery (2. G. 4.) *Fletcher v. Stone*, 2 Vern. 273. *Willson v. Fielding*, *ibid.* 763. 10 Mod. 426. *Cope v. Cope*, 2 Salk. 449.

(10) 2 Black. Com. 465, 466. 511. *Went Off. Ex.* 155.

(11) *Soam v. Bowden*, C. T. F. 396.

(12) 3 Bac. Abr. Executors (L.), 515-517.

preference; but, with the exception of these, the executor has a right likewise, in this species of debts, to prefer in payment whichever he pleases. (1)

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ING TO LEGAL
PRIORITY.

But where the testator, though in no respect indebted to his brother, had signed a note by which he acknowledged himself indebted to his brother in 5000*l.*, and always kept the note in his own custody, and the brother knew nothing of it, at the time it was signed, and at the testator's death, it was found among his papers:—It was held, to be a matter merely initiate or intended, and never perfected, and consequently as no debt at all. (2)

In *Lyttleton v. Cross* (3) Chief Justice Abbott said, "The situation of an executor is frequently one of great difficulty. The law imposes on him the burden of paying the debts of the testator in a particular order; and, on the other hand, it confers on him certain privileges. One of those privileges is, that he has a right to retain for his own debt, in preference to all other creditors of equal degree; and that, among creditors of equal degree, he may pay one in preference to another. He may even, after actions are commenced against him by a creditor on simple contract, confess a judgment in favour of another creditor of equal degree, and thus give the latter a preference." (4) Yet this election may be controlled by legal or equitable proceedings against him, of which he has due notice. (5)

AUTHORITY OF
EXECUTOR TO
GIVE PREFER-
ENCE TO CRE-
DITORS OF
EQUAL DE-
GREE.

Judgment of
Chief Justice
Abbott in *Lyt-
tleton v. Cross*.

Thus, if an action be properly commenced against an executor for any specific debt, it must be preferred by him in payment to others of the same class; and he will not be warranted in making any voluntary payment of such other debts, to defeat the party of his remedy. (6)

If one creditor commence an action, and if another creditor in equal degree commence a subsequent action, and first recover judgment, he must be first satisfied.

A decree in equity cannot be pleaded at law; but notwithstanding which, it is equivalent, in the administration of assets, to a judgment; and therefore, if a decree have a real priority in point of time, not by fiction and relation to the first day of term, it must be preferred, in the order of payment, to subsequent judgments. (7) So, pending a suit in equity by one creditor, an executor may confess a judgment at law, in favour of another creditor of the same degree (8); or, after a suit instituted by a creditor for an account, pay any other creditor in preference, and he will be allowed such payment in passing his accounts. (9)

Decree in
equity equiva-
lent to a judg-
ment.

An executor may also confess a judgment after a decree *quod computet*, if before a final decree. Where a creditor sues an executor both at law and equity for the same demand, equity will not compel him to make his election in which of the courts he will proceed, in case the executor be attempting to prefer other creditors before him by confessing judgments to

Confessing
judgments.

(1) 2 Black. Com. 511. 1 Rol. Abr. Executors (R.), 927. 11 Vin. Abr. Executors, 274. [P. a.] n.

(2) *Disher v. Disher*, 1 P. Wms. 204.

(3) 3 B. & C. 322.

(4) Vide etiam *Prince v. Nicholson*, 5 Taunt. 333. 665.

(5) Went. Off. Ex. 282.

(6) 11 Vin. Abr. Executors, 296. [Q. a. 2.] n. *Goodfellow v. Burchett*, 2 Vern. 300.

Com. Dig. Administration (C. 2.). *Sawley v. Gower*, 2 Vern. 62. Went. Off. Ex. 282. 2 Black. Com. 512.

(7) *Peplow v. Swinburn*, Bunb. 48. *Darston v. Orford* (Earl of), 3 P. Wms. 401. n. *Harding v. Edge*, 1 Vern. 143. *Morrice v. England* (Bank of), C. T. T. 217.

(8) *Waring v. Danvers*, 1 P. Wms. 295. C. T. T. 225.

(9) *Maltby v. Russell*, 2 S. & S. 227.

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ING TO LEGAL
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them, but will merely restrain him from taking out execution on the judgment without leave of the court. (1) But a mere demand by the creditor, will not divest the executor of his right of giving such preference; that effect, can only be produced by the process of a court of justice. (2)

An executor is not only warranted in the payment of one debt before another of the same order, but he may also pay a debt of an inferior nature before one of a superior, of which he has no notice (3), provided a reasonable time has elapsed after the testator's death; — for such payment, if precipitate, would be evidence of fraud.

Where an executor has received no notice of a specialty.

An executor may plead a judgment recovered against him on a simple contract to an action of debt on a specialty, if he had no notice of such specialty (4); and may even voluntarily pay, without notice, such inferior debt in exclusion of the superior: for otherwise, it might be in the power of an obligee to ruin an executor by suppressing a bond, until all the assets were expended in the payment of simple contract debts. (5)

After a suit is commenced, yet before an executor has notice of the plaintiff's demand, he is warranted in paying any other creditor (6): — but an executor is not authorised to confess a judgment for a debt of an inferior nature, if he have notice of the existence of a superior.

Executor confessing judgments to strangers.

Notwithstanding an executor has power to confess judgment in favour of one creditor, after an action has been commenced against him by another creditor of equal degree, and thereby give a preference to the former, yet he cannot confess judgment to a stranger, or even to a creditor for a larger sum than is due to him individually; therefore a judgment confessed by an executor or administrator to a creditor, as well for his own debt, as in trust for the debts of other creditors, cannot be pleaded in bar to an action brought against him by another creditor. (7)

**EXECUTOR'S
RIGHT OF RE-
TAINER.**

Executor can retain his own debt, in preference to all other creditors.

If a debtor appoint his creditor (8) his executor, the executor can retain his debt in preference to all other creditors; but the privilege is accompanied with this limitation, that he shall not retain his own debt, as against those of a higher degree; for the law places him merely in the same situation, as if he had sued himself as executor, and recovered his debt, which there could be no reason to suppose, during the existence of those of a superior order. (9)

One of two executors can retain for his own debt, out of a balance due from both to the estate. (10)

Where executor can sue his co-executor.

The mere nomination of a creditor to the executorship, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. (11) Hence, if a creditor be appointed executor with others, he may sue them,

(1) 3 Bac. Abr. 'Executors (L.), 520. *Barker v. Dumeres*, Barnard. C. C. 277.

(2) Went. Off. Ex. 277.

(3) 3 Bac. Abr. Executors (L.), 518.

(4) Ibid. n. *Harman v. Harman*, 2 Show. 492. 3 Mod. 115. *Davis v. Monkhouse*, Fitzg. 76. cit. Bull. N. P. 178. (a.) *Scudamore v. Hearne*, Andr. 340.

(5) 3 Bac. Abr. Executors (L.), 518. Went. Off. Ex. 277—279. *Britton v. Batt-hurst*, 3 Lev. 115. *Hawkins v. Day*, Ambl. 162., vide etiam *Greenwood v. Brudnish*, Prec. Ch. 534. Toller on Executors, 293.

(6) *Sawyer v. Mercer*, 1 T. R. 690.

(7) *Tolputt v. Wells*, 1 M. & S. 395.

(8) *Waring v. Danvers*, 1 P. Wms. 296.

(9) 2 Black. Com. 511. 3 ibid. 18, 19. Went. Off. Ex. 277. Com. Dig. Administration (C. 2.). 3 Bac. Abr. Executors (L.), 518. 1 Rol. Abr. Executors (L.) 922, 923. *Woodward v. Darcy*, Plowd. 185. *Paramour v. Yardley*, ibid. 543. 11 Vin. Abr. Executors, 72. [D. 2.], 261. [L. 2.] Winch, 19. Harg. Co. Litt. 264. n. 1.

(10) *Kent v. Pickering*, 2 Keen, 1.

(11) *Rawlinson v. Shaw*, 3 T. R. 557.

especially if he has not administered (1): — and if there be not personal assets, he may sue the heir, where the heir is bound. (2)

PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.

An executor may retain not only for debts due to him in his own right, but also for debts due to him as trustee. As where A. before marriage covenanted with B. and C. to leave them by his will, or that his executors after his death should pay them 700*l.* in trust, to pay the interest to his wife for life remainder over; and having died intestate before his wife, it was held, that B., in the character of administrator, might retain assets to that amount against a bond creditor, who sued before the six months were elapsed. (3) So, where a husband on marriage gave a bond to trustees, conditioned to pay to the wife 3000*l.* if she survived him, who subsequently died, leaving the daughter and the wife living; and the wife having administered *durante minore ætate* of the daughter, it was held, that she might retain the money due on the bond. (4)

Debts due to
executor as
trustee.

But, if the trust money is to be paid to the trustees in trust, not to pay the capital to the administrator, but to lay it out to secure an annuity for him, he has no right to retain the principal sum. So where A. before marriage covenanted, that his executors or administrators should pay to the trustees the sum of 400*l.* in trust, to secure out of the proceeds, an annuity of 20*l.* to the wife for life, it was held, that the wife, as administratrix, could not retain the 400*l.* (5)

The right of retainer is not lost, from the executor or administrator paying into court, in a creditor's suit, the money which has been received on account of the assets of the deceased; and where the fund in court is insufficient to discharge the debt of the executor or administrator, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. (6)

Right of re-
tainer not lost
by payment of
money into
court.

Where the person entitled to administration is an infant, and an administration *durante minoritate* is granted, not only may the administrator, as previously observed, retain for his own debt (7), but also, if the infant in point of right has a title to retain for a debt due to himself, the administrator may insist on that right. (8) So, where the creditor is a lunatic, and administration has been granted to the defendant for the use of the lunatic, the right of retainer will not be prejudiced. (9)

Retainer by an
administrator
*durante minori-
tate*;

by an adminis-
trator *durante
dementiæ*;

If administration be granted to a creditor as such, and afterwards be repealed at the suit of the next of kin, such creditor can retain against the rightful administrator. (10)

by a creditor
administrator;

An executor of an executor is entitled to retain out of the assets, debts due from the testator, either in his own right, or as the executor of the deceased executor. (11) So, where a bond creditor took out administration *de*

by executor of
executor;

by executor of
administrator;

(1) Went. Off. Ex. 78.

(2) Harg. Co. Litt. 264. (b.) n. 1. *Wankford v. Wankford*, 1 Salk. 299. Went. Off. Ex. 76—80.

(3) *Plumer v. Marchant*, 3 Burr. 1380., vide etiam *Cockroft v. Black*, 2 P. Wms. 298. *Franks v. Cooper*, 4 Ves. 763. *Loomes v. Stotherd*, 1 S. & S. 461.

(4) *Roskelley v. Godolphin* Sir T. Raym. 483. *Marriott v. Thompson*, Willes, 186. *Loane v. Casey*, 2 W. Black. 965.

(5) *Thompson v. Thompson*, 9 Price, 464.

(6) *Chissum v. Dewes*, 5 Russ. 29. *Langton v. Higgs*, 5 Sim. 228.

(7) *Roskelley v. Godolphin*, Sir T. Raym. 483. Com. Dig. Administration (C.).

(8) *Franks v. Cooper*, 4 Ves. 764.

(9) Ibid. 763.

(10) *Blackborough v. Davis*, 1 Salk. 38.

(11) *Spicer v. James*, 2 M. & K. 387.

**PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.**

by husband of
feme executrix;
by husband for
debt to wife.

Same executor
for creditor
and debtor.

Obligee of a
bond made ex-
ecutor by
obligor.

When surety
becomes execu-
tor.

Retention for a
balance.

Debt barred by
Statute of
Limitations.
Payments by
executor.

WHERE EXE-
CUTORS CANNOT
RETAIN.

Equitable
assets.

Damages
founded on *tort*.

Executor can-
not retain
against his co-
executor.

bonis non to his debtor, and died before he had made any election in what particular effects he would have the property altered by retainer, it was held, that the executor of the creditor, in accounting for the assets of the debtor, might deduct the debt. (1)

In case a married woman be executrix, the husband may retain, if the testator was indebted to him, or, which is the same thing, to the wife before marriage. (2) And it seems clear, that if the husband be executor, he may retain for a debt contracted by the testator with the wife *dam sola*. (3)

If the same person be the personal representative both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor, to satisfy the debts due to him as the representative of the creditor. (4)

If two be jointly and severally bound, and one makes the obligee his executor, he may either retain, or sue the survivor. (5)

If two be jointly bound in an obligation, the one as principal, the other as surety, and, on the principal's death, the surety become his personal representative, and on forfeiture of the bond discharge the debt, it has been held, that he cannot retain, for by joining in the bond with the principal, it became his own debt. (6) Yet in such a case it seems, he might retain for the money paid, as constituting a simple contract debt. (7)

An executor can retain out of a balance found to be due from himself and his co-executor to the estate. (8)

It seems, that an executor can retain for his own debt, though barred by the Statute of Limitations; for, as an executor may pay a debt to another, though he might have pleaded the Statute of Limitations, why may he not pay himself? (9)

An executor can retain for payments, which he has made out of his own moneys before the issuing of the writ, and exchange of debts of the deceased of equal or higher degree than the plaintiff's. (10)

No retainer is allowed out of equitable assets; for in equity all debts are equal, and a court of equity will never assist a retainer. (11)

An executor *de son tort* cannot retain for his own debt, even of a superior degree to that, upon which he is sued. (12)

Damages, which in their nature are arbitrary, such as damages founded on *tort*, cannot be retained. (13)

An executor cannot retain against his co-executor; for several joint executors or administrators are considered but as one person in law; the possession of one, is the possession of the other; the receipt of one is the receipt of the other; and, therefore, the retainer of one must be considered as the

(1) *Weeks v. Gore*, 3 P. Wms. 184. n.

(2) Toller on Executors, 358.

(3) *Prince v. Rowson*, 1 Mod. 208. 2
ibid. 51. cit. Williams on Executors, 842.

(4) *Burnet v. Dixe*, 1 Rol. Abr. Ex-
ecutors (L.), 922. *Fryer v. Gildridge*, Hob.
10.

(5) *Crosse v. Corke*, 3 Keb. 116. *Cock v.*
Cross, 2 Lev. 73. 3 Bac. Abr. Executors
(A.), 431. *Wankford v. Wankford*, 1 Salk.
299.

(6) *Anon.* Godb. 149. pl. 194.

(7) *Bathurst v. De la Zouch*, 2 Dick. 460.

(8) *Kent v. Pickering*, 2 Keen, 1.

(9) Williams on Executors, 844., sed vide
Shewen v. Vanderhorst, 1 Russ. & M. 349. 2
ibid. 75.

(10) Co. Litt. 283. (a.) Bull. N. P. 141.

(11) *Anon.* 2 Cas. Ch. 54. *Hopton v. Dry-*
den, Prec. Ch. 181. *Baily v. Ploughman*,
Mosely, 95.

(12) *Post*, 1868.

(13) *Loane v. Casey*, 2 W. Black. 968.

retainer of the other, and must enure, for their mutual benefit, on the discharge of the debts of both in proportion. (1)

PAYMENT OF
DEBTS ACCORD-
ING TO LEGAL
PRIORITY.

11. DEVASTAVIT.

DEVASTAVIT.

A devastavit is a wasting of the assets belonging to the testator. (2)

Defined.

Thus, if an executor, by palpable acts of abuse, as giving away, embezzling, or consuming the property, without regard to debts or legacies; or by misapplying it in extravagant expenses in the funeral, in the payment of debts out of their legal order, to the prejudice of such, as are superior; by an assent to, or payment of a legacy, where there is not a fund sufficient for creditors (3); by disbursements in the schooling, feeding, or clothing of an intestate's children subsequently to his decease (4): — he will be guilty of a *devastavit*.

ACTS OF EXE-
CUTORS, WHICH
AMOUNT TO A
DEVASTAVIT.

The general rule adopted, with respect to the liability of executors and administrators is founded upon two principles: *first*, that in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds; *secondly*, that care must be taken to guard against an abuse of their trust. (5)

If an executor pay money in discharge of an *usurious bond*, or of any other usurious contract entered into by the testator, he will be held personally responsible (6); or if he submit to *arbitration* a debt, or any other demand he may be entitled to, in right of his testator, and the arbitrator do not award him a recompense to the full value, this, as being his own voluntary act, will render him responsible for the difference. (7)

Payment of
money in dis-
charge of an
usurious bond.
Submission to
arbitration.

Where the executor of an obligee took in payment a *bill of exchange*, drawn on a banker for the money, who accepted the bill, and before payment failed, on the executor's afterwards bringing an action on the bond, it was held to be a payment. (8)

Receiving in
payment, bills
of exchange.

If executors release or cancel a bond due to the testator, or deliver it to the obligor, this will charge him to the amount of the debt, whether in point of fact he received it or not. (9)

Release or can-
cellation of a
bond.

If an executor in the character of executor commence an action, in which he has a right to recover, and afterwards agree with the defendant to receive a specific sum at a future day as a compensation, and the party fail to pay it, the executor is liable on a *devastavit* for the value. (10)

Compounding
of action.

If he release a *cause of action* accrued in right of testator, whether

Releasing

(1) *Chapman v. Turner*, 11 Vin. Abr. Executors, 72. [D. 2.].

(2) Went. Off. Ex. 300. 3 Bac. Abr. Executors (L.), 510. Com. Dig. Administration (I. 1.). 11 Vin. Abr. Executors, 306. [X. a. 4.]. *Skinner v. Sweet*, 3 Madd. 244.

(3) Went. Off. Ex. 304. *Spode v. Smith*, 3 Russ. 511.

(4) *Giles v. Dyson*, 1 Stark. 32. Toller on Executors, 424.

(5) *Powell v. Evans*, 5 Ves. 843. *Raphael v. Boehm*, 13 ibid. 410. *Tebbs v. Carpenter*, 1 Madd. 298.

(6) *Winchcombe v. Winchester* (Bishop of), Hob. 165. 193. *Hodsmen (Knight) v. Grisell*, Noy, 129.

(7) Went. Off. Ex. 304. *Anon.* 3 Leon. 51. Toller on Executors, 425.

(8) 3 Bac. Abr. Executors (L.), 512. n., et vide *Barker v. Talcot*, 1 Vern. 474.

(9) Went. Off. Ex. 303. 1 Nels. Abr. 262.

(10) *Norden v. Levit*, 2 Lev. 189. Sir T. Jones, 88. *Barker v. Talcot*, 1 Vern. 474.

DEVASTAVIT.
cause of action
accruing after
testator's death.
Executor tak-
ing an obliga-
tion in his own
name, for a debt
due by simple
contract.

ACTS OF NEGLIGENCE AND CARELESS ADMINISTRATION.

Delaying to
commence an
action.

Losing chat-
tels.

Permitting
rent to run in
arrear.

Lending
money on per-
sonal security.

Investment of
assets in private
securities.

before or subsequently to the testator's death, this will also, generally speak-
ing (1), be a *devastavit*. (2)

If an executor take an obligation in his own name, for a debt due by
simple contract to the testator, he will be equally chargeable, as if he had
received the money, for the new security has extinguished the testator's right,
and is *quasi* a payment. (3)

Such acts of negligence and careless administration, as tend to defeat the
rights of creditors or legatees, amount to a *devastavit*; because, if persons
accept the trust of executors they must perform it; they must use due
diligence, and not suffer the estate to be injured by their neglect. (4)

Thus, if an executor with assets delay the payment of a debt payable
on demand with interest, and suffer judgment for principal and interest
incurred after testator's death, it will be a *devastavit*. (5)

Delaying to commence an action, and thus enabling a creditor to avail him-
self of the Statute of Limitations (6), losing the chattels of the testator (7),
actually neglecting to sue the obligor of a bond (8), retaining money
for a length of time without vesting it in the funds or in other security
for interest (9), permitting rent to run in arrear, and subsequently lost
through such negligence (10), and assigning a term in trust to attend the
inheritance (11), are respectively considered to be a *devastavit* by the exe-
cutor.

An executor cannot lend money on personal security, though words,
which may imply a discretion so to do, are used by the testator in his
will (12); nor will a power to lend money upon real or personal security,
enable trustees to accommodate a trader with a loan upon his bond. (13)

These propositions are, however, qualified by *Webster v. Spencer* (14),
where it was held, that an executor, who had lent out, on the security of a
promissory note, money belonging to the testator, but not wanted for the
immediate uses of the will, was not guilty of a *devastavit*, provided he ex-
ercised a fair and reasonable discretion on the subject. (15)

If an executor lay out assets on private securities, the benefit made
thereby, will accrue to the estate, yet the executor will be responsible for
any deficiency (16); and "the particular circumstances cannot weigh."

(1) Toller on Executors, 425. 429.

(2) Went. Off. Ex. 303. *Chandler v. Thompson*, Hob. 266. *Brightman v. Keighly*, Cro. Eliz. 43.

(3) *Goring v. Goring*, Yelv. 10. *Norden v. Levit*, 2 Lev. 189.

(4) *Tebbs v. Carpenter*, 1 Madd. 298.

(5) *Seaman v. Everad*, 2 Lev. 40., et vide *Hall v. Hallet*, 1 Cox, 134.

(6) *Hayward v. Kinsey*, 12 Mod. 573. 11 Vin. Abr. Executors, 309. [X. a. 7.].

(7) *Goodfellow v. Burchett*, 2 Vern. 299.

(8) 3 Bac. Abr. Executors, (L.), 512. *Lowson v. Copeland*, 2 Bro. Ch. Ca. 156.

(9) *Bird v. Lockey*, 2 Vern. 744. *Perkins v. Bayntun*, 1 Bro. Ch. Ca. 375. *Littlehales v. Gascoyne*, 3 ibid. 73.

(10) *Tebbs v. Carpenter*, 1 Madd. 290.

(11) *Charlton v. Low*, 3 P. Wms. 330. *Willoughby v. Willoughby*, 1 T. R. 763.

(12) *Wilkes v. Steward*, Cooper, 6. *Holmes v. Dring*, 2 Cox, 1.

(13) *Langston v. Ollivant*, Cooper, 33.

(14) 3 B. & A. 360.

(15) *Vide etiam dict.* Bayley J. in *Clark v. Hougham*, 2 B. & C. 155. Although the lending itself may not amount to a legal *devastavit*, yet, in equity, an executor or administrator lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust (*Terry v. Terry*, Prec. Ch. 273. *Ryder v. Bickerton*, 3 Swanst. 80. a. 1 Eden. 149. a. *Adye v. Feuilletau*, 1 Cox, 24. 3 Swanst. 84. n. *Holmes v. Dring*, 2 Cox, 1. *Wilkes v. Steward*, Cooper, 6. *Vigrass v. Binfield*, 3 Madd. 62. *Walker v. Symonds*, 3 Swanst. 63., overruling *Harden v. Parsons*, 1 Eden. 145. *Bacon v. Clark*, 3 M. & C. 294.), and personally answerable if the security prove defective.

(16) *Adye v. Feuilletau*, 1 Cox, 24.

If an executor sell the testator's goods at an under value, although it be an appraised value (1), or if he delay disposing of them, by which they are injured, he is personally bound to make a compensation. (2)

DEVASTAVIT.

Sales at an under value.

If an executor omit to sell goods at their full price, and afterwards they are taken out of his hands, he will be liable to the extent of the value of the goods, and not merely to what he recovers in damages, for there was a default on his part. (3)

If goods be perishable, and the executor has been neither guilty of neglect in keeping them, nor delay in selling them, in case they be impaired, he will not be answerable for their just value, but only for what they were worth at the time of the sale; yet, if the goods be taken out of his possession, he must sue the party taking them, that he may exempt himself from any greater claim, than the damages he shall recover. (4)

Perishable goods.

If an executor merely give a receipt for so much due on a bond, as he in fact receives, he cannot be charged with a *devastavit* for the residue. (5)

Acts which will not amount to a DEVASTAVIT.

Though an executor compounding or releasing a debt must answer for the same, yet, if it appear to have been for the benefit of the trust estate, it will be a justifiable act.

If an executor compound an action of trover for the goods of his testator, and take a bond for the money payable at a future day, it does not necessarily amount to a *devastavit*, as the money for which the bond is taken, is assets immediately. (6)

Compounding of action.

In case of an executor investing money in the funds and appropriating the same, he will not be answerable for a loss by a fall in the stocks. (7)

Investment of money in funds.

And it seems, that an executor will not be liable for the loss of a loan of money upon real security, if at the time of lending, it was such a security, that its validity was unquestionable. (8)

Loan of money upon real security.

But the rule is, never to permit a trustee or executor *after a decree* to lay out money on mortgage, or to deal with the assets for the purposes of investment, without the leave of the court.

A conversion of the goods of the testator to the executor's own use, is not a *devastavit*, if he pay debts of the testator to the value with his own money. (9) Nor is he so liable, if he pay a debt of an inferior nature out of his own purse to the amount of the testator's effects in his hands, for they remain equally liable to the claim of the superior creditor, and may be seized equally at his suit or execution *in specie*, as the testator's property. (10)

Executor converting the goods of his testator to his own use.

If there be arrears of rent on a lease, and on the tenant becoming insolvent, the executors release the arrears, and give him a sum of money to quit possession — in case they appear to have thus acted for the benefit of the estate — such disbursements will be allowed. (11) Nor can an administrator be charged with any part of a debt as assets, where having arrested

Arrears of rent on a lease.

Insolvent debtor.

(1) Went. Off. Ex. 307.

(2) *Jenkins v. Plombe*, 6 Mod. 181, 182.

(3) Ibid.

(4) Ibid.

(5) Com. Dig. Administration (I. 2.). Went. Off. Ex. 303.

(6) *Norden v. Levit*, 2 Lev. 189.(7) *Hutchinson v. Hammond*, 3 Bro. Ch.Ca. 147. *Franklin v. Frith*, *ibid.* 433., vide etiam *Cooper v. Douglas*, 2 *ibid.* 231.(8) *Brown v. Litton*, 1 P. Wms. 141., sed vide *Norbury v. Norbury*, 4 Madd. 191.(9) *Merchant v. Driver*, 1 Saund. 307.(10) *Wheatly v. Lane*, *ibid.* 218. Toller on Executors, 428.(11) *Blue v. Marshall*, 3 P. Wms. 381.*Legh v. Holloway*, 8 Ves. 213.

DEVASTAVIT.

Goods stolen
from executor,
or lost by
casualty.

RESPONSIBILITIES FOR ACTS
OF BANKERS,
AGENTS, CO-
EXECUTOR, EX-
ECUTRIX, AND
HUSBAND OF
EXECUTRIX.
Bankers.

Agents.

Stat. 4 & 5 Will.
& M. c. 24.
s. 12.

Devastavit by
one executor,
will not charge
his companion.

MISAPPLICA-
TION OF ASSETS
BY A CO-EX-
ECUTOR.

a debtor, or where a debtor having applied to come out of prison under the Insolvent Act, he obtains from him all the property that can be acquired. (1)

If any goods of the testator be stolen from the possession of an executor, or from the possession of a third person to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire (2), the executor will not, *in equity*, be chargeable with these as assets. (3)

Respecting losses sustained by the failure of bankers or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be, that where the deposit was made from necessity, or conformably to the common usages of mankind, the executor will not be responsible for the loss. (4)

Where an executor sold houses and applied part of the money in payment of debts, &c. and paid the rest into his bankers, mixing it with his own money, instead of vesting the same in stock as directed by the will, and the bankers failed, he was held liable to pay the money to the legatees. (5)

If an executor appoint an agent to collect the testator's effects, and the agent embezzle them, it will be a *devastavit* by the executor. (6)

By stat. 4 & 5 Will. & M. c. 24. s. 12. an executor of an executor is liable on a *devastavit* committed by his testator, in the same manner, as he would have been, if living.

A *devastavit* by one executor will not charge his companion (7); and if there be several executors or administrators, each will be liable only for what he receives (8), provided he hath not intentionally or otherwise contributed to the *devastavit* of the other. (9)

Thus, if an executor, possessing assets of his testator, hand over those assets to a co-executor, and they are misapplied by that co-executor, then the executor who first parted with the assets, will be responsible for their misapplication, unless he can assign a good excuse for the act (10); in fact, where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter in the same manner, as he would have been for a stranger, whom he had entrusted to receive it. (11)

But if an executor be merely passive, by not preventing his co-executor from acquiring the assets, the former is not liable for any misapplication. (12) One executor in trust is not answerable for the receipts of the other—from merely taking probate; or from permitting the other to possess the assets; or from joining in necessary acts for the purposes of administration. (13)

(1) *Pennington v. Healey*, 1 C. & M. 402. 3 Tyrw. 319. Toller on Executors, 429.

(2) *Croft v. Lyndsey*, Freem. Ch. Ca. 1. *Bailey v. Gould*, Exch. Eq. coram Alderson B., July, 1840, cit. Williams on Executors, 1420.

(3) *Jones v. Lewes*, 2 Ves. sen. 240.

(4) *Churchill v. Hobson (Lady)*, 1 P. Wms. 243. *Knight v. Plymouth (Lord)*, 3 Atk. 480. Exp. *Belchier*, Ambl. 219. *Rowth v. Howell*, 3 Ves. 565. *Adams v. Claxton*, 6 ibid. 226. *Bacon v. Bacon*, 5 ibid. 334. *Darke v. Martyn*, 1 Beav. 525.

(5) *Fletcher v. Walker*, 3 Madd. 73.

(6) *Jenkins v. Plombe*, 6 Mod. 93.

(7) Went. Off. Ex. 306. Dyer, 210. 3 Bac. Abr. Executors (D.), 454. *Littlehale v. Gascoyne*, 3 Bro. Ch. Ca. 73.

(8) *Champneys v. Browne*, Barnes, 440.

(9) Toller on Executors, 490.

(10) *Townsend v. Barber*, 1 Dick. 356.

Davis v. Spurling, 1 Russ. & M. 66.

(11) Vide *Churchill v. Hobson (Lady)*, 1 P. Wms. 241. n. *Sadler v. Hobbs*, 2 Bro. Ch. Ca. 117.

(12) *Langford v. Gascoyne*, 11 Ves. 335.

(13) *Hovey v. Blakeman*, 4 ibid. 596.

In *Joy v. Campbell* (1) it was held by Lord Redesdale, that if an executor, living in London, remit money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty, if he be made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same, were one executor in India and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence."

DEVASTAVIT.

Effect of one executor remitting money to the other.

But an executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of *plene administravit*, from an action by a bond creditor of his testator, by shewing, that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it, to satisfy his own simple contract debt. (2)

Where *plene administravit* will not discharge a bond creditor.

If an executor administer part of the assets, he will be responsible for such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the will (3); for executors must either wholly renounce, or, if they act to a certain extent as executors, and take upon them that character, they can only be discharged by themselves administering the assets, or by putting the administration into the hands of a court of equity. (4)

Executor administering part of the assets.

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator and requiring payment. (5)

Where executor has not proved.

Respecting the liability of an executor, who merely joins his co-executor in an act, which might have been done with equal validity by the co-executor, Lord Redesdale in *Doyle v. Blake* (6) observed, that "where executors have been jointly charged, where one only has received the money, and the other joined in the receipt, it has been on the ground, that the property was under the control of both; that is, where two executors joined in the receipt to a debtor for a sum of money, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both; his requiring the discharge of the executor, who has not received the money,

Liability of an executor, who merely joins his co-executor in an act, which might have been done with equal validity by the co-executor.

Judgment of Lord Redesdale in *Doyle v. Blake*.

(1) 1 Sch. & Lef. (Irish), 341.

(2) *Crosse v. Smith*, 7 East, 246. By the established rules of courts of equity, a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust: — thus, in *Booth v. Booth* (1 Beav. 125.), a testator bequeathed to his partner, and to one Batkin, his personal estate, upon trust to invest the same for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were

lost. Batkin took no active part in the trusts, but was cognisant of the breach of trust, and took no proceedings to prevent it, and Lord Langdale held, that Batkin was responsible for the consequences of the breach of trust. Williams on Executors, 1434.

(3) *Read v. Truelove*, Ambl. 417.

(4) *Doyle v. Blake*, 2 Sch. & Lef. (Irish), 245., vide *Riky v. Kemmis*, 1 Lloyd & Goold (Irish), 101.

(5) *Orr v. Newton*, 2 Cox, 274.

(6) 2 Sch. & Lef. (Irish), 242.

DEVASTAVIT.

amounts in saying, 'I make this payment to you both, and not to him only who actually received the money.' The true consideration in a question of this kind is, whether the executor, who merely joins in the receipt, had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other. I believe, if the case of *Westley v. Clarke* (1) were seen with all the circumstances that were before Lord Northington, we should find, that he meant to establish no more than this — that the mere joining in the receipt should not have the conclusive effect of charging both."

Judgment of
Lord Eldon in
Walker v. Symonds.

Lord Eldon has frequently complained of the relaxation of the rule in favour of executors (2); but in *Walker v. Symonds* (3) his lordship alluded to its alteration, as having been effected: "Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice v. Stokes*, that though one executor has joined in a receipt, yet whether he is liable, shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility, scarcely two judges agree."

Executrix and
husband of
executrix.

If the husband of an executrix commit a *devastavit*, in case the executorship commenced before the marriage, they will both be chargeable; if commenced subsequently to the marriage the husband is only liable. If an executrix commit a *devastavit* and afterwards marry, the husband as well as the wife, are responsible during coverture. (4)

Executor be-
coming bank-
rupt.

If an executor become bankrupt, having wasted the assets, the *devastavit* may be proved under the fiat. (5)

Where a specific legacy was given to an executor, who afterwards became bankrupt and committed a *devastavit*, and the subject of the specific bequest was sold by his assignees, it was held, that the produce in their hands, was not specifically liable to make good the *devastavit* in favour of the parties beneficially interested under the will, but that such parties were only entitled to prove under the fiat to the amount of the *devastavit*. (6)

Judgment of
Lord Cotten-
ham in *Clough*
v. Bond, re-
specting the
liabilities of
executors for
loss of assets.

The judgment of Lord Cottenham in *Clough v. Bond* (7) will illustrate the liability of executors for loss of assets, and which is as follows:—"Although a personal representative acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person, who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, how-

(1) 1 Eden. 357.

(2) *Chambers v. Minchin*, 7 Ves. 198.
Brice v. Stokes, 11 ibid. 319. *Shipbrook*
(*Lord*) *v. Hinchinbrook (Lord)*, ibid. 252.
16 ibid. 479. *Westley v. Clarke*, 1 Eden. 360.
n. 2 Bro. Ch. Ca. 114. n.

(3) 3 Swanst. 64.

(4) *Beynon v. Gollins*, 2 Bro. Ch. Ca. 323.

(5) Whitmarsh's B. L. 2d ed. 269.

(6) *Geary v. Beaumont*, 3 Meriv. 431.
Toller on Executors, 429.

(7) 3 M. & C. 496.

ever unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (1); or if he leave money due upon personal security, which, though good at the time, afterwards fails. (2) And the case is stronger, if he be himself the author of the improper investment, as upon personal security, or an unauthorised fund. Thus, he is not liable, upon a proper investment in the three *per cents.*, for loss occasioned by the fluctuations of that fund (3), but he is for the fluctuations of any unauthorised fund. (4) So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it, be a co-executor or co-administrator." (5)

DEVASTAVIT.

12. EXECUTOR DE SON TORT.

EXECUTOR DE SON TORT.

Defined.

An executor *de son tort* (6) is one who assumes the office of executor, without a derivation of authority from the testator (7); he renders himself liable to all the troubles of an executorship, without any of the profits or advantages (8); whether a man has made himself such an executor, is a question not to be left to a jury, but is a conclusion of law resulting from the facts established in evidence. (9)

There cannot, generally speaking, be an executor *de son tort*, where there is a rightful executor, or where administration has been duly granted; for if, after probate of the will, or administration granted, a stranger take possession of the property, he may be sued as a trespasser by the executor or administrator.

Where a rightful executor exists.

Although a party may be executor *de son tort* of a term actually existing, and in that case cannot enlarge his estate by claiming in fee, yet if he enter generally on lands, of which there is no term in being, he cannot qualify his wrong, by expressly claiming only a particular estate, but must be a disseisor in fee, and not an executor *de son tort*. (10)

Disseisor in fee.

If there be indicia of a person slightly interfering as the representative of the deceased, he will be considered as an executor *de son tort* (11): thus,

WHAT WILL BE SUCH INTERFERENCE AS TO

- (1) *Phillips v. Phillips*, Freem. Ch. Ca. 11. Executors (B.), 449. Swinb. p. vi. s. 22.
 (2) *Powell v. Evans*, 5 Ves. 839. *Tebbs v. Carpenter*, 1 Madd. 290. No. 2. 2 Black. Com. 507. 11 Vin. Abr. Executors, 210. [C. a.]
 (3) *Peat v. Crane*, 2 Dick. 499. (n.) (8) 2 Black. Com. 507. Swinb. p. iv. s. 23. Williams on Executors, 186.
 (4) *Hancom v. Allen*, *ibid.* 498. *Howe v. Dartmouth (Earl of)*, 7 Ves. 137. (9) *Padget v. Priest*, 2 T. R. -99. Toller on Executors, 40.
 (5) *Longford v. Gascoyne*, 11 Ves. 333. (10) 3 Bac. Abr. Executors (B.), 449. *Shipbrook (Lord) v. Hinchinbrook (Lord)*, 11 *ibid.* 252. 16 *ibid.* 477. *Underwood v. Stevens*, 1 Meriv. 712. *Norwich (Mayor of) v. Johnson*, 3 Lev. 35. 3 Mod. 90. 2 Show. 457. Toller on Executors, 39, 40.
 (6) There is no such appellation as "administrator *de son tort*." Godolph. pt. ii. c. 8. s. 2. (11) *Padget v. Priest*, 2 T. R. 100. *Stokes v. Porter*, Dyer, 166. (b.) 11 Vin. Abr. Executors, 209. [B. a.]
 (7) Went. Off. Ex. 320. 3 Bac. Abr.

EXECUTOR DE
SON TORT.CONSTITUTE AN
EXECUTOR DE
SON TORT.

where in one case a bible was taken, and in another, where a bedstead was taken, they were held sufficient to constitute an executor *de son tort*. (1) So, if A. B. be appointed by the ordinary to collect the effects, and he exceed his authority, and sell any of them, even such as are perishable (2), or if he had the express direction of the ordinary for such sale, the same being illegal, he becomes an executor *de son tort*. (3)

If a person carry on the business of the intestate (4), or pay the debts of the deceased, or the fees for proving his will, this constitutes him an executor *de son tort*; but it is otherwise, if he pay the debts or fees with his own money. (5)

Where an executor under a second will, sued the person appointed executor under a prior one, who administered with knowledge of the later one, and whose probate was revoked, it was held, that the plaintiff might recover the full value of the goods administered. (6)

Where a creditor took an absolute bill of sale of the goods of the debtor, but agreed to leave them in his possession for a limited time, before the expiration of which, the debtor died and the creditor took and sold the goods, he was held liable to the extent of their value, as executor *de son tort*, for the debts of the deceased. (7)

By stat. 43 Eliz. c. 8. s. 2. if administration by fraud be granted to an insolvent person, who gives any of the effects to A., or releases a debt due from him to the intestate, A., for so much, shall be an executor *de son tort*. (8)

A party may be an executor *de son tort* of a term, and is chargeable for waste committed by him on the demised premises. (9) Thus, if he enter on a term (10), or an estate *pur autre vie* (11), (which is made assets by stat. 29 Car. 2. c. 3.,) he will be considered an executor *de son tort*, especially if he enter in right of the deceased, and do acts on the land which belong to the office of an executor, as turning the cattle upon it, delivering to the widow more apparel than is suitable to her rank (12), answering in the character of an executor to any action brought against him, or pleading any other plea than *ne unques* executor. (13)

An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor, after action brought, has consented to the retainer. (14) In answer to such evidence of retainer, the plaintiff may shew, who are the rightful executors. (15)

A person will not be considered as an executor *de son tort*, from merely locking up the goods for preservation (16); directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (17); making an inventory of his property (18); feeding his cattle (19); repairing his houses (20); or pro-

Stat. 43 Eliz.
c. 8. s. 2.

Fraudulent
grant of ad-
ministration.

Executor *de
son tort* of a
term.

Cannot retain
for his own
debt though it
be of higher
degree.

ACTS WHICH
WILL NOT CON-
STITUTE AN
EXECUTOR DE
SON TORT.

(1) 3 Bac. Abr. Executors (B.), 443.
Robbins's case, Noy, 69.

(2) Went. Off. Ex. 324.

(3) Ibid. 175. 11 Vin. Abr. Executors,
209. [B. a.]

(4) *Hooper v. Summersett*, Wightw. 16.

(5) Williams on Executors, 188.

(6) *Woolley v. Clark*, 5 B. & A. 744.

(7) *Edwards v. Harben*, 2 T. R. 587.

(8) Went. Off. Ex. 335.

(9) *Norwich (Mayor of) v. Johnson*, 3 Lev.
35.

(10) Swinb. p. vi. s. 22. No. 2. 3 Bac.
Abr. Executors (B.), 449.

(11) *Bradburn v. Kennerdale*, Carth. 166.

(12) Went. Off. Ex. 325.

(13) 3 Bac. Abr. Executors (B.), 443.

(14) *Curtis v. Vernon*, 3 T. R. 587., *ant*,
1860.

(15) Bull. N. P. 143.

(16) Godolph. pt. ii. c. 8. s. 6.

(17) *Dyer*, 166. (b.) marg.

(18) Godolph. pt. ii. c. 8. s. 6.

(19) Ibid.

(20) Ibid.

viding necessities for his children (1); for these are offices merely of kindness and charity.

If A. take the goods of the deceased, and sell or give them to B., this will make A. an executor of his own wrong, not B. (2) So, also, if a person possess himself of the effects of the deceased under the authority of, and as agent for, the rightful executor, he cannot be charged as executor *de son tort* (3); but it would be no excuse, that the goods were taken by consent of a person to whom administration was afterwards granted. (4)

In *Serle v. Waterworth* (5) it appeared, that the widow of a hairdresser, who died in October, 1836, continued to reside in the house, and to keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In December she received notice of a bond debt due from him, and had his goods valued. In January, 1837, on the application of a creditor to whom he owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date; and in March she took out administration:—It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort*.

Where a party receives a debt due to the estate of the person deceased for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*, unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased, which is a question for the jury. (6)

It is laid down in *Coulter's case* (7), that "it is clear that all lawful acts which an executor *de son tort* doth are good." (8)

In *Parker v. Kett* (9) Lord Holt laid down, that "a legal act done by an executor *de son tort* will bind the rightful executor," and shall alter the property; and that the reason is, "because the creditors are not bound to seek further than him, who acts as executor; therefore, if an executor *de son tort* pays 100*l.* of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor" (10); but such payments must be understood of cases, where such payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor. (11)

An executor *de son tort* may pay a specialty debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action. (12)

In an action of trover or trespass by a rightful executor or administrator against an executor *de son tort*, the latter may, under the general issue, and in mitigation of damages, give evidence of payments made by himself in the rightful course of administration; and should those payments amount to the full value of the goods claimed, the plaintiff will still, it seems, be entitled

EXECUTOR DE
SON TORT.

Acting as
agent for the
executor.

Giving a pro-
missory note
for a debt of
the testator.

Receiving a
debt due to the
testator, and
applying it
towards the
funeral ex-
penses.

PROTECTED
PAYMENTS BY AN
EXECUTOR DE
SON TORT.

(1) Godolph. pt. ii. c. 6. s. 8.

(2) Ibid. s. 1. Com. Dig. Administra-
tion (C. 2.).

(3) *Hall v. Elliot*, Peake's N. P. C. 119.

(4) *Parsons v. Mayesden*, Freem. 152.

(5) 4 M. & W. 9.

(6) *Camden v. Fletcher*, ibid. 378.

(7) 5 Co. 30. (b.)

(8) *Greysbrooke v. Foxe*, Plowd. 282.

(9) 1 Ld. Raym. 661.

(10) Vide *Mountford v. Gibson*, 4 East,
454.

(11) Ibid.

(12) *Oxenham v. Clapp*, 2 B. & Ad. 309.

**EXECUTOR DE
SON TORT.****LEGAL REME-
DIES AGAINST
AN EXECUTOR
DE SON TORT.**

to a verdict for nominal damages. (1) And such payments will not be allowed in damages, if there be a failure of assets; because the lawful executor would by these means be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference. (2)

An executor *de son tort* is liable to the action of the lawful executor or an administrator, or to that of a creditor; and, in the latter case, may be charged as executor generally. (3) If there be also a lawful executor, they may be joined in an action by a creditor, or sued severally (4); but it is otherwise, if there be a lawful administrator; he cannot be so joined with an executor *de son tort*. (5) If a creditor take out administration, he may recover his debt against him, who before the grant was executor *de son tort*, as well as the goods of the intestate taken or converted previously to the same. (6) And if a person act under the power of attorney from one of several executors who has proved the will, although he cannot be charged as executor *de son tort* during the life of such executor, yet, if he continue to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved the will. (7)

Stat. 30 Car. 2.
c. 7.

By stat. 30 Car. 2. c. 7., made perpetual by stat. 4 & 5 Will. & M. c. 24. s. 12, the executor of an executor in his own wrong, is chargeable on a *devastavit* by his testator, in the same manner as such testator would have been, if living.

But it seems, that an executor *de son tort* of an executor *de son tort*, is not liable for a *devastavit* committed by such first executor, either at common law, or by either of the last two mentioned statutes.

ADMINISTRATORS.**APPOINTMENT.**

Right to administration can be enforced by *mandamus*.

Stat. 31 Edw. 3.
c. 11.

Administration is so much a claim of right, that a *mandamus* lies in favour of the party entitled to enforce it (8); but where the ordinary has an election, the court will not compel him to grant administration to any particular party, so as to deprive him of the election; but they will oblige him to grant it to some party. (9)

The stat. 31 Edw. 3. c. 11. provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and that such administrators shall be put upon the same footing with regard to suits and accounting, as executors appointed by will.

Administrators

Administrators are only the officers of the ordinary, appointed by him in

13. ADMINISTRATORS.**I. Appointment.**

(1) *Mountford v. Gibson*, 4 East, 447.,
sed vide Bull. N. P. 48.

(2) 2 Black. Com. 508. Went. Off. Ex.
324—328. *Layfield v. Layfield*, 7 Sim. 172.

(3) Com. Dig. Administration (C. 1.).
Whitehall v. Squire, Carth. 104. Went. Off.

Ex. 328—336. *Hargrave's case*, 5 Co. 31.

(4) Went. Off. Ex. 328—336.

(5) *Ibid*.

(6) Com. Dig. Administration (C. 3.).
Str. 384.

(7) *Cottle v. Aldrich*, 4 M. & S. 175.

(8) *Rex v. Horsley (Inhab. of)*, 8 East,

408.

(9) *Anon.* Str. 552. cit. in 8 East, 408.

pursuance of the foregoing statute, which selects the next and most lawful friend of the intestate, who is interpreted (1) to be the husband, if he were not entitled at common law; and, secondly, his next of blood, that is under no legal disabilities.

The stat. 21 Hen. 8. c. 5. enlarges the power of the ecclesiastical judge, and permits him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept, whichever he pleases.

On taking out letters of administration, the party swears, that the deceased made no will, as far as the deponent knows or believes, and that he will truly administer the goods, chattels, and credits, by legally paying the deceased's debts, as far as the same will extend; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by the court, and render a just account of his administration when lawfully required.

Although an executor may perform many acts before he proves, yet a party can do nothing as administrator, till letters of administration are issued, because the former derives his authority from the will, and not from the probate; the latter owes his entirely to the appointment of the ordinary. (2)

Letters of administration do not issue till after the expiration of fourteen days from the death of the intestate, unless for special cause, the judge shall think fit to decree them sooner, — and which is granted, if the goods be perishable.

By stat. 37 Geo. 3. c. 90. s. 10. if a party administer, and omit to take out letters of administration within six months after the intestate's death, he incurs the penalty of fifty pounds.

ADMINISTRATORS.

are the officers of the ordinary.

Stat. 21 Hen. 8. c. 5.

OATH OF ADMINISTRATOR.

TIME WHEN LETTERS OF ADMINISTRATION ISSUE.

Stat. 37 Geo. 3. c. 90. s. 10.

II. Administration to the Husband.

ADMINISTRATION TO THE HUSBAND.

The husband has a right, exclusively of all others, to be the administrator of his wife (3), even though the marriage be voidable, unless sentence of nullity be declared before her death (4); but he is not entitled to administration, if the marriage be void *ab initio*, as if the wife be of unsound mind. (5) And in case the husband die without taking out administration to his wife, administration will be granted to the next of kin of the wife, and not to the representatives of the husband. (6) But such administrator is considered in equity, as a trustee for the representatives of the husband. (7)

Husband has a primary right to be the administrator of his wife.

A widow has not a right to be appointed administratrix to her husband; but the ordinary has his election to grant it to her, or to the next of kin; or he

A widow has not a right to be appointed

(1) *Hensloe's case*, 9 Co. 39.

(2) 11 Vin. Abr. Executors, 202. [A. a.] 4 Burns' Eccl. Law, 241. *Wankford v. Wankford*, 1 Salk. 299.

(3) *Humphrey v. Bullen*, 1 Atk. 459. *Sir George Sand's case*, 3 Salk. 22. *Elliott v. Gurr*, 2 Phill. 19. *Watt v. Watt*, 3 Ves. 244.

Rex v. Bettsworth, Str. 1111. Stat. 29 Car. 2. c. 3. s. 25.

(4) *Elliott v. Gurr*, 2 Phill. 19.

(5) *Browning v. Reane*, *ibid.* 69.

(6) *Reece v. Strafford*, 1 Hagg. 347. Williams on Executors, 317.

(7) *Humphrey v. Bullen*, 1 Atk. 458.

ADMINIS-
TRATORS.administratrix
to her hus-
band.

Feme covert.

may grant it to them both jointly (1); or he may grant it to her as to part, and to the next of kin as to part. (2) But if a wife be divorced *a mens et thoro*, she forfeits her right to the administration. (3)

If the widow renounce administration, it will be granted to the children, or other next of kin of the intestate, in preference to creditors.

A feme covert cannot administer without her husband's permission (4), unless he be absent from England, or incapable of granting permission (5); in which case a stranger can join the wife in the administration bond (6); but administration is never committed except to the wife. (7)

III. Administration to the next of Kin.

ADMINISTRA-
TION TO THE
NEXT OF KIN.

Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendendum*, the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity, is either lineal or collateral. (8)

Lineal consan-
guinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between the *propositus* in the annexed table of consanguinity, and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between the *propositus* and his son, grandson, and great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of the *propositus* is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grand-sire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil, and canon, as in the common law.

This lineal consanguinity falls strictly within the definition of *vinculum personarum ab eodem stipite descendendum*, since lineal relations are such as descend one from the other, and both of course from the same common ancestor. (9)

Collateral kin-
dred.

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but differing in this, that they do not descend the one from the other.

Collateral kins-
men.

Collateral kinsmen are, such, as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if the *propositus* have two sons, who have each issue; both of these issues are lineally descended from the *propositus* as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from one common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

The very being of collateral consanguinity consists in this descent from one and the same common ancestor. A. and his brother are related, be-

(1) *Anon. Str.* 552.(2) 1 *Rol. Abr. Executor* (D.), 908.
Fawtry v. Fawtry, 1 *Salk.* 36. *Com. Dig.*
Administration (B. 6.).(3) *Pettifer v. James*, *Bunb.* 16.(4) *Thrustout d. Levick v. Coppin*, 2 *W.*
Black. 801.(5) *Toller on Executors*, 91. *Com. Dig.*
Administration (D.).(6) *Ibid.*(7) *Holdig v. Chace*, *Sty.* 75.(8) 2 *Black. Com.* 202.(9) *Ibid.* 203.

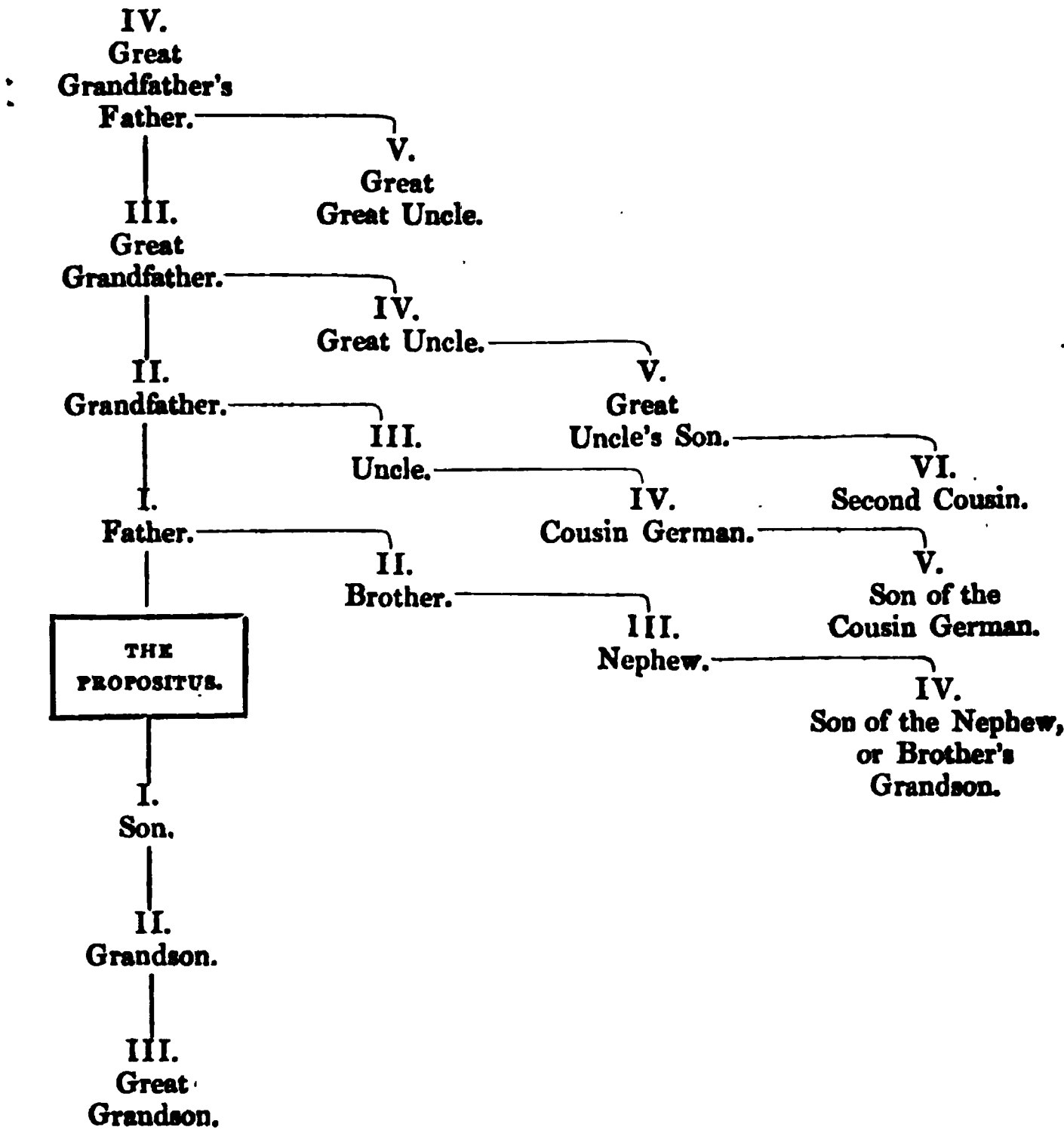
cause both are derived from one father. A. and his first cousin are related, because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen are derived. And as from one couple of ancestors the whole race of mankind is descended, it necessarily follows, that all men are in some degree related to each other. (1)

ADMINISTRATORS.
Administration to the next of kin.

The mode of calculating the degrees in the collateral line is not that of the canonists adopted by the common law in the descent of real estates, but conforms to that of the civilians, and is as follows:—to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending (2); or in other words, to take the sum of the degrees in both lines to the common ancestor. (3)

Thus, for example, the *propositus* and his cousin-german are related in the fourth degree. We ascend first to the father (4), which is one degree, and from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, which is the fourth degree. So, in reckoning to the son of the nephew, or the brother's grand-

(1) 2 Black. Com. 204, 205. 504.
(2) Ibid. 207. 504. *Mentney v. Petty*, Prec. in Ch. 593.
(3) Ibid. 12th ed. n. (4.)
(4) See the following table of consanguinity, in which the degrees of collateral consanguinity are computed as far as the sixth.



ADMINIS-
TRATORS.Administration
to the next of
kin.

son, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree. (1)

Of the kindred, those, we must recollect, are to be preferred, who are the nearest in degree to the intestate; but from among persons of equal degree, in case they apply, the ordinary has the power of making his election. (2)

The court never forces a joint administration; and where the option was between two persons in equal degree of relationship, one of whom had been twice a bankrupt, the court rejected the claim of the latter, and condemned him in costs. (3)

But if there be no material objection on one hand, or reasons of preference on the other, the court in its discretion puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate. (4)

Of the next of kin, then, first the children, and, on failure of them, the father of the deceased, or if he be dead, the mother is entitled to administration: the parents, indeed, as well as the children, are of the first degree, but the children are allowed the preference (5); then follow brothers (6); but *primogeniture* gives no *right* to a preference (7); then grandfathers (8); and although they are both of the second degree, yet the former are first entitled; next in order are uncles or nephews (9), and lastly cousins, and the females of each class respectively. (10) Relations by the father's side and the mother's, in equal degree of kindred, are equally entitled; for in this respect dignity of blood gives no preference. (11) So the half blood is admitted to the administration as well as the whole (12), for they are the kindred of the intestate, and excluded from inheritances of land only on feudal reasons (13); therefore the brother of the half blood shall exclude the uncle of the whole blood (14); and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion. (15)

ADMINISTRA-
TION CUM TES-
TAMENTO AN-
NEXO.Stat. 21 Hen. 8.
c. 5.IV. *Administration cum Testamento annexo.*

Under stat. 21 Hen. 8. c. 5., where the testator has made a will, and not appointed an executor, or has appointed an executor, who refuses to assume the office, or, if having accepted it die intestate, the ordinary must grant administration *cum testamento annexo*, and the duty of such administrator is to act in accordance with the will (16)

(1) 4 Burns' Eccl. Law, 355. Black. Desc. 41, 42.

(2) 11 Vin. Abr. Executors, 114, 115. [M. 9.]. Com. Dig. Administration (B. 6.).

(3) *Bell v. Timiswood*, 2 Phill. 22.

(4) *Budd v. Silver*, *ibid.* 115. Toller on Executors, 90.

(5) 11 Vin. Abr. Executors, 91, 92. [K. 3.]. 2 Black. Com. 504.

(6) 11 Vin. Abr. Executors, 93. [K. 3.].

(7) *Warwick v. Greville*, 1 Phill. 123.

(8) 11 Vin. Abr. Executors, 93. [K. 3.]. n. Com. Dig. Administration (B. 6.). *Blackborough v. Davis*, 1 Salk. 38. 1 Ld. Raym. 684.

(9) 2 Black. Com. 505. *Stanley v. Stanley*, 1 Atk. 455.

(10) 2 Black. Com. 505.

(11) *Blackborough v. Davis*, 1 P. Wms. 53.

(12) 11 Vin. Abr. Executors, 91. [K. 3.]. *Smith v. Tracy*, 1 Vent. 323. *Collingwood v. Pace*, *ibid.* 424. *Winchelsea (Earl of) v. Norcliffe*, 1 Vern. 437.

(13) 2 Black. Com. 505.

(14) 11 Vin. Abr. Executors, 85. [K.].

(15) 2 Black. Com. 505.

(16) *Isted v. Stanley*, Dyer, 372. *Hayton v. Wolfe*, Cro. Jac. 614. *Day v. Chapfeild*, 1 Vern. 200.

The ordinary cannot grant administration with the will annexed in which an executor is named, until he has either formally renounced his right to the probate, or neglected to appear on being duly cited to accept or refuse the same. (1)

Where the court has a discretion, it generally elects such of the claimants, as have the greatest beneficial interest in the effects of the deceased. (2) If there be a residuary legatee, administration is in general granted to him in exclusion of the next of kin, because in that case, the next of kin hath no interest in the property, and the presumption of the statute, that the testator would have given it to him, cannot exist when such a legatee is appointed. (3) And even where there is no prospect of a residue, a residuary legatee is entitled to an administration *de bonis*, in preference to legatees and annuitants. (4) If several persons are entitled to the residue, it may be granted to any of them (5); and if it be thus granted, the other residuary legatees have no claim to a subsequent grant in the lifetime of the grantee.

The court generally elects the claimant, who has the greatest beneficial interest.

Such administration may also be granted, although it be uncertain, whether there will be a residue or not. (6)

If the executor fail to take probate, and there be no residuary legatee, the next of kin are entitled to administration *cum testamento annexo*. (7) If the next of kin decline it, such administration may be granted to a legatee or to a creditor (8); but notice must be given of the application of the legatee or creditor to the next of kin. (9)

When the executor resides out of the jurisdiction, and administration *cum testamento annexo* has been granted absolutely to another person, under a letter of attorney from the executor for his use and benefit, such letter of attorney is revocable; and when the executor revokes it, and desires probate, the court is bound to grant it to him. (10)

Administration under a letter of attorney.

V. Administration de Bonis non.

If a deceased executor have taken out probate, or the deceased's next of kin administration, then an administration *de bonis non* becomes necessary, that is, of the goods of the deceased left unadministered by the former executor or administrator, by the grant of which, such administrator *de bonis non* becomes the only personal representative of the party originally deceased. (11)

ADMINISTRATION DE BONIS NON.

Administration of either species is, generally speaking, granted to the next of kin of such party. But in case there be a residuary legatee, it will be granted to him in preference to such next of kin, because the next of kin

(1) In re *Jenkins*, 3 Phill. 3.

(2) *Wetdrill v. Wright*, 2 ibid. 242., et vide in re *Gill*, 1 Hagg. 341.

(3) 11 Vin. Abr. Executors, 90. 94. [K. 3.].

(4) *Atkinson v. Barnard (Lady)*, 2 Phill. 316.

(5) Com. Dig. Administration (B. 6.). *Taylor v. Shore*, Sir. T. Jones, 162. 11 Vin. Abr. Executors, 94. [K. 4.].

(6) Com. Dig. Administration (B. 6.). *Thomson v. Butler*, 2 Lev. 56. 1 Vent. 219. Toller on Executors, 99.

(7) *Kooystra v. Buyskes*, 3 Phill. 531.

(8) Ibid. *Snape v. Webb*, 2 C. T. Lee, 411.

(9) *Kooystra v. Buyskes*, 3 Phill. 531. Com. Dig. Administration (B. 6.).

(10) *Pipon v. Wallis*, 1 C. T. Lee, 402.

(11) 11 Vin. Abr. Executors, 111. [M. 7.]. *Att. Gen. v. Hooker*, 2 P. Wms. 340. Com. Dig. Administration (B. 1.). *Greysbrooke v. Fore*, Plowd. 279. 3 Bac. Abr. Executors (B.), 440.

ADMINIS-
TRATORS.

Where adminis-
tration will be
granted to the
residuary lega-
tee.

has then no interest in the property. (1) Thus, where A. made C. executor and residuary legatee, and B. made C. executor without giving him the surplus, and C. afterwards died intestate, it was held, that the administrator of C. should be administrator *de bonis non* of A., but that the next of kin of B. should be administrator *de bonis non* of B. (2) If the residue be bequeathed to several persons, such administration may be granted to all or either of them, as in the case of an original administrator, although there be no present residue. (3) But for such purpose there must be a complete disposition of the property. (4) If the executor be himself residuary legatee, although he refused, or, *before* he proved the will, died *intestate*, an immediate administration with the will annexed, will be granted to his administrator. (5) If an executor be residuary legatee, although he refused, or died *before* probate, *leaving a will*, his executor will be entitled to such administration. (6) If an executor and residuary legatee, *after* probate, die intestate, administration *de bonis non*, with the will annexed of the testator, will be granted to the administrator of such executor. If a feme covert executrix die intestate, then as to the effects which she had in that capacity, administration will be granted to the residuary legatee, if any, or to the next of kin of the testator. If she were herself residuary legatee, it will be granted to her husband. (7)

Where there are two executors, of whom only one proves and dies, and then the other renounces, the executors of the acting executor have no concern with the administration of the goods left unadministered, but the same will be granted to the next of kin, or residuary legatee of the first testator. (8)

Where there
were two exe-
cutors, both of
whom die.

If there be two executors, one of whom appoints an executor, and dies, and the survivor dies intestate, the executor of the executor cannot intermeddle with the first testator's effects; for the power of his testator was determined by his death, and the executorship vested solely in the other executor as survivor.

Administrator
durante minori-
tate of the ex-
ecutor of an
executor.

Where an administrator is appointed during the minority of the executor of an executor, he has no authority to intermeddle with the effects of the original testator. The ordinary in either case can commit administration *de bonis non* to the next of kin or residuary legatee of the original testator. (9)

In *Hirst v. Smith* (10), which was an action of *assumpsit* by an administrator *de bonis non*, the promise was alleged to have been made with the first administrator, without stating any promise to the plaintiff. After verdict for the plaintiff, an exception was taken, that a promise ought to have been alleged, as having been made either to the intestate or the plaintiff; but

(1) Com. Dig. Administration (B. 6.).
Thomas v. Butler, 1 Vent. 219. 2 Lev. 56.
3 Bac. Abr. Executors (B.), 441.

(2) 11 Vin. Abr. Executors, 87. [K.].
Farrington v. Knightly, Prec. Ch. 567.

(3) Com. Dig. Administration (B. 6.),
vide *Thomas v. Butler*, 2 Lev. 56.

(4) 11 Vin. Abr. Executors, 89. [K. 2.].
Sparke v. Denne, Sir W. Jones, 225.

(5) 11 Vin. Abr. Executors, 88. [K. 2.],
92. [K. 3.]. *Hinson v. Button*, 2 Rol. 158.

(6) Com. Dig. Administration (B. 6.).
Isted v. Stanley, Dyer, 372.

(7) 11 Vin. Abr. Executors, 89. [K. 2.],
91. [K. 3.], 111. [K. .]. *Rackfield v.*
Careless, 2 P. Wms. 161. 4 Burns' Eccl.
Law, 236. 3 Salk. 21. *Vanthienson v.*
Vanthienson, Fitzg. 203. *Johnson's case*,
Poph. 106.

(8) Com. Dig. Administration (B. 1.).
House v. Petre (Lord), 1 Salk. 311.

(9) Went. Off. Ex. 468, *et seq.* *Limmer*
v. Every, Cro. Eliz. 211. Toller on Executors,
116—119.

(10) 7 T. R. 182.

the court observed, that there was a privity of estate in law between the former administrator, from whom the plaintiff deduced his title, and the plaintiff.

ADMINIS-
TRATORS.

VI. *Administration durante minore Ætate.*

Stat. 38 Geo. 3. c. 87., after reciting, that inconveniences arose from granting probate to infants under the age of twenty-one, enacts, that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

ADMINISTRA-
TION DURANTE
MINORE ÆTA-
TE.

Stat. 38 Geo. 3.
c. 87.

If administration be granted to such guardian for the use and benefit of several infants, it ceases on the eldest attaining twenty-one.

If there be several infant executors, he who first attains the age of twenty-one years can prove the will, and the administration ceases (1); but administration granted during the minority of several children, will not expire on the marriage of one of them to a husband of full age. (2) Nor, if an infant be executrix, will it be determined by her taking a husband who is of age; Nor, if there be several infants, by the death of one of them. (3)

If administration be granted *pendente minore ætate*, and the minor coming of age takes upon himself the administration, he must give security to the same amount, that the administrator did in the first instance. (4)

If there be two executors, one of whom has attained the age of twenty-one years, and the other not, administration shall not be granted during the minority of him that is under age, because the former may execute the will. (5)

Where there
are two execu-
tors, one of
whom only is a
minor.

It is not an inflexible rule, that administration will be granted to the guardian of the minor, and the court have in many cases laid down, that it will not be bound by the choice of the minor. (6) Thus, where a grandfather, to whom, as the next of kin, the administration *durante minoritate* would in the ordinary course have passed, was turned eighty, it was granted to an uncle, he giving full justifying security. (7)

Administration
will not always
be granted to
a minor.

An administrator *durante minore ætate* may not only bring actions to recover debts due to the deceased (8), but he may also bring trover for the goods, because he has more than the bare custody of them, for he has the property itself (9); and though he has only a special property in the goods, he may do all acts which are incumbent on an executor to do, and which are for the benefit of the estate. (10) He may sell goods for the payment of debts; he may assent to a legacy, and receive debts due to the deceased. He may also sue for debts; and if an action be brought against him, and

Acts which an
administrator
*durante minore
ætate* can per-
form.

(1) 4 Burns' Eccl. Law, 240.

(2) *Jones v. Strafford (Earl of)*, 3 P. Wms. 79.

(3) Ibid., *sed vide* Com. Dig. Administration (F.). *Prince's case*, 5 Co. 29. (b.)

(4) *Abbott v. Abbott*, 2 Phill. 578.

(5) 4 Burns' Eccl. Law, 240. *Pigot and Gascoyne's case*, 1 Brownl. 46. 11 Vin. Abr. Executors, 99. [L. 2.]. *Fox v. Tremain*, 1 Mod. 47. *Hatton v. Mascal*, 1 Lev. 181.

(6) *West v. Willby*, 3 Phill. 374. *Appleby v. Appleby*, 1 C. T. Lee, 135. *Hughes v. Ricards*, 2 ibid. 543.

(7) *In re Ewing*, 1 Hagg. 381.

(8) Com. Dig. Administration (F.). *Piggot's case*, 5 Co. 29. (a.)

(9) Com. Dig. Administration (F.). *Sethe v. Sethe*, 1 Rol. Abr. Executors (M.), 910.

(10) 3 Bac. Abr. Executors (B.), 435.

ADMINISTRATORS.

Administrator, &c. must aver that infant is under age.

Due administration may be shewn under *plene administravit*.

Liability of administrator to account.

Administrator *durante minore ætate* of the executor of an executor, how described.

Administrator, &c. continuing in possession after the executor is come of age.

the administration determine, pending such action, he may retain assets to satisfy the debt, which is attached on him by the action (1); and he may grant leases. (2)

If an administrator *durante minore ætate* bring an action, he must aver in the declaration, that the infant is still under age. (3) But the defendant can take advantage of the omission on special demurrer only. (4) If an action be brought against such administrator, the plaintiff need not aver, that the infant is still under age, for it is a matter more properly within the cognisance of the defendant (5); and if his power be determined, he ought to shew it.

If an executor *durante minore ætate* has duly administered the assets, and paid over the surplus to the executor of full age, he can prove such facts, in an action by a creditor, under a plea of *plene administravit*. (6) But if he have committed a *devastavit*, he will be liable to creditors, even though he should obtain a release from the infant when of full age. (7) He cannot however be charged for waste as executor *de son tort*, after the infant has attained twenty-one, for he had authority to administer. (8)

If an administration *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release will not be any bar to it. (9)

An administrator *durante minore ætate* of the executor of an executor, is the representative of the first testator; and in an action by the creditor of the original testator, such an administrator is properly charged as the administrator of the second executor, and not as the administrator *de bonis non* of the original testator. (10)

If an administrator *durante minore ætate* continue in the possession of the effects after the executor is come of age, he may be sued either by the executor or by a creditor. (11) But if such administrator administer in part, and deliver to the executor, on his coming of age, all the residue, he cannot be charged by a stranger. (12) If, before the executor attain the age of twenty-one, the administrator wasted the assets, he may be charged on the special matter by the executor (13); but subsequent to that period, he is not liable for the *devastavit* at the suit of a creditor. The creditor must resort against the executor, who is entitled to his remedy against the administrator. (14)

(1) 3 Bac. Abr. Executors (B.), 435. Com. Dig. Administration (F.). *Prince's case*, 5 Co. 29. (b.) *Sparks v. Crofts*, Comb. 465. *Roskelley v. Godolphin*, Sir T. Raym. 483. *Freke v. Thomas*, 1 Salk. 39. Williams on Executors, 381.

(2) 4 Bac. Abr. Leases (I. 7.), 781, *et seq.* *Sir Moyl Finch's case*, 6 Co. 67. (b.)

(3) *Piggot's case*, 5 Co. 29. (a.) *Walthall v. Aldrich*, Cro. Jac. 590.

(4) 3 Bac. Abr. Executors (B.), 435.

(5) *Beal v. Simpson*, 1 Ld. Raym. 409. *Carver v. Haselrig*, Hob. 251. *Walthall v. Aldrich*, Cro. Jac. 590. Williams on Executors, 383.

(6) *Anon.* Freem. 150.

(7) Bull. N. P. 145. *Lawson v. Crofts*, 1 Sid. 57.

(8) *Palmer v. Litherland*, Latch, 160.

(9) 1 Rol. Abr. Executors (M.), 910.

(10) *Anon.* Freem. 288. *Norton v. Molineux*, Hob. 246. Williams on Executors, 386.

(11) Com. Dig. Administration (F.). *Lawson v. Crofts*, 1 Sid. 57. *Anon.* 1 Anders. 34.

(12) *Brooking v. Jennings*, 1 Mod. 174, 175.

(13) *Palmer v. Litherland*, Latch, 160.

(14) 3 Bac. Abr. Executors (B.), 435. *Palmer v. Litherland*, Latch, 267. *Anon.* 1 Anders. 34. *Packman's case*, 6 Co. 18. (b.)

ADMINIS-
TRATORS.VII. *Administration pendente Lite.*

Where a suit exists, either respecting a will or the right of administration (1), the ordinary can appoint an administrator *pendente lite*, who is only the officer of the court while the suit is pending (2); but until a plea in the cause has been given in and admitted, such an administrator is not appointed; and the court of Chancery will not generally interfere, and appoint a receiver during the litigation. (3)

Such an administrator can maintain actions for the recovery of debts due to the deceased (4), and collect the effects of the deceased, but he cannot vest or distribute them (5), and when the suit is terminated, must pay over all he has received in the character of administrator to the person pronounced by the court to be entitled. (6)

An administrator *pendente lite* can be sued, because he is complete administrator until his appointment be revoked. (7)

Such an administrator is not liable to interest upon the balance in his hands during the pendency of the suit in the ecclesiastical court. (8)

Although an administrator *pendente lite* has no authority to pay legacies, yet, if paid *bond fide*, he ought to be allowed for them (9): —and it seems, if an administration *pendente lite*, determine pending a suit concerning the assets, the administrator ought to retain sufficient assets to satisfy the demand. (10)

ADMINISTRA-
TION PENDENTE
LITE.

APPOINTMENT.

When the ordinary can appoint an administrator *pendente lite*.

Can sue and be sued.

Interest of money.

Payment of legacies.

Retainer of assets.

VIII. *Administration durante Absentia.*

If the spiritual court exercise its discretion by making a grant of administration *durante absentia*, it is on the ground, that there is no legal representative, and then it is grantable by law. Nothing but an absence out of the realm can authorise the appointment of an administrator *durante absentia*. (11)

By stat. 38 Geo. 3. c. 87. s. 1. "at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of such will shall have been granted, are or is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful for the ecclesiastical court, which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on

ADMINISTRA-
TION DURANTE
ABSENTIA.

APPOINTMENT.

Stat. 38 Geo 3.
c. 87. s. 1.

(1) *Walker v. Woollaston*, 2 P. Wms. 575.
11 Vin. Abr. Executors, 105. [M. 2.].

(2) 4 Burns' Eccl. Law, 297.

(3) Ibid. 238. *Knight v. Duplessis*, 1 Ves. sen. 325.

(4) *Walker v. Woollaston*, 2 P. Wms. 576.
Knight v. Duplessis, 1 Ves. sen. 325. *Ball v. Oliver*, 2 Ves. & B. 97.

(5) *Gallican v. Evans*, 1 Ball & B. (Irish), 192. *Adair v. Shaw*, 1 Sch. & Lef. (Irish), 254.

(6) *Adair v. Shaw*, 1 Sch. & Lef. (Irish), 255. *In re Graves*, 1 Hagg. 313.

(7) *Impey v. Pitt*, 2 Show. 69.

(8) 1 Ball & B. (Irish), 191.

(9) *Adair v. Shaw*, 1 Sch. & Lef. (Irish), 254. Upon analogous principles to those under which letters of administration *pendente lite* are issued, is administration grounded, on the incapacity of the next of kin at the time of the intestate's death arising from taint or excommunication, madness or bankruptcy. If such incapacity be afterwards removed, such administration may be avoided. Toller on Executors, 102. Com. Dig. Administration (B. 1.). *Fawcett v. Fawcett*, 1 Salk. 36.

(10) *Ginty v. Costello*, 1 Jones (Irish), 17.

(11) *Clare v. Hedges*, 1 Lutw. 342. n. *Slater v. May*, 2 Ld. Raym. 1071.

ADMINIS-
TRATORS.

Sect. 4.

Court may appoint persons to collect outstanding debts.

Sect. 5.

Stock belonging to the estate of the deceased, may be transferred into the name of the accountant general in Chancery, in trust for such purposes as the court shall direct in any suit.

Executor returning to reside within the jurisdiction of the court to be made a party in such suit.

When authority of administrator *durante absentia* ceases.

Averments in declaration by administrator.

the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment, stamped only with one 5s. stamp, and shall pay no further or other duty to his majesty, his heirs, or successors."

And "that it shall be lawful for the court of equity in which such suit shall be depending, to appoint (if it shall be needful) any person or persons to collect in, any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner, duly to account for the same."

And "that it shall be lawful for the accountant general of the high court of Chancery, or for the secretary, or deputy secretary of the governor and company of the Bank of England, to transfer, and for the governor and company of the Bank of England, to suffer a transfer to be made of any stock belonging to the estate of such deceased person, into the name of the accountant general, in trust, for such purposes as the court shall direct, in any suit in which the person to whom such administration hath been granted, shall be, or may have been, a party: provided nevertheless, that if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the court where such suit is depending shall direct."

Under the statute, administration may be granted to a creditor, but to avail himself of its provisions he must, like every other person, file a bill in equity. (1)

Where a person entitled to administration was resident in France (2), and another in the West Indies (3), the court required notice to be given them, previously to administration being granted to other parties.

The authority of the administration *durante absentia* ceases on the appearance of the executor or next of kin, and his taking out probate or administration. (4) In *Clare v. Hedges* (5), in the case of a common law administration *durante absentia*, if any of the debtors of the deceased paid his debt to the temporary administrator, though it was after the return of the executor next of kin, yet if the debtor had no notice of such return, it was a good payment. (6)

If an administrator have been appointed under the statute, and the executor die to whom the probate had been granted, the administration, notwithstanding, continues, until the appointment of a new representative. (7)

In an action by a person to whom administration *durante absentia* is granted, the declaration must aver the absence of the executor beyond the seas at the time, that the administration was granted, and that his absence then continued. (8)

(1) *Woolley v. Green*, 3 Phill. 314.

(2) *Goddard v. Cressonier*, *ibid.* 637.

(3) *Miller v. Washington*, 3 Hagg. N. R. 277.

(4) 1 Rol. Abr. Executors (C.), 907. *Clare v. Hedges*, 1 Lutw. 342. n. *Slaughter v. May*, 1 Salk. 42.

(5) 1 Lutw. 342. n.

(6) Vide etiam in re *Cassidy*, 4 Hagg.

360.

(7) *Taynton v. Hannay*, 3 B. & P. 26.

(8) *Slater v. May*, 2 Ld. Raym. 1071.

ADMINIS-
TRATORS.IX. *Administration Bond.*

By stat. 21 Hen. 8. c. 5. s. 3. the ordinary is directed to grant an administration "taking surety of him or them, to whom shall be made such commission." And by stat. 22 & 23 Car. 2. c. 10. s. 1. it is enacted, that all ordinaries, ecclesiastical judges, &c. shall, upon granting administration, take sufficient bonds with two or more able sureties, of the persons appointed administrators in the name of the ordinary, with condition, that such administrators shall make a true inventory of the goods and chattels of the deceased, and shall well and truly administer such goods and chattels according to law, and cause a true and just account of the said administration, &c. to be made, and shall deliver and pay unto such person or persons respectively, as the judge of the court in which administration was granted by his decree or sentence shall appoint, all the rest and residue of such goods and chattels as shall be found remaining on the said administrator's account, the same being first examined and allowed by the said judge, &c.

It is no breach of the conditions of the arbitration bond "to refuse to distribute among the next of kin the surplus of the intestate's estate after payment of debts," &c. without the previous decree of the court directing the administrator to do so. (1) Nor is it a ground of forfeiture, that the administrator has not paid the debts of the intestate. (2)

Where an administrator converted assets of the intestate to his own use, and became a bankrupt before he had exhibited his inventory, or made his account, and the ecclesiastical court discharged him from the suit: — It was held, that his malfeasance in converting to his own use the intestate's assets, was a breach of the clause of the condition, "well and truly to administer" them, and that the sureties were liable for the amount of the assets misapplied, notwithstanding the administrator had received his certificate as a bankrupt. (3)

It may be assigned as a breach in an action on the bond, that the administrator has not delivered a true and perfect inventory (4), or that he has not made a just and true account (5), and either of these breaches will be incurred without any citation. (6)

It is not a sufficient answer to the assignment of a breach for not exhibiting an inventory on a certain day, "that there was no court on that day." The defendant must also plead, that he was ready, &c., for he must shew, that he had done all that could be done on his side, towards a perfect performance. (7)

If the bond be given under the ordinary (stat. 21 Hen. 8. c. 5. s. 3. and 22 & 23 Car. 2. c. 10. s. 1.), the parties desirous of enforcing it against the sureties must apply to the ecclesiastical court to pronounce it forfeited, in order to its being put in suit. It seems, that the next of kin or a creditor may sue on such bond in the name of the ordinary, and the court of King's

ADMINISTRA-
TION BOND.Stat. 21 Hen. 8
c. 5. s. 3.Stat. 22 & 23
Car. 2. c. 10.
s. 1.ACTION ON THE
BOND.What is not a
breach.What may be
assigned as
breaches.Parties to en-
force the con-
ditions of the
bond.(1) *Canterbury (Archbishop of) v. Tappen*,
8 B. & C. 151.(2) *Canterbury (Archbishop of) v. Willis*,
1 Salk. 316.(3) *Canterbury (Archbishop of) v. Robert-*
son, 1 C. & M. 691. 3 Tyrw 390.(4) *Greenside v. Benson*, 3 Atk. 248.(5) *Canterbury (Archbishop of) v. Willis*,
1 Salk. 316.(6) *Ibid.* 315.(7) *Ibid.* 179.

ADMINIS-
TRATORS.

Jurisdiction.

Bench will direct the ordinary to permit his name to be used in an action thereon, on the application of a party properly entitled. (1)

Where the creditors of the intestate brought an action against the sureties on the administration bond, without the permission of the archbishop, and upon *oyer* craved, the ecclesiastical court refused to give the bond to the plaintiffs, the court of Common Pleas refused an application, that an authenticated copy of the bond, on the production of the bond itself in the ecclesiastical court to the attorney of the defendants, should be a sufficient *oyer*; as the granting of such an application would deprive the ecclesiastical court of its jurisdiction in deciding, whether the action should be brought or not, or of insisting on an indemnity. (2)

14. ACTIONS BY EXECUTORS AND ADMINISTRATORS.

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.

Stat. 3 & 4
Will. 4. c. 42.
s. 2.

Actions in
respect of the
realty.

It has been previously stated (3) that, with respect to suits and demands, administrators under stat. 31 Edw. 3. st. v. c. 5. are invested with the rights and liabilities of executors.

By stat. 3 & 4 Will. 4. c. 42. s. 2., after reciting, that there is no remedy provided by law for injuries to the *real* estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, enacts that "an action of *trespass*, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages when recovered shall be part of the personal estate of such person." (4)

Stat. 7 Will. 4.
and 1 Vict.
c. 26. s. 6.

Property un-
disposed of by
the testator.

By stat. 7 Will. 4. and 1 Vict. c. 26. s. 6. "if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

(1) *Canterbury (Archbishop of) v. House*, Cowp. 141. *Greenside v. Benson*, 3 Atk. 248.

(2) *Canterbury (Archbishop of) v. Tubb*, 3 Bing. N. C. 789.

(3) *Ante*, 1870.

(4) If an action be brought by a termor upon stat. 7 & 8 Geo. 4. c. 31. for an injury done to his house, within three calendar months from the offence committed, and

that action abates by the death of the termor after the three months have expired, his executor cannot bring a fresh action (*Adams v. Bristol (Inhab. of)*, 4 N. & M. 144. 3 A. & E. 389.); and it is doubtful, whether an executor of a termor can in any case bring an action upon stat. 7 & 8 Geo. 4. c. 31. for an injury sustained in the lifetime of the testator

By stat. 11 Geo. 2. c. 19. s. 15. an executor or administrator of tenant for life, on whose death any lease of lands &c. determined, shall in an action on the case recover from the under-tenant a proportion of the rent reserved, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due.

Where several join in case for injury to a leasehold reversion, whose title consists in their being executors, it is enough to produce a probate granted to one of them only, for the title is by the *will*, and the rest may prove at any time. (1)

In *Coles v. England (Bank of)* (2), which was in case by the executors of a stockholder against the Bank of England for refusing to transfer stock of the testatrix, and to pay the dividends. It appeared, that nearly all the stock had been sold and transferred in the lifetime of the testatrix by her nephew C., who had brought another woman to personate her and forge her signature. After the sale, testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found, that she had no means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence; and that the defendants had not been guilty of any:—It was held, that the facts were a defence on the plea of not guilty, and that they furnished evidence in support of pleas denying, that testatrix was proprietor of the stock, and a plea denying, that sufficient money had been received by defendants for paying the dividends. (3)

An administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged. (4)

An executor can maintain an action against a sheriff for the escape of a party in execution on a judgment obtained by the testator, even where the escape happened in the testator's lifetime. (5)

He may have an action against the sheriff for not returning his writ, and paying money levied on a *fiери facias* (6); or for a false return, stating that he had not levied the debt, when in truth he had. (7)

And the executor of a landlord may maintain an action against an officer, for removing goods taken in execution before the payment of a year's rent. (8)

Executors can maintain covenant entered into with the testator for payment of rent under a lease granted by the testator, for a term longer than his own, during the continuance of the testator's term (9); also on a covenant that touches the realty, as for assuring lands, if it were broken in the testator's lifetime (10); but if waste be committed by the lessee in the lifetime of the lessor, after his death his heir can have no action for the waste, because he cannot recover treble damages; nor can the executor have it, for

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.

CASE.

Stat. 11 Geo. 2.
c. 19. s. 15.

Injuries to
leaseholds.

Refusal to
transfer stock.

Breach of pro-
mise of mar-
riage.

AGAINST SHE-
RIFF FOR AN
ESCAPE.

COVENANT.

(1) *Walters v. Pfeil*, M. & M. 362.

(2) 10 A. & E. 437.

(3) Vide etiam *Franklin v. England (Bank of)*, 9 B. & C. 156.

(4) *Chamberlain v. Williamson*, 2 M. & S. 408.

(5) Com. Dig. Administration (B. 13.).
Spurstow v. Prince, Cro. Car. 297., vide
Berwick v. Andrews, 2 Ld. Raym. 973.

(6) 1 Rol. Abr. Executors (P.), 913.
Spurstow v. Prince, Cro. Car. 297.

(7) *Williams v. Cary*, 4 Mod. 404. 1
Salk. 12. Comb. 322, 323. S. C. nom.
Williams v. Grey, 1 Ld. Raym. 40. 3 Bac.
Abr. Executors (O.), 538. Toller on Ex-
ecutors, 435.

(8) *Palgrave v. Windham*, Str. 212.

(9) *Baker v. Gostling*, 1 Bing. N. C. 19.

(10) Com. Dig. Administration (B. 13.),
Covenant (B. 1.). 3 Bac. Abr. Executors
(O), 532. *Lucy v. Levington*, 2 Lev. 26.
1 Vent. 175. Went. Off. Ex. 162. 211.

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.

Seeking to answer an agreement under seal by a parol promise.

Plea not issuable, if not shewing, that at the time of the testator's decease the deed sued on, was within the diocese of London.

DEBT.

Stat. 32 Hen. 8. c. 37.

Arrears of rent.

Rent reserved on a lease for years.

he has no right to recover the place wasted, the inheritance of which has descended to the heir. (1)

In *Harris v. Goodwin* (2) the plaintiff declared against the defendant as administratrix, upon a covenant under seal entered into by the testator; the defendant pleaded, that the testator had died insolvent, and then alleged a parol agreement with the plaintiff, upon the faith of which, she was induced to take out letters of administration to assign the deed to the plaintiff, the promise being, that the plaintiff would not seek to charge her in that capacity; the plaintiff replied, taking issue upon the promise alleged in the plea:—It was held, that the plea was bad, as seeking to answer an agreement under seal by a parol promise, and that at the trial of the cause, it was not to be taken as alleging a deed under seal, but was proved by evidence of a parol agreement; and as such proof was given, a verdict for the defendant was rightly entered, and the plaintiff was entitled to a judgment *non obstante veredicto*.

To an action of covenant brought by the plaintiff as administrator of D., by virtue of letters of administration granted to him by the archbishop of Dublin, upon a deed of separation, whereby the defendant covenanted to pay his wife an annuity, which he likewise charged upon certain estates in Ireland, the defendant (who was under terms to plead issuably) pleaded that D., at the time of his death, was an inhabitant of, and commoner within, the diocese of the bishop of London:—It was held, that the plea was not issuable, it not shewing that at D.'s decease the deed sued on, was within the diocese of London. (3)

By stat. 32 Hen. 8. c. 37. the executors and administrators of tenants in fee, fee-tail, or for life, of such rents, may have an action of debt for all such arrears, or may distrain for the same upon the lands chargeable, so long as they remain in the possession of the tenant who ought to have paid the rent, or of any other person claiming under him by purchase, gift, or descent. The statute also provides, that a tenant *pour autre vie*, his executors and administrators, may after the death of the *cestuique vie* have an action of debt, or may distrain for such arrears incurred in the lifetime of *cestuique vie*.

This statute being remedial, applies to the executors of all tenants for life, not merely to such executors as previously to the statute had no remedy whatever, but also to those who were entitled to an action of debt, to whom, therefore, it gives merely the additional remedy of distress. (4)

But although the executor of all tenants for life be authorised by the statute to distrain for such arrears (5), it seems, that rent reserved on a lease for years, is not within its provisions, inasmuch as the landlord is not tenant in fee, fee-tail, or for life, of such a rent, and the executors of such tenants only are mentioned in the act. (6) However, in trespass, where it appeared the defendant had distrained the plaintiff's goods for rent due to his testator on a lease for years, Chief Justice Lee held it to be comprehended by the foregoing statute, and the defendant obtained a verdict. (7)

(1) Went. Off. Ex. 163. Com. Dig. Waste (C. 3.). 2 Inst. 305. Toller on Executors, 432.

(2) 9 Dowl. P. C. 409.

(3) *Huthwaite v. Phaire*, 1 M. & G. 159.

(4) Harg. Co. Litt. 162. (b.) n. *Hool v. Bell*, 1 Ld. Raym. 172. *Read v. Erington*, Cro. Eliz. 322.

(5) *Hool v. Bell*, 1 Ld. Raym. 172.

(6) Gilb. Law of Distress, 3d ed. §4. *Prescott v. Boucher*, 3 B. & Ad. 849.

(7) *Powel v. Killick*, at Westminster, M. T. 25 Geo. 2. cit. Toller on Executors 452., sed vide *Prescott v. Boucher*, 3 B. & Ad. 849.

Nor does stat. 32 Hen. 8. c. 37. extend to the executor of the grantee of a rent-charge for a term of years, if he so long live (1), nor to copyhold rents, but only to rents out of free land. (2)

But the executor of an executor, is held to be within the equity of the foregoing statute. (3)

Executors can support an action of debt on the stat. 2 & 3 Edw. 6. c. 13. for not setting out tithes due to the testator (4); or a *quare impedit*, in case he died within six months after the usurpation (5); and it seems, that under this statute, an executor may maintain an ejectment for an *ouster* of the testator, although he were seised in fee, because in such case the executor may proceed in that form of action for damages only (6), in the same manner as a lessee, where the lease expires pending the suit. (7)

By the common law an executor is entitled to an action of replevin for goods distrained in the testator's lifetime (8), or to an action of detinue for any specific chattel, or to bring ejectment to recover land held for a term of years; for in those instances the thing itself is an object of the action, and the property continues in the plaintiff. (9)

He may likewise avow for rent in arrear at the testator's death as incident to a reversion for years, which devolved upon him as executor. (10)

An executor can maintain an action of deceit, *audita querela*. (11) He may also sue in that character in a court of conscience. (12)

By the equity of stat. 4 Edw. 3. c. 7. an executor may maintain an action of trover for the conversion of the testator's goods in his lifetime. (13)

Executors, in their representation of the testator, can maintain actions to enforce all the personal contracts of their testator. (14)

An executor can sue for a debt due to the testator by judgment, statute, recognisance, obligation, or other specialty (15); or for an action of debt, suggesting a *devastavit* in the lifetime of his testator, on a judgment recovered by such testator against an executor. (16) The executor of the assignee of a bail bond can sue upon it (17), and maintain an action on a bond, though conditioned for the performance of an award. (18)

An executor can likewise maintain an action for the performance of a

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.

Stat. 2 & 3
Edw. 6. c. 13.
Quare impedit.

REPLEVIN.
DETINUE.
EJECTMENT.

Avowry for
rent.

DECEIT.
Audita querela.

TROVER.
Stat. 4 Edw. 3.
c. 7.

PERSONAL
CONTRACTS.

(1) Toller on Executors, 452.

(2) Ibid. *Appleton v. Doily*, Yelv. 135.,
sed vide *Brandlin v. Millbank*, Carth. 91.

(3) Went. Off. Ex. 258.

(4) *Holl v. Bradford*, 1 Sid. 88. *Morton v. Hopkins*, ibid. 407. *Williams v. Cary*, 4 Mod. 404. *Eaves v. Mocato*, 1 Salk. 314. *Mr. Justice Moreton's case*, 1 Vent. 30.

(5) Went. Off. Ex. 164. *Mason v. Dixon, Latch*, 168. Noy, 87. *Lemason and Dickson's case*, Poph. 189.

(6) *Mr. Justice Moreton's case*, 1 Vent. 30. *Doe d. Shore v. Porter*, 3 T. R. 13.

(7) *Doe d. Shore v. Porter*, 3 T. R. 16. arg. Co. Litt. 285. *Thrustout d. Turner v. Grey*, Str. 1056.

(8) *Arundell v. Trevill*, 1 Sid. 81. *Mason v. Dixon, Latch*, 168. Went. Off. Ex. 164. Gilb. Law of Distress, 3d ed. 156.

(9) *Mason v. Dixon, Latch*, 168. Went. Off. Ex. 159. 163, et seq.

(10) Com. Dig. Distress (A. 2.). 1 Rol. Abr. Distress (O.), 672. *Wankford v. Wank-*

ford, 1 Salk. 299. *Duncomb v. Walter*, 2 Show. 254.

(11) *Mason v. Dixon, Latch*, 167. Went. Off. Ex. 171. 3 Bac. Abr. Executors (N.), 529.

(12) *Wase v. Wyburd*, Doug. 246.

(13) *Harris v. Vandcogie*, Sir F. Moore, 400. *Rutland (Countess of) v. Rutland (Countess of)*, Cro. Eliz. 377. *Sale v. Coventry (Bishop of)*, 1 Anders. 242. *Russell's case*, 1 Leon. 193, 194. *Mr. Justice Moreton's case*, 1 Vent. 30.

(14) 3 Bac. Abr. Executors (N.), 529. *Rutland (Countess of) v. Rutland (Countess of)*, Cro. Eliz. 377. 1 Rol. Abr. Executors (P.), 912. Went. Off. Ex. 169.

(15) Com. Dig. Administration (B. 13.).

(16) *Berwick v. Andrews*, 1 Salk. 314. 2 Ld. Raym. 971. 1502. *Erving v. Peters*, 3 T. R. 685.

(17) *Nott v. Stephens*, Fortesc. 367.

(18) *Dawney v. Vesey*, 2 Vent. 249.

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.SIMPLE CON-
TRACTS.

Contract relat-
ing to freehold
property.

When execu-
tors will not be
restrained from
collecting debts
at the instance
of the next of
kin.

CAPACITIES
AND INCAPACI-
TIES OF EXECU-
TORS IN CASES
OF BANK-
RUPTCY.

personal thing (1); for work, labour, and materials found by him as executor, in completing a contract entered into by his testator (2); and for goods sold as executor in carrying on the testator's business; — for the money when recovered would be assets. (3)

Executors can also maintain actions — on simple contracts in writing, or not in writing, either express or implied (4); on contracts for the benefit of a third person (5); for a relief due to the testator (6); of account on accounts with his testator (7); for the taking of the testator's goods (8); for trespass with cattle on his leasehold premises (9); for cutting corn, though growing on his freehold lands, and thereupon carrying it away. (10)

The general rule is, that the *personal* representatives cannot sue upon a contract relating to *freehold* property. The heir or devisee is the party to sue upon such contract. There is, however, an exception in the case of a breach of such contract in the testator's lifetime, occasioning a *special damage* to his *personal* estate; and it has been decided (11), that an administratrix may maintain *assumpsit* against the vendor of a freehold estate for not delivering an abstract of title in due time to the intestate, whereby the purchase could not be completed by the appointed day, and the intestate incurred expense in endeavouring to procure a title, and was deprived of the use of the deposit he had paid, &c.

An executor, who has obtained probate, will not be restrained, at the instance of the next of kin, from suing for and collecting the debts due to the deceased, though the will may have been impugned in the ecclesiastical court in a suit to recall probate. But he will be ordered to bring in the money recovered, upon the next of kin's (a pauper) giving security for costs. (12)

An executor can prove a debt due to the testator under a fiat, and can issue a fiat before probate. (13)

If a fiat have been superseded, the executors of the party against whom it issued, can take out a fiat for a debt due to him; but if it have not been superseded, they have no such right; for the debt having vested in his assignees, the executors are incapable of being the petitioning creditors. (14)

Executors can sign a bankrupt's certificate (15); and where the bankrupt's father, being principal creditor, chose himself sole assignee, and dying intestate, the bankrupt, as his representative, chose himself assignee, and signed his own certificate, it was held regular. (16) But an executor, who has also a claim in his own right, cannot sign in both capacities. (17)

(1) *Mason v. Dixon*, Latch, 168. An attorney's bill delivered by his executor before action brought, is not taxable. *Doe d. Sabin v. Sabin*, 8 Dowl. P.C. 468.

(2) *Marshall v. Broadhurst*, 1 Tyrw. 348.

(3) *Aspinall v. Waks*, 10 Bing. 51.

(4) Com. Dig. Administration (B. 13.). 3 Bac. Abr. Executors (N.), 529. *Petrie v. Hannay (Bart.)*, 3 T. R. 660.

(5) *Bafeild v. Collard*, Aleyn, 1.

(6) *Saint John v. Bawdripp*, Noy, 43. *St. John (Lord) v. Brandring*, Cro. Eliz. 883.

(7) Stat. 13 Edw. 1. Westm. 2. c. 23. Com. Dig. Administration (B. 13.).

(8) Stat. 4 Edw. 3. c. 7. Com. Dig. Ad-

ministration (B. 13.), vide etiam *Mason v. Dixon*, Latch, 168.

(9) Went. Off. Ex. 165, et seq.

(10) *Emerson v. Emerson*, 1 Vent. 187.

(11) *Orme v. Broughton*, 4 M. & Sc. 417.

(12) *Mullen v. Horner*, 1 Hayes & Jones (Irish), 398.

(13) Exp. English, 2 Bro. Ch. Rep. 610. Exp. Paddy in re *Drakely*, 3 Madd. 241. et vide *Rogers v. James*, 2 Marsh. 425.

(14) Exp. Goodwin, 1 Atk. 100.

(15) Whitmarsh's B. L. 2d. ed. 356. Exp. *Sausmerez*, 1 Atk. 85.

(16) Toller on Executors, 452.

(17) Exp. *Sausmerez*, 1 Atk. 85.

If a bankrupt's estate pay a clear dividend of ten shillings in the pound, and he obtain his certificate under the fiat, his representatives are entitled to the allowance. (1)

Executors may also maintain actions, the cause of which accrued after the testator's death (2) — as where a bond has been given to the testator but forfeited after that event (3), or a personal covenant entered into with the testator be broken (4), or a debt on any other species of contract made with him become payable (5), or his goods be taken (6), or trespass committed on his leasehold premises (7); in all these, and the like instances, the executor, in his representative capacity, is entitled to a remedy by action.

So if the testator died possessed of a term for years in an advowson, it vests in his executor; and for disturbance he can maintain a *quare impedit*. (8) So an executor may have an action of replevin for goods taken after the death of the testator. (9) An executor may also avow for rent accrued due after that time, as incident to a reversion for years, which vested in him in that character. (10) If a defendant in execution on a judgment recovered by the testator, escape after the testator's death, the executor can have an action against the sheriff for the escape (11); and he has the like remedy, if the defendant were in execution on a judgment recovered by him as executor. (12)

So a bail-bond may be assigned to the executor of a deceased plaintiff, and he may bring an action upon it (13); or a bill of exchange may be indorsed to A. as executor, and he may in that character maintain an action on the bill against the acceptor. (14) And in like manner an executor may bring an action on any other contract made with him in his representative capacity. (15)

In *Grissell v. Robinson* (16) it appeared, that P. orally agreed to grant defendant a lease for sixty years; that defendant paid part of the consideration, but P. died before the contract could be carried into effect; the plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the court of Chancery, and that the lease was granted pursuant to a proposal of plaintiff thereafter mentioned, plaintiffs having paid their own attorney his charges for drawing this lease, upon which it was held, that they were entitled to sue defendant for money paid, and that in their own right.

ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.

WHERE CAUSE
OF ACTION
HAS ACCRUED
AFTER TESTA-
TOR'S DEATH.

(1) Whitmarsh's B. L. 2d ed. 351. Ex-
parte *Calcot*, 1 Atk. 208, 209. 3 *ibid.*
814.

(2) Com. Dig. Pleader (D. 1.). *Anon.*
3 Leon. 212.

(3) 3 Bac. Abr. Executors (O.), 532. 1
Rol. Abr. Dett (P.), 602.

(4) Went. Off. Ex. 15, *et seq.* 11 Vin.
Abr. Executors, 128. (Q.), 231. (G. a.).

(5) *King v. Stevenson*, 1 T. R. 487. *Munt*
v. Stokes, 4 *ibid.* 565. Com. Dig. Pleader
(D. 1.). 3 Bac. Abr. Executors (O.), 532.
Hargrave's case, 5 Co. 31. (b.) *Smith v.*
Norfolk, Cro. Car. 225. *Frevin v. Paynton*,
1 Lev. 250.

(6) 3 Bac. Abr. Executors (O.), 532. 1
Rol. Abr. Dett (P.), 602. *Carew v.*
Broughton, Lane, 80. *Jenkins v. Plomba*, 6
Mod. 92.

(7) Com. Dig. Administration (B. 13.).
Went. Off. Ex. 163, *et seq.*

(8) Went. Off. Ex. 173.

(9) *Ibid.*

(10) Com. Dig. Administration (B. 9.).
Wankford v. Wankford, 1 Salk. 299. 11 Vin.
Abr. Executors, 204. [A. a.]. *Duncomb v.*
Walter, 2 Show. 266.

(11) 3 Bac. Abr. Executors (O.), 538.
Lambert and Slingsby's case, Godb. 262.

(12) *Slingsby v. Lambert*, 1 Rol. 276.
Wate v. Briggs, 1 Ld. Raym. 35. *Bonafous*
v. Walker, 2 T. R. 128.

(13) *Rush v. Rush*, Fortesc. 370.

(14) *King v. Stevenson*, 1 T. R. 487.

(15) Com. Dig. Pleader (D. 1.). 1 Rol.
Abr. Dett (P.), 602. 3 Bac. Abr. Ex-
ecutors (O.), 533.

(16) 3 Bing. N. C. 10.

**ACTIONS BY
EXECUTORS
AND ADMINIS-
TRATORS.**

**EFFECT OF RE-
FERRING A
CAUSE.**

A defendant executor does not preclude himself, by referring a case, from availing himself of a plea of judgment recovered *pais darrein continuance*, while the reference was pending, although it appears from affidavits, that he has a certain amount of assets in his hands. (1)

In a bond of submission, to which A. and B. who were partners and C. were parties, it was provided, that in case of the death of either party during the reference, the award was to be delivered to his personal representatives. B. died before the award was made, and several meetings were held, before it was objected by C., that B's personal representatives should be made parties to the submission. On an award having been made in favour of A., without B.'s executor having been made a party, it was decided to be no ground for setting aside the award. (2)

**ARREST BY
EXECUTOR.**

An executor or administrator may arrest the defendant, in cases where a plaintiff suing in his own right may do so (3); and he can exercise this right before probate. If the defendant was arrested by the testator, and the action abated by his death, his executors may arrest the defendant again for the same cause of action. (4)

**Stat. 43 Geo. 3.
c. 46. s. 3.**

Executors or administrators, who have holden a party to bail, without reasonable or probable cause, for a debt due to the deceased, are within the stat. 43 Geo. 3. c. 46. s. 3. (5)

**Form of affi-
davit.**

An executor can hold to bail on an affidavit of his belief of the existence of the debt (6): thus, if an executor swear to the books of the testator, and that he believes them to contain a true account, and the debt to be still unpaid, it will suffice. (7)

But an affidavit, that the defendant was indebted to his testator in 50*l*. as appears by the testator's books, was held defective, and common bail ordered. (8) And an affidavit on debt "as appears from a statement made from the testator's books, by an accountant employed by the deponent," was likewise held insufficient. (9)

**ACTIONS
AGAINST EX-
ECUTORS AND
ADMINISTRA-
TORS.**

GENERALLY.

Where actions against testator survive against executor.

Actions which cannot be maintained against executor.

15. ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

In all cases where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator express or implied, the action survives against the executor; and by the express enactment of stat. 3 & 4 Will. 4. c. 42. s. 14., debt on simple contract can be maintained in any court of common law against any executor or administrator.

But no action, where in form the declaration must be *vi et armis contra pacem*, or where the plea must be, that the testator was not guilty, will lie against an executor; in fact, if it be a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as for example, beating or imprisoning a man, there the person injured has

(1) *Alder v. Park*, 5 Dowl. P. C. 16.

(2) *In re Hare, Milne, and Haswell*, 8 Dowl. P. C. 71., *anté*, 29. tit. ARBITRATION AND AWARDS.

(3) Tidd, 143.

(4) *Mellin v. Evans*, 1 C. & J. 82.

(5) *Feely v. Reed*, 5 B. & A. 515. (s) Tidd, 984.

(6) *Mackenzie v. Mackenzie*, 1 T. R. 716

(7) 1 Crompt. Pr. 40.

(8) *Ibid. Walrond v. Franksam*, Str. 1219.

(9) *Rowney v. Dean*, 1 Price, 402.

only a reparation for the *delictum* in damages to be assessed by a jury, and therefore the executor is not liable; but where, besides the crime, property is acquired, which benefits the testator, there an action for the value of the property will survive against the representative. (1)

Although an executor can sue in a court of conscience, he is not liable to be sued there. (2)

By stat. 3 & 4 Will. 4. c. 104., "when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary hold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well as debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs allow, or devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act (3) liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided, that in the administration of assets by courts of equity under this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

Executors and administrators are answerable, whether expressly named or not, as far as they have assets (4), for all debts due from the testator by judgment, statute, recognisance, obligation, or other debts by record or specialty (5); and an action of debt lies against the executor of a sheriff, on a judgment recovered against the testator for an escape. (6)

Actions can also be maintained against executors for issues forfeited; fines imposed at the assizes; quarter sessions; by commissioners of sewers or bankrupts; by stewards in leets (7); for a relief due from the testator to the lord of the manor (8); on simple contracts of the testator, either in writing or by parol,—as on bills of exchange and promissory notes, debt for rent on a parol lease (9), or *assumpsit* for money had and received by the testator to the plaintiff's use (10); by a gaoler for provisions found for the testator in prison (11); or against the executor of a sheriff for levying money on a *fieri facias*, and dying before payment (12); or, seemingly, on a collateral promise by the tes-

ACTIONS
AGAINST EX-
ECUTORS AND
ADMINISTRA-
TORS.

Court of con-
science.

Stat. 3 & 4
Will. 4. c. 104.

Freehold and
copyhold estates
in all cases to
be assets for the
payment of sim-
ple contract or
specialty debts.

FOR WHAT
DEBTS ANSWER-
ABLE, WHETHER
EXPRESSLY
NAMED OR NOT.

(1) *Hambly v. Trott*, Cowp. 376.

(2) Stat. 14 Geo. 2. c. 10. *Ailway v. Burrows*, Doug. 263. Tidd, 373.

(3) August 29. 1833.

(4) 3 Bac. Abr. Executors (P.), 535. Went. Off. Ex. 261. *Morgan v. Greene*, Sir W. Jones, 223. Cro. Car. 187. *Howse v. Webster*, Yelv. 103.

(5) Com. Dig. Administration (B. 14.). Went. Off. Ex. 261.

(6) *Whitacres v. Dussey*, Dyer, 322.

(7) Com. Dig. Administration (B. 14.). Went. Off. Ex. 265, *et seq.*

(8) Com. Dig. Administration (B. 14.). *Saint John v. Bawdripp*, Noy. 43, 44.

(9) Com. Dig. Administration (B. 14.).

(10) *Pinchon's case*, 9 Co. 89. (b.) *Le Case del Marshalsea*, 10 *ibid.* 77. (b.) *Rose v. Bartlett*, Cro. Car. 294. *Norwood v. Rede*, Plowd. 182.

(11) *Pinchon's case*, 9 Co. 87. (b.)

(12) Com. Dig. Administration (B. 14.) 1 Rol. Abr. Executors (H.), 921.

ACTIONS
AGAINST EX-
ECUTORS AND
ADMINISTRA-
TORS.Liability for
rent.Distress for
rent.

Covenant.

Debt for rent.

tator (1), as where he promised to give A. a sum of money in consideration that he would marry B.

An executor who has entered, &c. may be sued in the *debet* and *detinet* as assignee, for rent which became due after the death of his testator, who was the lessee. (2)

If a lessee die before the expiration of a term, and his executor continue in possession during the remainder, and after its termination, a distress may be taken for rent due for the whole term. (3)

An action lies against an executor on the testator's covenant, as to pay rent (4), or to repair premises. (5)

In debt for rent against an administrator as assignee of the intestate, the defendant pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent and unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which the defendant had paid to the plaintiff, and part towards the expense of a party wall under the Building Act (6); that, before the rent became due, the defendant offered to surrender all his interest in the premises to the plaintiff, who refused to accept them; and that he had fully administered, &c.: to which it was replied, that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; and that the defendant did not offer to surrender, &c.: — It was holden, that the real value of the premises, as against the defendant, must be taken to be that, which it would have been, if he had not himself committed a breach of a covenant to repair in the original lease; and that the value, as between the plaintiff and the defendant, was not affected by the insolvency of the undertenant, whose lease also contained a covenant to repair, with a proviso of re-entry for breach and for non payment of rent. (7)

Non perform-
ance of con-
tract.

In *Wentworth v. Cock* (8) the plaintiffs entered into an agreement with C. to supply him with a certain quantity of slate immediately, with a certain other quantity, monthly, at a fixed price, and with any further quantity monthly that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force until 1st January, 1838:—It was held, that the plaintiffs might sue the administrator of C. for refusing to receive slate sent in pursuance of the contract after C.'s death, and before 1st January, 1838.

Stat. 3 & 4
Will. 4. c. 42.
s. 2.
Liability for
torts of testator.

By stat. 3 & 4 Will. 4. c. 42. s. 2. "an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to

(1) Com. Dig. Administration (B. 14.).
Lee v. Rowkeley, 1 Rol. 14. *Berisford v. Woodroff*, Cro. Jac. 404. *Christopher v. How*, Sty. 158.

(2) *Buckley v. Pirk*, 1 Salk. 317. *Derisley v. Custance*, 4 T. R. 75.

(3) *Braithwaite v. Cooksey*, 1 Hen. Black.

(4) *Billinghurst v. Speerman*, 1 Salk. 297.
Com. Dig. Covenant (C. 1.).

(5) *Tilney v. Norris*, Carth. 519. 1 Salk. 309. 1 Ld. Raym. 553.

(6) Stat. 14 Geo. 3. c. 78.

(7) *Hornidge v. Wilson*, 11 A. & E. 645.

(8) 10 *ibid.* 42.

be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

An administrator is liable to an action for money had and received by the intestate for coal tortiously taken by him from plaintiff's land, if the intestate sold it and received the money;— notwithstanding no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. And where part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass under stat. 3 & 4 Will. 4. c. 42. s. 2. for so much as was raised within the six months, and also money had and received for so much as was raised before, the acts being distinct, and therefore the two actions not incompatible. (1)

In trover against an executor it appeared, that the watch, which was the subject-matter of the action, had been given by the testatrix to one S. in September, 1837; that S. re-delivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that on its being demanded by the plaintiff in December, 1838, the testatrix said, that she would consult her solicitor; and that the testatrix died in March, 1839:—It was held, that this was sufficient evidence to warrant the jury in finding a conversion within six months before her death. (2)

Executors and administrators are within the custom of foreign attachment; and, if a plaint be entered in the court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the city. (3) But a debt due to the deceased, cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased. (4) An attachment cannot be issued for the debt of a testator, of money or goods in the hands of the executor, unless they were due or belonging to the testator at the time of his death, although they be assets; as if an executor sell the goods of the testator, the money cannot be attached in his hands. (5) If an executor take a bond for a debt due to the testator, the money payable on the bond cannot be attached. (6) If an executor recover damages in trespass for the testator's goods, or on a covenant made with him, there cannot be an attachment of the damages. (7) If money be awarded to an executor on a submission by him of controversies between his testator and another person, the money due by the award cannot be attached. (8) Nor can there be an attachment of a legacy, for creditors have an interest in it, and they are incapable of being warned. (9)

An executor, it seems, is bound, provided he have assets, to maintain an apprentice till the term is expired; because it is a lien on the executor, although not named, in respect of the assets. (10) But justices of the peace

ACTIONS
AGAINST EX-
ECUTORS AND
ADMINISTRA-
TORS.

Coal tortiously
taken.

What is con-
sidered a con-
version within
six months be-
fore death of
the testator.

FOREIGN AT-
TACHMENT.

LIABILITIES
FOR APPREN-
TICES.

(1) *Powell v. Rees*, 7 A. & E. 426.

(2) *Richmond v. Nicholson*, 8 Scott, 194.

(3) Com. Dig. Attachment (A, B.), *vide* *Anon. Dyer*, 196. (b.) *Fisher v. Lane*, 3 Wils. 297. 2 W. Black. 834.

(4) Com. Dig. Attachment (D.). *Hodges v. Cox*, Cro. Eliz. 843.

(5) *Horsam v. Turgot*, 1 Vent. 113.

(6) *Ibid.*

(7) *Ibid.* 112.

(8) *Ibid.* 113. S. C. 1 Lev. 306.

(9) Toller on Executors, 479. cit. 1 Ch. Ca. 257. 1 Rol. Abr. Customs de London (E.), 551. *Wood v. Smith*, Noy. 115.

(10) Com. Dig. Justices of Peace (B.), 57. 3 Bac. Abr. Executors (O.), 535. *Wadsworth v. Gye*, 1 Sid. 216. *Rex v. Peck*, 1 Salk. 66. *Baxter v. Burfield*, Str. 1266.

ACTIONS
AGAINST EX-
ECUTORS AND
ADMINISTRA-
TORS.Stat. 32 Geo. 3.
c. 57. ss. 1 & 6.What not a
waiver of a cre-
ditor's right to
sue.When execu-
tors render
themselves
liable *de bonis
propriis*.

have, generally speaking, no authority to order an executor to maintain an apprentice. (1)

Respecting parish apprentices, on whose binding no larger sum than 5*l*. shall have been paid, specific regulations are, in the event of the master's death, prescribed by the stat. 32 Geo. 3. c. 57., which enacts, that if the master of such an apprentice shall die during the term, the covenant in the indenture for his maintenance, shall not continue in force longer than three calendar months after the death of such master, during which the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint; and that if the personal representatives of such master, having assets, during the three months shall refuse or neglect to maintain and provide for such apprentice, according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master.

Where the attorney of a creditor of testator wrote as follows to the attorney of his executor:—"My clients do not claim from W. payment of this money as executrix of W. B. W., but they claim from her individually, she having become liable by payment of interest from time to time to this debt:"—It was held to be no waiver of the creditor's right to sue W. as executrix, nor any excuse to her for discharging legacies before debts. Where an executrix has a life estate in a chattel under a bequest, her taking possession of the chattel, is no consent to a further bequest thereof in remainder. (2)

There are cases in which executors are personally responsible *de bonis propriis*—as by the commission of those acts which constitute a *devastavit* (3); by making themselves chargeable in their private capacities to the plaintiff's demands; by pleading a plea, the falsehood of which, lies in their own knowledge, and which, if true, would be a perpetual bar to the action (4); and by promising to pay a debt of the testator, or answering damages out of their own estates. (5)

But there must be a sufficient consideration to support such promise; and it must be alleged and proved, that assets were come to their hands; or that, in consideration that the creditor would forbear to sue them, they promised to pay the debt (6); or an admission of assets must be implied from the nature of the promise itself, as where an executor owned the money lay ready for the plaintiff, whenever he would call for it (7); so likewise and where executors gave a note to a creditor, whereby they promised "as executors" to pay, &c. with interest. (8)

But, in case there be no assets, a promise by an executor to pay a debt

(1) *Pett v. Wingfeild* (*Inhab. of*), Carth. 231. *Rex v. Pett*, Show, 405. 1 Salk. 66.

(2) *Richards v. Browne*, 3 Bing. N. C. 493.

(3) Com. Dig. Administration (I. 3.). 3 Bac. Abr. Executors (M.), 522. Went. Off. Ex. 227, *et seq.*

(4) Went. Off. Ex. 280. 3 Bac. Abr. Executors (M.), 525. 11 Vin. Abr. Executors, 388. [D. b.]. *Howard v. Jemmet*, 1 W. Black. 400.

(5) But such promise, or some note or memorandum thereof, must be in writing, and signed by him, or some other person by his

authority. *Vide* stat. 29 Car. 2. c. 3. s. 4. *Hawkes v. Saunders*, Cowp. 289. *Rann v. Hughes*, 7 Bro. P. C. 551.

(6) *Trewinian v. Howell*, Cro. Eliz. 91. *Reech v. Kennegal*, 1 Ves. sen. 125. *Hawkes v. Saunders*, Cowp. 293. *Rann v. Hughes*, 7 Bro. P. C. 551. 3 Bac. Abr. Executors (M.), 528. *Scott v. Stevens*, 1 Sid. 89. *Scott v. Stephenson*, 1 Lev. 71. *Lane v. Mallory* (*St. Henry*), 1 Rol. 27.

(7) *Camden v. Turner*, cit. Cowp. 293.

(8) *Childs v. Monias*, 2 B. & B. 460.

of the testator is *nudum pactum*. (1) And on a plea of *plene administravit*, proof of an admission by the executor, *that the debt was just, and should be paid as soon as he could*, is not evidence to charge him with assets. (2)

ACTIONS
AGAINST EX-
ECUTORS AND
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TORS.

An executor's paying interest on a bond due from the testator for the principal (3), or merely submitting to an award, does not amount to an admission of assets. (4)

But if the executor bind himself by a personal engagement to perform the award, or if his submission to arbitration be a reference, not only of the cause of action, but also of the question, whether he has or has not assets and if the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determine, as between the parties, that the executor had assets to pay the debt. The defendant therefore is concluded by the award, although it will not operate as an admission of assets in any other litigation, and he may be attached for non payment. (5)

It should, however, be observed, that by stat. 29 Car. 2. c. 3. s. 4. "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The promise, though in writing, still requires a sufficient consideration to support it (6); and the consideration as well as the promise, must be expressed in the written memorandum or note.

Stat. 29 Car. 2.
c. 3. s. 4.

Executor shall
not answer out
of his own
estate upon a
parol promise.

Executors and administrators cannot in general *be held to bail*, for they are not personally liable, but only in respect of the assets. It were unreasonable to subject them to an arrest in their representative capacity. (7) But they may be held to bail, if it appear, that they have wasted the property (8); although a bare suggestion of a *devastavit* is not sufficient for that purpose; without the oath of the plaintiff. (9) So where, on a judgment against an executor, execution is sued out, and the sheriff returns a *devastavit*, in an action of debt on the judgment, the executor may be required to put in special bail. (10) And where an executor has personally promised to pay a debt, it seems, he may be holden to bail on such promise.

HOLDING EX-
ECUTORS TO
BAIL

16. THE DECLARATION.

THE DECLAR-
ATION.

In an action by a lessor against the executor of the lessee for rent incurred in the testator's time, whether the action be in debt or covenant, the venue is transitory; and so it is in actions, where the executor is sued as ex-

VENUE.

(1) *Pearson v. Henry*, 5 T. R. 8.

(2) *Hindsley v. Russell*, 12 East, 232.

(3) *Pearson v. Henry*, 5 T. R. 8.

(4) *Ibid.* 6.

(5) *Barry v. Rush*, 1 *ibid.* 691. *Pearson v. Henry*, 5 *ibid.* 7. *Worthington v. Barlow*, 7 *ibid.* 453.

(6) *Rann v. Hughes*, 7 *ibid.* 350. *n. Wain v. Walters*, 5 East, 10. *recog. in Saunders v. Wakefield*, 4 B. & A. 595. *Clancy v. Piggott*, 2 A. & E. 481. *Hawes v. Armstrong*, 1 Bing. N. C. 761.

(7) 3 Bac. Abr. Executors (O.), 542. *Goldsmith v. Plat (Lady)*, Cro. Jac. 350. *St. George's case*, Yelv. 53. *Sir Henry Mildmay's case*, Cro. Car. 59. Litt. 2. 1 Crompt. Prac. 29.

(8) 1 Crompt. Prac. 29. *Anon.* 1 Lev 39. *Dupratt v. Testard*, Carth. 264.

(9) 3 Bac. Abr. Executors (O.), 542.

(10) *Ibid.* *Dubray v. —*, Comb. 206. *Boothsby v. Buller*, 1 Sid. 63.

THE DECLARATION.

PARTIES TO SUE
IN ACTIONS BY
EXECUTORS.

Executors must join in the bringing of actions.

Infant co-executor.

Feme covert.

Where one executor refuses to join in the action.

Stat. 25 Edw. 3. c. 5.
Executor of an executor.

ADMINISTRATORS.

ecutor for rent incurred in his own time. But where he is sued in debt in the *debet* and *detinet*, or in covenant, as assignee for rent incurred in his own time, the venue is local. (1)

As executors in their representation of the testator make but one person they must all join in the bringing of actions in his right (2), although some have omitted to prove the will, or have even refused before the ordinary (3); but a defendant can only take advantage of the omission by plea in abatement, after oyer of the probate (4); and if the defendant plead the general issue, the defect is waved. (5)

If an infant be co-executor with other persons of full age, it seems he must join with them in an action, and they shall altogether sue by attorney. (6)

If a married woman be executrix, the husband cannot sue in right of the testator without the wife. (7)

On a judgment against husband and wife executrix, if she survive, an action of debt does not lie suggesting a *devastavit* by the husband; for although, in case she married after the testator's death, she is answerable for the wasting by the husband, yet she shall not be charged *de bonis propriis* for the costs recovered against him. (8)

If A. and B. be appointed executors, and A. refuse to join in such action B. may commence the action in the names of them both; and then, on summoning A., there shall be judgment of severance; that is to say, that B. shall sue alone, or on A.'s default on the summons, there shall be the same judgment, and B. may then proceed in the action, and recover in his own name only; otherwise a co-executor, by collusion with the debtor, might prevent his being sued for the debt. (9) By the death of the party severed the writ will not abate. (10) Nor, if he live till judgment, can he sue out execution, because the recovery is in the name of the other executor alone. (11)

By the stat. 25 Edw. 3. c. 5. the executor of an executor is put on the same footing, in regard to the bringing of actions, as an immediate executor. (12)

An administrator may, in right of his intestate, maintain actions in the same manner, as an executor in right of his testator. (13)

All special and limited administrators may likewise maintain actions in right of their respective intestates. And, indeed, the principle on which the ordinary has the power of granting such administrations is, that there may be a person capable of recovering property belonging to the estate. (14)

(1) *Hellier v. Casbard*, 1 Sid. 266. *Cornel v. Lisset*, 2 Lev. 80. 1 Saund. 241. Williams on Executors, 1521.

(2) 3 Bac. Abr. Executors (O.), 535. Went. Off. Ex. 205.

(3) Went. Off. Ex. 205, *et seq.* Com. Dig. Abatement (E. 13.), Pleader (D. 1.). *Hensloe's case*, 9 Co. 37. *Swallow v. Emberson*, 1 Lev. 161.

(4) 1 Saund. 291. n.

(5) Ibid.

(6) 3 Bac. Abr. Executors (A.), 430. 1 Rol. Abr. Attorney (C.), 288. *Loftus' case*, Cro. Eliz. 278. *Forwist v. Tremaine*, 2 Saund. 212, 213. 1 Vent. 102. 1 Sid. 449. *Coan v. Bowles*, Carth. 124., *vide ante*, ADMINISTRATION DURANTE MINORE ETATE.

(7) Com. Dig. Administration (D.). Went. Off. Ex. 212.

(8) Com. Dig. Administration (L. 3.). *Horsy v. Daniel*, 2 Lev. 161.

(9) *Price v. Parkhurst*, Cro. Car. 420. 2 Rol. Abr. Judgment (C.), 98. Went. Off. Ex. 224.

(10) *Anon.* Cro. Eliz. 652. Co. Litt. 139.

(11) Went. Off. Ex. 205, *et seq.*

(12) *Vide* *ibid.* 257. *Lambert and Slaby's case*, Godb. 262.

(13) Com. Dig. Administration (B. 13.). Went. Off. Ex. 482.

(14) *Walker v. Woollaston*, 2 P. Wms. 576. *Sir Moyle Finch's case*, 6 Co. 67. (b.)

If there be several administrators, they must, like co-executors, all join in an action. (1) THE DECLARATION.

K. being left executor, M., as his attorney, obtained letters of administration to the testator's effects, with the will annexed, for the benefit of K., who never took out probate. K. died, having appointed an executor, and S. took out administration with the will of the first testator annexed, and also administration with the will of K. annexed, for the benefit of K.'s executor, till that executor should himself obtain probate. M. was still living, and the goods of the first testator were not fully administered: — It was held, that during the life-time of K. the goods of the first testator vested not in him, but in M. as the personal representative of the first testator, but that after K.'s death, M. ceased to be such representative; and consequently, that arrears of interest becoming due to the estate of the first testator in the lifetime of K. were not recoverable in *assumpsit* by S. as his personal representative; but that S. might, by virtue of the administration taken out by him, bring *assumpsit* for such arrears accruing after the administration was granted. (2)

Where one or two *joint* obligees, covenantees, or partners die, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. (3) And although the right of a deceased partner devolves on his executor, yet the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased. (4)

Where one or two joint obligees, covenantees, or partners, die.

It follows, that where the contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him, cannot be joined.

But if the interest of the covenantees be several, and one of them die, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living; and if the *interest* be several, it will make no difference, that the *language* of the covenant is joint.

Where the interest of the covenantees is several; and where joint.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship will be enforced, although the covenant be in terms joint and several. (5)

The rule is the same with respect to actions in form *ex delicto*, as those in form *ex contractu*. Therefore, if one or more of several parties jointly interested in property at the time an injury was committed be dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. (6)

An executor *de son tort* is not entitled to bring any action in right of Executor *de son tort*.

(1) Com. Dig. Abatement (E. 14.), (Collector of), 2 M. & S. 225. 2 Saund. Pleader (D. 10.). 117. It appears from the foregoing authorities, that the case of *Hall v. Rougham*,

(2) *Suwerkrop v. Day*, 8 A. & E. 624. (3) *Keb. 798.*, Freem. 468.) is overruled. (5) 1 Saund. 154. *Withers v. Bircham*, 3

(3) *Martin v. Crump*, 2 Salk. 444. 1 Ld. Raym. 340. Comb. 474. (4) Ibid. *Kemp v. Andrews*, Carth. 171. B. & C. 254. *Lane v. Drinkwater*, 1 C. M. 1 Show. 188. 3 Lev. 290. *Golding v. Vaughan*, 2 Chitt. 437. *Rex v. Customs* & R. 599.

(6) Williams on Executors, 1462—1464.

THE DECLARATION.**PARTIES TO SUE IN ACTIONS AGAINST EXECUTORS.**

If there be several executors they must be all sued.

Surviving executors.**Executor of a deceased partner.****Feme covert and a stranger.****Executor *de son tort*.**

the deceased; because as he comes in by wrong, he is liable to all the troubles of an executorship, without any of its privileges.(1)

If there be several executors, they must be all sued (2), in case they have all administered. But such as have not administered may be omitted (3), for creditors and strangers are bound to take notice of such executors only, as in fact execute the office. If one only confess a judgment, it seems, that it shall not bind nor conclude the rest. If they plead distinct pleas, it is said, that the plea which is best for the estate, or most decisive of the question, shall be received. Of co-executors, if some are full age, and others infants, the action may be against them all; but the latter cannot appear with others by attorney, but must appear by guardian.

If any of the executors die, the action must be brought, not against the surviving executors and executors of deceased executors, but against surviving executors only.(4)

The executor of a deceased partner and the survivor, cannot be jointly sued for a debt due from the partnership, because the former is to be charged *de bonis testatoris*, the latter *de bonis propriis*(5); but the creditor may proceed against either, who may claim contribution from the other. But if the executors of a deceased partner continue his share of the partnership property in trade, for the benefit of his infant daughter, they are liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names are not added to the firm, but the trade is carried on by the other partners under the same firm as before, and the executors, when they divide the profit and loss of the trade, carry the same to the account of the infant, and take no part of the profits themselves.(6)

If a feme covert and a stranger are executors, the action must be against the stranger, executor, and the husband and wife executrix.(7)

If a person intermeddle as executor with the estate of the deceased, he may in general be sued as executor *de son tort*, although there be a lawful executor (8); and in such case he is uniformly declared against, as if he were a lawful executor, though the party died intestate; and he may be joined in the same action with the lawful executor, though not with the lawful administrator.(9) And if the husband of an executrix after her death, detain part of the goods of the testator, he may be sued as executor *de son tort*.(10) So, if a stranger take away the goods of the deceased, and there be no lawful executor, he also is liable to be sued as executor *de son tort*, though he claim them as his own (11); but in this case, if there be a lawful executor or administrator, the stranger cannot be sued as executor *de son tort*.(12) And no person can ever be sued as administrator *de son tort*, nor can an executor *de son tort* of an executor *de son tort* be sued as such at law.(13)

(1) 2 Black. Com. 507. *Walker v. Woolaston*, 2 P. Wms. 576. *Sir Moyle Finch's case*, 6 Co. 67. (b.)

(2) 1 Chitt. Pl. 51.

(3) *Swallow v. Emberson*, 1 Lev. 161. *Quick v. Copleston*, 1 Sid. 242.

(4) 1 Rol. Abr. Executors (Z.), 928.

(5) *Hall v. Huffam*, 2 Lev. 228.

(6) *Wightman v. Townroe*, 1 M. & S. 112.

(7) Com. Dig. Abatement (F. 20.).

(8) *Read's case*, 5 Co. 34. (a.)

(9) 1 Saund. 265. n. (2.) Com. Dig. Administrator (C. 3.).

(10) 1 Chitt. Pl. 51.

(11) *Read's case*, 5 Co. 33 (b.)

(12) Ibid. 34. (a.).

(13) *Anon.* 2 Mod. 293, 294. *Hansard v. Galliffe*, Andr. 252.

In an action by and against executors and administrators the declaration should technically be in the *detinet* only, except in an action upon a judgment recovered against an executor suggesting a *devastavit*, where the *debet* and *detinet* is proper (1), and the defendant cannot in such action plead *plene administravit*. (2)

THE DECLARATION.

DECLARATION SHOULD TECHNICALLY BE IN THE DETINET ONLY.

But a declaration in the *debet* and *detinet* against an executor, is not subject to a special demurrer, as the former will be rejected as surplusage. (3)

If a man name himself executor or administrator, and it appears that the cause of action is in his own right, it will be no objection, for the calling himself "executor" is but surplusage. (4)

But if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *econtra*, it is substantially inaccurate. (5) But by stat. 16 & 17 Car. 2. c. 8. it is aided after verdict (6); and by stat. 4 Anne, c. 16. on a general demurrer, or after a judgment by default. (7)

If the money recovered on each of the counts will be assets, the counts may be joined in the same declaration. (8)

Joinder of counts.

In a declaration in *assumpsit* brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. (9)

Statement of promise.

In all actions by and against executors and administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, is not in any case considered in issue, unless specially denied. (10)

Character in which executors sue not considered in issue, unless specially denied.

If the grant of probate &c. be absolutely void or repealed, or the seal be forged, a simple denial of the plaintiff's character seems sufficient (11); but when it is avoided, as to the particular cause of action by extrinsic matter, it should be specially pleaded. (12)

The plea of the general issue only admits the title stated in the declaration, and therefore if that title be insufficient, the plaintiff cannot recover. Thus, in an action by an administrator, on a judgment recovered by his intestate in the King's Bench at Westminster (which is *bonum notabile* in Middlesex), where the plaintiff made *profert* of letters of administration from the archdeacon of Dorset, and the defendant pleaded a plea, which admitted the letters of administration:—It was held, on motion in arrest of judgment, that in order to enable the plaintiff to recover, he ought to have had letters of administration from the bishop of London; and that the plea only admitted the plaintiff's title as stated, which was insufficient. (13)

Plea of the general issue only admits the title stated in the declaration.

(1) 1 Rol. Abr. Dett (P. Q.), 602. 2 Bac. Abr. Debt (F.), 626. Com. Dig. Pleader (W. 8.).

(2) *Skelton v. Hawling*, 1 Wils. 258.

(3) *Gardner v. Barman*, 4 Tyrw. 412. 1 Chitt. Pl. 361.

(4) *Hornsey v. Dimocke*, 1 Vent. 119. Com. Dig. Pleader (D. 1.). *Hargraves v. Holden*, 1 C. M. & R. 580. n. (a.) *Aspinall v. Wake*, 10 Bing. 51. 3 M. & Sc. 426.

(5) *Reynell (Sir George) v. Langcastle*, Cro. Jac. 545. Com. Dig. Pleader (D. 1.). *Collett v. Collett*, 3 Dowl. P. C. 211.

(6) *Coomber v. Watton*, 1 Sid. 342. *Frederick v. Paynton*, 1 Lev. 251. Com. Dig. Pleader (D. 1.).

(7) *Lee v. Pilmy*, 2 Ld. Raym. 1513.

(8) 2 Saund. 117. (d.) *Gallant v. Boute-flower*, 3 Doug. 34.

(9) *Hirst v. Smith*, 7 T. R. 182. Where the affidavit of debt and the writ stated the debt to be due to the plaintiff's "executors of," and not "as executors of," and the declaration stated it to be due to them in their own right, it was held to be no variance. *Anon.* 1 Dowl. P. C. 97.

Where, however, the plaintiff had assisted the defendant in her general character, and then declared against her in the character of executrix, it was held that the bail was entitled to be discharged. *Manesty v. Stevens*, 9 Bing. 400. 1 Dowl. P. C. 711.

(10) *D'Aranda v. Houston*, 6 C. & P. 511.

(11) Bull. N. P. 143.

(12) *Stokes v. Bate*, 5 B. & C. 491.

(13) *Adams v. Savage (Tertnants of)*, 6 Mod. 134. Roscoe's Ev. 604.

THE DECLARATION.

STATEMENT OF
LETTERS OF
ADMINISTRATION.

Profert.

A declaration by an administrator, should contain a statement of the grant of the letters of administration; but it seems, that the omission of the date of the grant is immaterial. (1)

It is requisite for an executor when he declares as such, to make a *profert in curia* of the letters testamentary, and for an administrator to make a *profert* of the letters of administration.

If an executor declaring as such, make *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant it should seem, in order to raise the objection, must demand oyer; for if he plead, that the plaintiff never was, nor is executor "in manner and form as alleged in the declaration," the plaintiff will succeed on this issue, if he obtain probate at any time before the trial. (2)

Where the letters of administration, reciting that R. R. was an executor, were set out on oyer, it was held, that an express averment of the fact in the defendant's plea became unnecessary. (3)

In a declaration by an administrator, it is sufficient to state, that administration was granted by the court of prerogative, without naming the judge of that court. (4)

JOINDER OF
COUNTS.

In actions by
executors.

The plaintiff cannot join in the same declaration, a demand as executor or administrator, with another which accrued in his own right; and such misjoinder is a defect in substance, and therefore bad on a general demurrer, or in arrest of judgment, or in error. (5)

In *M'Clelland v. M'Adam* (6), where in the general *indebitatus* count it was stated, that defendant was indebted to the plaintiff as executrix, for money lent by the plaintiff to the defendant, and the other considerations in the same count, were alleged to move from the plaintiff as executrix, and the promise was alleged as made "to the plaintiff executrix as aforesaid:"—It was held on special demurrer, that the declaration was vitiated by this misjoinder of different considerations in different rights, but that if they had all appeared to have been in the same right; it would have been sufficient, if any one consideration were properly averred, as the remaining considerations might be rejected.

In *Lancefield v. Allen* (7), a count in the declaration by an executor stated, that the defendant had accounted with the plaintiff's "executors as aforesaid," which was joined with counts stating promises to the testator. After a verdict and judgment for the plaintiffs, a writ of error was brought upon the ground of the misjoinder, but the judgment was affirmed with costs.

In actions
against execu-
tors.

A plaintiff cannot have an action against a defendant to charge him as executor, and also in his own right, for the judgment in the one case, is *de bonis propriis*, and in the other *de bonis testatoris*. (8) And such misjoinder is a substantial defect. (9) Therefore a count for money *had and*

(1) *Hughes v. Williams*, 2 C. M. & R. 331.

(2) *Thompson v. Reynolds*, 3 C. & P. 123. The "letters testamentary" incorporate by necessary and express reference the will annexed; therefore, if oyer be craved of the "letters testamentary," the plaintiff should give a copy as well of the will as of the certificate of the ordinary.

(3) *Roth v. Enniskillen (Earl of)*, 1 Hudson & Brooke (Irish), 187.

(4) *Collis v. Mahon*, 1 Jones (Irish), 132.

(5) 2 Saund. 117. (e.) n. Tidd, 12.

(6) 1 Alcock & Napier (Irish), 488.

(7) 1 Bligh, N. S. 592.

(8) *Herrenden v. Pabner*, Hob. 88. *Hall v. Huffum*, 2 Lev. 228.

(9) *Jennings v. Newman*, 4 T. R. 347. *Rose v. Bowler*, 1 Hen. Black. 108. *Briden v. Parkes*, 2 B. & P. 424. 2 Saund. 117 (e.) n. *Foxwist v. Tremaine*, ibid. 210. *Corner v. Shew*, 4 M. & W. 163., vide *Haydn v. Moat*, 5 Dowl. P. C. 298.

received by the defendant, as executor, for the plaintiff's use (1), or for *money lent* to the executor as such, cannot be joined to a count on a promise made by the testator. (2) So a count upon a promise by the defendant as executor, for *use and occupation* after the death of the testator, cannot be joined in the same declaration with a count upon promises by the testator to pay rent; inasmuch as the former makes the defendant personally liable, whereas the latter makes him liable only to the extent of assets. (3) Again, a count for *goods sold* to or *work done* for the defendant, as executor, cannot be joined with a count for a debt due from the defendant in his representative capacity; for, since no goods can be sold to, or work performed for, another in his representative character, the claim in respect thereof, is necessarily from the defendant in his own right. (4) If, in fact, the goods or work had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor, the declaration instead of containing the common counts for goods sold to, and work done for, the executor, should state the contract to have been made with the testator, and that at the time of his death, the work was incomplete, but was finished afterwards; and that the defendant, as executor, then promised to pay.

THE DECLARATION.

But a count on an *account stated* with the defendant as executor, whether the account be averred to have been stated of money *due from the testator* to the plaintiff, or of money *due from the defendant as executor* to the plaintiff, may be joined to counts on promises made by the testator; and so may a count for *money paid* by the plaintiff to the use of the defendant *as executor*. For these counts do not charge the defendant personally; but he may plead *plene administravit*, and the judgment is *de bonis testatoris*. It must be observed, that whenever an executor or administrator is sued upon promises by him in that character, the words "as executor" must be inserted in each count in stating the promise, and also in stating the debt, or cause of action, if it be laid to have accrued after the death of the testator or intestate. (5)

Counts which do not charge the defendant personally.

In an action by or against executors where six years have elapsed since the death of the testator, or if it be on any other account material for the plaintiff to avail himself of a promise or acknowledgment by the defendant since the death, it may be necessary to add all or one of the common counts on promises to or by the executor in that character, for otherwise such promise or acknowledgment cannot be given in evidence. (6)

Statute of Limitations.

And on a plea of the Statute of Limitations to a declaration containing only counts on promises to the testator, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself, after the death of the testator. (7)

(1) *Parker v. Baylis*, 2 B. & P. 73.

(2) 2 Saund. 117. (e.) n.

(3) *Wigley v. Ashton*, 3 B. & A. 101.

(4) *Corner v. Shew*, 3 M. & W. 350.

(5) *Brigdon v. Parkes*, 2 B. & P. 424. 1

Chitt. Pl. 204. 206. Williams on Executors, 1522.

(6) *M'Lachlan v. Evans*, 1 Y. & J. 380. 2 Saund. 207, 208. 1 Chitt. Pl. 360.

(7) *Sarell v. Wine*, 3 East, 409., vide *Tanner v. Smart*, 6 B. & C. 608.

THE PLEADINGS.

Executor can plead any matter which his testator might have done.

Executors can plead differently.

Liability to real and not to personal representative.

NON ASSUMPSIT.

Stat. 2 Geo. 2. c. 22. s. 13.
Set-off.

Equitable demand cannot be set-off at law.

Tender.

Ne unques executor.

17. THE PLEADINGS.

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded. (1)

If there be several executors, they may plead different pleas, and that which is the most advantageous to the testator will be received. (2)

Where a man accepts a lease, reserving the rent to the lessor and his executors, and is sued for rent by the executors, if he allege, that he is liable to the real and not to the personal representatives of the testator, he must plead it specially; and it does not lie on the executors to shew, that the testator's interest was a chattel interest. (3)

Where in an action by an executor on a promissory note, the declaration alleged a promise to the plaintiff after the death of the testator:—It was held, that *non assumpsit* was a good plea. (4)

If an executor declare on a bill or note payable to his testator, laying a promise to pay himself, such promise may be denied by the plea of *non assumpsit*, the statement of the bill or note in such a case being only matter of inducement, from which the promise to pay the executor is implied by law. (5)

By stat. 2 Geo. 2. c. 22. s. 13., where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. But in an action by an executor in his own name to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set-off a debt due to him from the testator. (6)

It seems under this statute, an equitable demand cannot be set-off at law. (7)

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him as executor or administrator to the defendant. (8)

A defendant sued as executor or administrator cannot set-off a debt due to himself personally; nor if issued for his own debt, can he set-off what is due to him as executor or administrator; because debts sued for, and intended to be set-off, must be mutual and due in the same right. (9)

Whenever a tender with *tout temps prist* is pleaded by an executor or administrator, he must allege that his testator or intestate was at all times, from the time of making the promise to the time of his death, ready to pay, and that he the defendant has, at all times since the death of his testator or intestate, been ready to pay. (10)

A person sued as an executor, can deny his being such by specially

(1) Com. Dig. Pleader (D. 8.).

(2) *Chaffe v. Kelland*, 1 Rol. Abr. Executors (A. 1.), 929. Went. Off. Ex. 205, et seq. *Elwell v. Quash*, Str. 20.

(3) *Warburton v. Ivie*, 1 Jones (Irish), 313.

(4) *Gilbert v. Platt*, 5 Dowl. P. C. 748.

(5) *Timmis v. Platt*, 2 M. & W. 720. 5

Dowl. P.C. 748. Kennedy, N. R. 133. Lutwyche, Pl. 21.

(6) *Shipman v. Thompson*, Willes, 103. *Schofield v. Corbett*, 6 N. & M. 527.

(7) *Tucker v. Tucker*, 4 B. & Ad 751.

(8) *Gallant v. Bouleflower*, 3 Doug. 34.

(9) *Bishop v. Church*, 3 Atk. 691. *Galt v. Luttrell*, 1 Y. & J. 180.

(10) *Clemens v. Reynolds*, Sayer, 18.

pleading *ne unques executor* or *administrator*; but unless pleaded, his representative character is admitted.

THE PLEAD-
INGS.

The plea of *ne unques executor* does not deny the cause of action, but only, that the defendant is one of the representatives of the testator (1), and under such plea it will suffice to give evidence of such circumstances, as will render the defendant liable as *executor de son tort*.

If the defendant being sued as administrator plead, that before the date of the writ his administration was revoked and granted to another, he ought to allege, that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator. (2)

When letters of administration have been revoked.

In *assumpsit* against several defendants as executors with plea of *ne unques executors*, the plaintiff may have a verdict against the real executors, on the counts laying the promises by the testator, and the other defendants must be discharged (3), and the plaintiff cannot recover on counts upon promises by all the defendants as executors. (4)

When letters of administration have been obtained in an inferior diocese, the defendant may plead in bar, that they were *bona notabilia*, and may give that fact in evidence, under the plea of *ne unques executor* (5), for the ordinary has no jurisdiction to grant probate, and the grant is therefore void.

Administration obtained in an inferior diocese.

If the defence be, that the letters of administration were unfounded, on the ground, that the defendant did not reside within the diocese of the bishop who granted administration, but in a different province, at the time of the death of the intestate, that fact should be specially pleaded; it cannot be given in evidence under the plea, "that the plaintiff was not, nor is administrator," &c. (6)

Illegal letters of administration.

If in an action against a person as executor, he plead a retainer for a debt due to himself, and the plaintiff reply, he was only executor *de son tort*, the defendant may, by way of plea *puis darrein continuance*, rejoin, that he has since obtained letters of administration. (7)

Puis darrein continuance.

It may be pleaded in abatement, in an action by an administrator, that the plaintiff's letters of administration have been revoked *puis darrein continuance*. (8) A defendant sued as executor *de son tort* may plead, that he has since obtained letters of administration, to support a previous plea of retainer in the character of executor. (9)

If an administrator *pendente lite* plead in bar to an action, brought against him as administrator generally, without disclosing the nature of his authority, he is estopped from pleading *puis darrein continuance*, that he was such a limited administrator, and that his administration had ceased. (10)

Unless a *devastavit* be suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable, as the fiat would not find any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fieri facias*. (11)

Bankruptcy of executor.

(1) 1 Saund. 207. (a.) n.

(2) *Garter v. Dee*, Freem. 13.

(3) *Griffiths v. Franklin*, M. & M. 146.

(4) *Ibid*.

(5) 1 Saund. 274. n. (3.)

(6) *Stokes v. Bate*, 5 B. & C. 491.

(7) *Vaughan v. Browne*, Str. 1106.

(8) Bull. N. P. 309. Com. Dig. Abatement (T.), 24.

(9) *Vaughan v. Browne*, Str. 1106. 1 Saund. 265. n. (2.)

(10) *Ginty v. Costello*, 1 Jones (Irish), 17.

(11) *Serle v. Bradshaw*, 2 C. & M. 148.

THE PLEAD-
INGS.PLENE AD-
MINISTRATIVIT.Essential aver-
ments.Plea which is
bad in part, is
bad in toto.If several exe-
cutors plead
plene adminis-
travit, the
plaintiff may
succeed as to
one of them
only.Where *plene*
administravit
no bar to an
action against
executor, upon
a covenant by
the testator.If administra-
tor plead in-
consistent
pleas, judgment
may be signed.

If an executor or administrator have not assets to pay the debts or legacies of his testator, he must plead *plene administravit*, or *plene administravit præter &c.*; for a judgment against an executor or administrator, whether by default or on demurrer (1), or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra* (2), is conclusive upon him, that he has assets to satisfy such judgment. (3)

The essential part of the plea of *plene administravit* is, that "the said defendant has no goods which were of the said A. B. (the testator), at the time of his death, in the hands of the said defendant as executor, to be administered, or had, at the time of the commencement of the suit, or ever since;" and the omission of any of such averments will be fatal on demurrer, as well in a general, as a special *plene administravit*. (4)

A plea which is bad in part is bad *in toto*; if therefore two defendants join in a plea, which is sufficient for one, but not for the other, the plea is bad as to both, for the court cannot sever it, and say, that one is guilty and the other is not, when they all put themselves on the same terms; but this rule does not apply, when the objection to the plea is merely on account of surplusage; and if several executors join in the same plea of *plene administravit*, each will only be liable to pay the assets found by the jury to be in his own hands, though it is more usual for each executor to plead separately. (5)

A plaintiff who sues several persons as executors, shall not be defeated *in toto*, upon causes of action stated in the declaration to have accrued to the deceased merely on the ground, that one of the defendants was not an executor, and succeeded in his plea to that effect; but in such case the plaintiff cannot recover on counts laying promises by the defendants as executors. (6) So, if several executors plead *plene administravit*, the plaintiff may succeed as to one of them only. (7)

Plene administravit is no bar to an action against an executor upon a covenant by the testator, when the executor has paid over the residue within six months after probate (8); and where an administrator, being under terms to plead issuably, pleads inconsistent pleas, e. g. *plene administravit* and his own bankruptcy, the plaintiff may sign judgment for want of a plea.

An executor, after payment of all the debts of which he had notice, invested certain parts of the residue of the testator's personal estate remaining in his hands in the funds in his own name, received the dividends, and paid them over to the legatees in satisfaction of their legacies given by the will: — It was held, that under these circumstances, the executor could not sustain a plea of *plene administravit* to an action brought against him fifteen years after the testator's death, for a specialty debt of the testator's, of which he had no notice. (9)

(1) *Rock v. Leighton*, 1 Salk. 310. *Leonard v. Simpson*, 2 Bing. N. C. 176.

(2) *Ramsden v. Jackson*, 1 Atk. 292. *Erving v. Peters*, 3 T. R. 685.

(3) 1 Saund. 219. (b.) n.

(4) *Hewlet v. Framingham*, 3 Lev. 28. 2 Saund. 216. n. (1.) *Gewen v. Roll*, Cro. Jac. 132.

(5) 1 Saund. 336. n. (10.)

(6) *Griffiths v. Franklin*, M. & M. 146.

1 Saund. 207. (a.) n.

(7) 1 Chitt. Pl. 52.

(8) *Davis v. Blackwell*, 2 M. & Sc. 7. 9

Bing. 5.

(9) *Smith (Knight) v. Day*, 2 M. & W. 684.

The payment of legacies is no answer to the claims of a creditor, where the action is brought against the personal representative of the debtor. (1)

THE PLEAD-
INGS.

This court will not compel a personal representative, who pleads *plene administravit*, to furnish a particular of the dates, amounts of payments, and nature of the demands paid in the administration of the assets. (2)

Bill of particulars.

Personal property of a testator in the hands of a receiver, appointed by the court of Chancery before probate was granted to the executor, is not assets in the hands of the executor, wherewith he is chargeable upon a plea of *plene administravit*. (3)

Property in the hands of a receiver.

An executor is bound to plead a debt of a higher nature, of which he has notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra* if he have not assets for both, otherwise it will be an admission of assets to satisfy both debts. (4) Thus, the executor is bound to plead a judgment recovered against the testator in bar of an action on a bond, otherwise he will admit, that he has assets to satisfy the judgment. (5)

Plene administravit præter.

Testator being indebted to R., deposited with him a policy of assurance on testator's life, as security for the debt and for a further advance then made by R., and died leaving R. and M. his executors. R. still holding the policy, applied to the insurers for the amount due on it, 200*l.*, which they refused to pay unless R. and M. gave a receipt for it as executors. They did so, R. making protest, that he signed as executor merely to satisfy the insurers. In an action by a judgment creditor, to which the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.), it was held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R. (6)

In actions, whether of *assumpsit*, debt, or covenant, against an executor or administrator as such, to the plea of *ne unques executor* or *administrator*, the plaintiff may re-assert the fact.

REPLICATIONS
TAKING JUDG-
MENTS OF
ASSETS QUAN-
DO, &c.

To a plea of *plene administravit* if untrue, the plaintiff should reply that, at the time of exhibiting the bill, or the commencement of the suit, the defendant had assets; or if assets have come to his hands since the commencement of the suit and before the plea (7), or if at the time the defendant first had notice of the action he had assets, but unduly administered them afterwards, these facts may be replied to specially.

Plea of judgments outstanding.

If the plea be *plene administravit*, except a sum not sufficient to satisfy bonds or judgments outstanding, the plaintiff can reply, that the defendant had assets *ultra*, or that the judgments mentioned in the plea were obtained by fraud and covin, or suffered fraudulently for more than was due (8), or that the bond pleaded as an outstanding debt, is satisfied and kept on foot by fraud. (9)

If the plaintiff cannot deny the plea of *plene administravit*, he should

(1) *Pearson v. Archdeaken*, 1 Alcock & Napier (Irish), 23.

(2) *Grand Canal Comp. v. Connolly*, 2 Hudson & Brooke (Irish), 343.

(3) *Dowling v. Shine*, 1 Jones (Irish), 116.

(4) *Rock v. Leighton*, 1 Salk. 310.

(5) *Earle v. Hinton*, Str. 732. Williams on Executors, 1535.

(6) *Glaholm v. Rowntree*, 6 A. & E. 710. A plea of *plene administravit* does not require a counsel's signature. *Read v. Speer*, 5 Dowl. P. C. 330.

(7) *Mara v. Quin*, 6 T. R. 10.

(8) *Pease v. Naylor*, 5 ibid. 82.

(9) Com. Dig. Pleader (D. 9.).

THE PLEADINGS.

Where debt or cause of action denied.

Judgment.

Costs.

pray judgment of assets *quando acciderint*, either generally or specially, as "which after satisfying moneys due on the outstanding judgments, bonds, &c. mentioned in the defendant's plea, shall come to the defendant's hands as executor, &c. to be administered" (1); or if *plene administravit præter*, a sum acknowledged to be in hand has been pleaded, the plaintiff should pray and take judgment *pro tanto*, and of assets *quando acciderint* as to the residue, in case the plea be true.

If the defendant have pleaded the general issue, or any other plea denying the debt or cause of action, with the plea of *plene administravit*, the plaintiff must proceed to trial to establish his debt, and on the prayer of judgment of assets *quando*, &c. upon the plea of *plene administravit*, there is a stay of judgment till the determination of the issue. But where the debt has not been denied, and the plaintiff has merely pleaded *plene administravit* generally or specially, and the plaintiff prays judgment of assets *quando acciderint* thereon, there should be an entry of that judgment immediately, and an award of an inquiry to ascertain the amount of the plaintiff's demand, unless the defendant has by *cognovit* confessed the same, in order to save the expense of an inquiry, or unless in reference to the form of action, the judgment is final in the first instance, as in debt, &c. On a plea of *plene administravit præter*, the plaintiff is entitled to judgment of assets in *future quando* for costs as well as for the debt (2); and the plaintiff should not take issue on the plea, for if he do, and the plea be found for the defendant, the latter will be entitled to costs. (3)

EVIDENCE.

PROOF OF THE TITLE OF EXECUTOR OR ADMINISTRATOR.

Seal of ecclesiastical court proves itself.

Exemplification of probate.

Probate to one of several executors, is evidence of the title of all.
Title of administrator.

18. EVIDENCE.

If the plaintiff's character of executor or administrator be denied by the pleadings, he must prove his title as executor or administrator. The title of an executor is established by proof of the death of the testator and by the production of the probate.

The seal of the ecclesiastical court on the probate proves itself. (4) If the probate be lost, the ecclesiastical court will grant an exemplification which will be evidence of the proving of the will (5); or an examined copy of the act book of the court, containing an entry of the will having been proved, &c. will be sufficient, without accounting for the non production of the probate. (6) The original will, though produced by the officer of the court, cannot be read in evidence, unless it bears the seal of the court or some other mark of authentication. (7)

Where there are several executors, probate to one only is evidence of the title of all. (8)

The title of the plaintiff as administrator may be proved by the production of the letters of administration, or of a certificate or exemplification

(1) Com. Dig. Pleader (D. 9.).

(2) *Cox v. Peacock*, 2 Scott, 125.

(3) *Iggulden v. Terson*, 2 Dowl. P. C. 277.

(4) *Kempton v. Cross*, C. T. H. 108. 2 Stark. Ev. 441. 3d ed.

(5) *Shepherd v. Shorthose*, Str. 412. Bull. N. P. 246.

(6) *Cox v. Allingham*, Jacob, 514.

(7) *Rex v. Barnes*, 1 Stark. 243. *Pinney v. Pinney*, 8 B. & C. 335.

(8) *Walters v. Pfeil*, M. & M. 362.

thereof granted by the ecclesiastical court (1), or by the original book of acts directing the grant of the letters (2), or by an examined copy of the act book. (3)

EVIDENCE.

Where a bond is *bona notabilia* without the province of Canterbury, being in Dublin, the court will take judicial notice, that the granting letters of administration belonged to some court in Ireland. (4)

Judicial notice of the Irish courts.

After notice to defendants' executors to produce probate, and refusal by them to do so, an instrument produced by the officer of the ecclesiastical court, purporting to be the will of the defendants' testator, and indorsed by the officer, as being the instrument whereof probate had been granted to the defendants, and that they had sworn to the value of the effects, was held to be admissible in evidence, in an action against defendants for money had and received by their testator. (5)

Refusal by executors to produce probate.

By Reg. Gen. H. T. 4 Will. 4. s. 21., in all actions by and against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied. (6)

Reg. Gen. H. T. 4 Will. 4. s. 21.

A will of lands being lost, the probate is not even admissible as secondary evidence of its contents. (7) And a probate is not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character (8)

EFFECT OF PROBATE. Where the will is lost.

The probate is the only evidence of a will of personalty (9); and, as long as it remains unrepealed, it cannot be impeached in the temporal courts. (10)

Only legitimate evidence of personal property being vested in an executor.

A will of a feme covert, authorised by a power in her marriage settlement, cannot be given in evidence to shew a title to personal property, except it have been proved in the ecclesiastical court. (11)

Though a person has not been a party to a suit respecting the granting a probate, he is not admitted to prove, that another person was appointed executor, or that the testator was insane (12), or that the will was forged.

The assignation book at the prerogative court, is good evidence to prove the revocation of a probate. (13)

Assignation book.

Letters of administration, which have been granted to a person as administrator of A. B. deceased, are not legitimate proofs of A. B.'s death. (14) The probate is not evidence that copyholds pass by it (15), and the probate of a will is not, at least, conclusive evidence of its validity, on an indictment for the forgery of the same will. (16)

Validity of will.

It may be shewn, that a probate is forged, because such evidence supposes that the spiritual court has given no judgment (17); and he may shew, that

Forged probate.

(1) Bull. N. P. 246. (a.)

(2) Ibid. *Elden v. Keddell*, 8 East, 187. Per Bayley J. in *Ramsbottom v. Buckhurst*, 2 M. & S. 567.

(3) Ibid.

(4) *White v. Ross*, 4 Jur. 986.(5) *Gorton v. Dyson*, 1 B. & B. 219.(6) Vide *Davis v. Williams*, 13 East, 232. *Cox v. Allingham*, Jacob, 514.(7) *Doe d. Ash v. Calvert*, 2 Camp. 389.(8) *Hume v. Rundell*, 6 Madd. 331.(9) *Rex v. Netherseal (Inhab. of)*, 4 T. R. 258.(10) *Allen v. Dundas*, 3 ibid. 125.(11) *Stone v. Forsyth*. Doug. 707.(12) *Noell v. Wells*, 1 Lev. 236.(13) *Rex v. Ramsbottom*, Leach, C. C. 25. n.(14) *Thompson v. Donaldson*, 3 Esp. N. P. C. 63.(15) *Jervoise v. Northumberland (Duke of)*, 1 J. & W. 570.(16) *Rex v. Buttery*, R. & R. C. C. 342.*Rex v. Gibson*, ibid. 343. n. (a.) overruling *Rex v. Vincent*, Str. 481.(17) *Chichester v. Philips*, Sir T. Raym. 404. *Noell v. Wells*, 1 Sid. 359. 1 Lev.236. Bull. N. P. 246. (b.) *Prince's case*, 5 Co. 30. *Allen v. Dundas*, 3 T. R. 125. Thus letters of administration are revoked Bull. N. P. 246. (b.)

EVIDENCE.	the particular spiritual court granting probate had no jurisdiction under the circumstances; as, that the supposed testator was still alive, or that he left <i>bona notabilia</i> .
Inventory. PROBATE STAMP.	An <i>inventory</i> , exhibited for the purpose of obtaining probate in the ecclesiastical court, seems not to be, in general, presumptive evidence of assets to the amount stated (1); and the probate stamp seems not to be <i>prima facie</i> evidence of the receipt of assets to the amount covered by the stamp. (2)
Testator's death.	To prove a person dead, the production of the letters of administration, granted by the ordinary, is not of itself sufficient evidence. (3)
<i>Plene administravit</i> .	An executor can either plead a retainer of a debt due to him, or may give it in evidence on the plea of <i>plene administravit</i> . (4) Upon <i>plene administravit et issint riens inter mains</i> (5), if it be proved, that the executor hath goods in his hands which were the testator's, he may give in evidence, that he hath paid to that value of his own money, and need not plead it specially. In an action of case, against executor upon <i>plene administravit</i> , "the plaintiff must prove his debt, otherwise he shall recover but <i>1d.</i> damages, though there be assets, for the plea only admits the debt, but not the quantity." (6) Where the defendant pleads a retainer and also a judgment recovered, which together cover the assets, it is sufficient for the plaintiff to falsify either claim. (7)
Evidence of assets.	A debt due from the plaintiff to the defendant as executor, is evidence of assets, on the plea of <i>plene administravit</i> . (8)
DEVASTAVIT.	If an executor or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment suggesting a <i>devastavit</i> , be allowed to shew, that he has not assets: and it will be sufficient for the plaintiff, upon issue on the plea of <i>non devastavit</i> , to prove the former judgment and the return of <i>nulla bona</i> to the <i>fieri facias</i> . (9) When the defendant pleads <i>non est factum testatoris</i> , or a release to the testator, or payment by him, or <i>non assumpsit</i> , these pleas admit assets. (10) So a judgment for the plaintiff on demurrer, or by default, will be evidence of assets (11), though no <i>devastavit</i> has been returned by the sheriff. (12)
Evidence of <i>devastavit</i> .	On a <i>scire fieri</i> inquiry, the judgment against the executors on a false plea, is sufficient evidence of a <i>devastavit</i> . (13)

On the want of jurisdiction, vide *Betsworth v. Betsworth*, Sty. 10. 12 Vin. Abr. Evidence, 128. [A. b. 58.].

(1) *Stearn v. Mills*, 4 B. & Ad. 657. In *Hickey v. Hayter*, 1 Esp. N. P. C. 313., an inventory exhibited by an administrator was held to be *prima facie* evidence of assets.

(2) *Per* Littledale and Parke Js. in *Stearn v. Mills*, 4 B. & Ad. 657, vide *Foster v. Blakelock*, 5 B. & C. 328. *Mann v. Lang*, 3 A. & E. 702.

If a consistory court proceeds to hear exceptions to an inventory exhibited by an executor, a prohibition lies. *Griffiths v. Anthony*, 5 Dowl. P. C. 223.

(3) *Thompson v. Donaldson*, 3 Esp. N. P. C. 63. *Moons v. De Bernales*, 1 Russ. 301.

(4) 1 Saund. 333. n.

(5) 1 Inst. 283. (a).

(6) *Per* Holt C. J. in *Shelley's case*, 1 Salk. 296.

(7) *Campion v. Bentley*, 1 Esp. N. P. C. 344., vide *Ent v. Withers*, Freem. 467. *Gibbert v. Dee*, ibid. 537.

(8) *White v. Nazum*, 1 Hayes & Jones (Irish), 241.

(9) *Erving v. Peters*, 3 T. R. 685. *Shelton v. Hawling*, 1 Wils. 259. 1 Saund. 313. (d.) Roscoe's Ev. 614.

(10) 1 Saund. 335. n.

(11) *Rock v. Leighton*, 1 Salk. 310.

(12) *Leonard v. Simpson*, 2 Bing. N. C. 176., vide etiam *Palmer v. Waller*, 1 M. & W. 689. Roscoe's Ev. 614.

(13) *Palmer v. Waller*, 5 Dowl. P. C. 172.

Declarations made by a testator, are evidence against a person claiming in the character of his administrator. (1)

The declaration of a party suing as a representative of others, made before he became such, are evidence. (2)

In an action by a special administrator under stat. 38 Geo. 3. c. 87. the declarations of the executor named in the will, made by him while he was the acting executor, are not admissible against the plaintiff: thus, in *Rush v. Peacock* (3) Lord Denman said, "The acts of the original executor, done by him in that capacity, may be admissible in evidence against the plaintiff who has succeeded, *durante absentia*, to the office of executor; but I do not think the mere declarations of the executor stand on the same footing."

In an action against executors, upon a covenant by the testator for title and for quiet enjoyment against any person claiming under him, a declaration by one of the executors, that they were in possession by virtue of a deed of gift by the testator to them prior to the covenant, is not admissible against the other executor; and in such an action, the verdict could not be entered against one only of the defendants, the allegation of title and entry in and by both being indivisible. (4)

The bare possibility of an action being brought against a witness is no objection to his competency: but in order to show a witness interested, it is necessary to prove, that he must derive a *certain* benefit from the determination of the cause one way or other.

A witness is competent to prove a codicil, made subsequently to a second will, and reviving a former will, though he has acted under the first will, and might possibly be subjected to actions brought against him as executor *de son tort*, if it should be set aside. (5)

An administrator *pendente lite*, after his administration is determined, is a competent witness for the executor or general administrator. (6)

In covenant on an indenture of lease against the administrator of the assignee of the lessee, assigning breaches for non payment of rent and non repair, it was pleaded that, by assignment during the continuance of the lease, the premises were assigned to the intestate and J. S., and that J. S. was still alive; which assignment was denied by the replication:—It was held, that J. S. was a competent witness for the plaintiff, to prove, that he never accepted or acted under the assignment, because he stood indifferent between the parties, for the verdict could not be used in evidence against him; and if it could, that objection was cured by the statute; and if he fixed the defendant with the whole damages, he would be equally liable for contributions. (7)

By stat. 7 Will. 4. & 1 Vict. c. 26. s. 16. "in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

EVIDENCE.

DECLARATIONS BY TESTATOR.

DECLARATIONS OF REPRESENTATIVE, BEFORE HE BECAME SUCH.

Competency of witness.

When declaration by an executor, is not admissible against his co-executor.

COMPETENCY OF WITNESS.

Uncertain interest.

Administrator *pendente lite*.

Assignee.

Stat. 7 Will. 4. and 1 Vict. c. 26. s. 16.

Creditor attesting a will to be admitted a witness.

(1) *Smith v. Smith*, 7 C. & P. 401.(2) *Smith v. Morgan*, 2 M. & Rob. 257.(3) *Ibid.* 167.(4) *Fox v. Waters*, 4 Jur. 555.(5) *Baillie v. Wilson*, cit. 4 Burr. 2254., et vide *Goodtitle v. Welford*, Doug. 140.(6) *Fotherby v. Pate*, 3 Atk. 605.(7) *Fowler v. Round*, 5 M. & W. 478.

EVIDENCE.

Creditor of the estate.

Because the interest is altogether uncertain, a creditor of the estate is a competent witness for an executor or administrator to increase the fund: thus, in *Davies v. Davies* (1) Mr. Justice Parke held, that an unsatisfied creditor was a competent witness for an administrator upon a plea of *plene administravit*. (2)

Distinction between creditors of estates and the creditors of bankrupt insolvents.

The distinction between creditors of estates and the creditors of bankrupts or insolvents is, that in the former the interest is uncertain, and in the latter cases the assignee is under an obligation to distribute equally among all the creditors, to whom, therefore, all the fund *prima facie* belongs, and whatever is either added to or taken from the fund, must naturally be presumed to be for the advantage or disadvantage of the creditor, and which creates a positive interest in each creditor to increase the amount.

DEVISEE.

A devisee, who takes under a will a vested interest in the testator's estate, has been considered incompetent to support the will in an action of ejectment brought by another devisee against the heir. (3)

DOWER
(PARTY ENTITLED TO).

A claim to an estate or interest in land, on the part of a witness in an action of ejectment, will not in all cases disqualify. Thus, in *Doe d. Nightingale v. Maisey* (4), which was an ejectment brought to recover premises, which the defendant claimed as heir at law to his father, the defendant's mother was tendered as a witness for him, and was objected to on the ground, that her evidence would tend to establish for her a title to dower; but it was held, that she had no legal interest in the event of the suit, and was competent, Lord Tenterden observing, "that the judgment in the action would be no evidence of the husband's seisin. If he was seised, she is equally entitled to dower, whether the premises be in the hands of the defendant, or the lessor of the plaintiff."

Stat. 1 Vict.
c. 26. s. 17.

Under stat. 1 Vict. c. 26. s. 17. no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

EXECUTOR.

An executor taking a pecuniary interest under a will, is not precluded from giving evidence to support the will in an action of ejectment brought by the heir at law; for the verdict against the plaintiff would only have the effect of establishing the will as to the real property, and the witness would have no immediate interest in the termination of that suit; and even before stat. 3 & 4 Will. 4. c. 42., a witness so situated, was not disqualified by reason of any indirect interest in the record, since the judgment would not be evidence in the ecclesiastical court upon a question, whether the will were good as to the personalty. (5)

HEIR.

An heir apparent is also competent upon any question concerning the lands, for the heirship is no interest, but a mere contingency.

LEGATEE —
releasing his
interest;

A witness who has released his interest (a legacy) after hearing the release read, is a competent witness, although he swears he did not know what he released, and expected the legacy. (6)

claiming an
undivided in-
terest.

In ejectment by a party claiming an undivided interest in an estate

(1) M. & M. 345.

(2) Vide *Paull v. Brown*, 6 Esp. N. P. C. 34. *Nowell v. Davies*, 5 B. & Ad. 371. *Craig v. Cundell*, 1 Camp. 381. seems to be overruled.

(3) *Pyke v. Crouch*, 1 Ld. Raym. 730. *Helliard v. Jennings*, *ibid.* 505.

(4) 1 B. & Ad. 439., vide etiam *Gully v. Exeter (Bishop of)*, 4 Bing. 293.

(5) *Doe d. Wood v. Teage*, 5 B. & C. 335.

(6) *Moore v. Griffin*, 1 Armstrong & Macartney (Irish), 127.

under a will (the question in the cause being the competency of the testator), a person claiming another undivided interest in the same estate under the same will, is a competent witness for the lessor of the plaintiff. (1)

EVIDENCE.

In *Nowell v. Davies* (2) it was decided, that a person entitled to an annuity under the will was a competent witness on the part of the defendants.

Annuitant.

In an action for breach of covenants to pay rent and repair, contained in a lease, the reversion in which was vested, by the provisions of a will, in plaintiffs upon trust (among others) to pay an annuity to the separate use of a married woman for life, and after her death, to pay certain annuities to the use of her children:—It was held, that her husband was a competent witness, though other parts of the trust property had been sold, because the rents were not sufficient for the purposes of the will. (3)

Husband of annuitant.

In an action by an administrator against a debtor of the intestate, a person entitled to a distributive share of the estate, will not be a competent witness to support the action (4): and a release from the witness to the administrator of all claims *up to the time of executing the release*, would not restore competency, the right of the witness being prospective; and such a witness, will not be competent in an action against the administrator. (5)

Next of kin.

In actions by or against executors or administrators, a residuary legatee, or person entitled as next of kin to a distributive share of the estate, is incompetent to increase the fund in which he is so interested, for he has a direct and certain interest in giving evidence to this effect.

Specific legatee.

But this principle does not apply to legatees of specific sums or chattels, for it is a matter altogether uncertain, whether they will or will not derive any benefit from a favourable termination of the suit. (6)

In an action by an undertaker for funeral expenses against a person not an executor, a residuary legatee is a competent witness for the plaintiff. For although a person, other than the executor, may have rendered himself liable to the undertaker, the estate is ultimately answerable for so much of the costs as an executor was reasonably bound to pay, and no more, and the witness therefore has no disqualifying interest. (7)

Residuary legatee competent in an action for the funeral expenses of the testator.

By stat. 7 Will. 4. and 1 Vict. c. 26. s. 15. "if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

Stat. 7 Will. 4. and 1 Vict. c. 26.

Gifts to an attesting witness to be void.

(1) *Doe d. Wildgoose v. Pearce*, 5 M. & W. 606.

(2) 5 B. & Ad. 368.

(3) *Abercrombie v. Hickman*, 8 A. & E. 683.

(4) *Mathews v. Smith*, 2 Y. & J. 426.

(5) *Allington v. Bearcroft*, Peake's Add. Cas. 212.

(6) *Clarke v. Gannon*, R. & M. 31., vide etiam *Johnson v. Baker*, 2 C. & P. 207., vide per Patteson J. in *Nowell v. Davies*, 5 B. & Ad. 370.

(7) *Green v. Salmon*, 8 A. & E. 348.

EVIDENCE.

Residuary
legatee.Action by
executor.

In an action by an executor to recover a debt due to the testator, a residuary legatee is an incompetent witness for the plaintiff. (1) This incompetency does not arise from the use of the verdict as evidence in any future suit, for the witness could neither be plaintiff nor defendant in an action relating to the debt; the witness is disqualified, because he receives an immediate benefit by a verdict for the plaintiff. (2) Although the action may be in the name of the executor, yet the residuary legatee is the party substantially interested in the event. And even if such legatee release all claim to the debt in question, this will not restore his competency, for he has still an interest in supporting the action, in order that the costs may not be a charge on the estate. (3)

19. Costs.

COSTS.

Formerly, an executor when plaintiff paid no costs either on a nonsuit or verdict, because he sued *in autre droit*, and the law did not presume him to be sufficiently cognisant of the nature and foundation of the claims he had to assert.

But if he brought the action in his private capacity, and failed, as in an action for trover and conversion, subsequent to the testator's death, or in any other proceeding, where the cause of action accrued to him personally, he was liable for costs.

Judgment of
Chief Justice
Tindal in
Southgate v.
Crowley.

Thus, in *Southgate v. Crowley* (4) Chief Justice Tindal said, "Before the recent act, when executors sued in right of their testator, they were not liable to costs although they should fail in their action. I had always thought, that this arose, not from express exemption by any law, but owing to the particular mode in which the language of the statutes giving costs to a defendant is expressed. By 23 Hen. 8. c. 15. s. 1. costs are given to a defendant when the plaintiff is nonsuited, or a verdict passes against him, in actions on contracts *immediately* with, or for wrongs *immediately* done to, the plaintiff. That statute was extended to all personal actions by Jac. 1. c. 3.; which being framed on the model of 23 Hen. 8. c. 15., it was held, that executors and administrators are neither within the one nor the other, inasmuch as the contract on which they sue is not made immediately with themselves, but with their testator or intestate. And certainly this was no new doctrine of mine; for in *Tattersall v. Groote* (5) Lord Eldon says, 'On a review of all the cases, we think, that the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate. This doctrine seems founded on the act of parliament of which all the cases are an exposition, namely, the 23 Hen. 8. c. 15. Attending to the language of that act, perhaps we may be authorised to say, that the sound principle on which the exemption of the executors and administrators rests, is not the degree of ignorance under which they may be supposed to

(1) *Baker v. Tyrwhitt*, 4 Camp. 27.(2) *Per Tindal C. J.* in 6 Bing. 394.(3) *Baker v. Tyrwhitt*, 4 Camp. 27.

(4) 1 Bing. N. C. 521.

(5) 2 B. & P. 255.

lie; but that the exemption founds itself on the description of the actions contained in the statute by which costs are to be paid.' And though cases have been cited of an earlier date in which the practice is ascribed to a different cause, yet the modern doctrine is, that which I have pointed out, and results from a view of all the decisions."

By stat. 3 & 4 Will. 4. c. 42. s. 31., which has been held to have a retrospective operation (1), it is enacted, that "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts of law at Westminster shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

In *Wilkinson v. Edwards* (2) Chief Justice Tindal said, "The general rule now is, that an executor or administrator who has been nonsuited, or who has lost a verdict, is liable to costs; and it is cast on him to make out that there are particular circumstances in his case, which would justify the court in exempting him by an exercise of their discretionary authority."

The plaintiff cannot in any instance, in an action upon a promise made to himself, be relieved from liability to costs by the provisions of stat. 3 & 4 Will. 4. c. 42., because the operation of that statute is confined to cases where the executor or administrator was not liable to costs under stat. 23 Hen. 8. c. 15. (3): thus, an executor suing on a count upon promises to himself as executor, stating a consideration, partly of money due to the testator in his lifetime, and partly of an account stated with himself as executor, is liable to costs if nonsuited, and cannot be relieved under stat. 3 & 4 Will. 4. c. 42. (4)

In order to induce the court to exempt an executor who has failed in an action brought by him in that character from costs, under stat. 3 & 4 Will. 4. c. 42. s. 31., it is not sufficient, that the action has been brought *bond fide* under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant; unnecessary prolixity in the pleadings is not such conduct; nor omitting to give the plaintiff information, which may not have prevented his proceeding with the action, if the plaintiff did not apply for the information. (5)

In *Southgate v. Crowley* (6) Chief Justice Tindal said, "One occasion for the exercise of the discretion of the court in favour of the executor no doubt would be, where, having proceeded with every caution, he has been led on to incur the expense of a trial by misrepresentation or deception in the adverse party."

But it is not sufficient for such a plaintiff to shew, that it was necessary

Costs.

Stat. 3 & 4
Will. 4. c. 42.
s. 31.

Executors
suing in right
of the testator
to pay costs..

Judgment of
Chief Justice
Tindal in
*Wilkinson v.
Edwards.*

Operation of
stat. 3 & 4
Will. 4. c. 42.
confined to
cases, where
executors were
not liable to
costs under
stat. 23 Hen. 8.
c. 15.

What is re-
quisite to ex-
empt an ex-
ecutor from
costs under
stat. 3 & 4
Will. 4. c. 42.

Judgment of
Chief Justice
Tindal in
*Southgate v.
Crowley.*

(1) *Freeman v. Moyes*, 1 A. & E. 338. *Grant v. Kemp*, 2 C. & M. 636.

(2) 1 Bing. N.C. 303., vide etiam *Farley v. Briant*, 3 A. & E. 852.

(3) *Spence v. Albert*, 2 A. & E. 785. *Ash-*

ton v. Poynter, 1 C. M. & R. 738. *Williams on Executors* 1492.

(4) *Spence v. Albert*, 2 A. & E. 785.

(5) *Farley v. Briant*, 3 ibid. 839.

(6) 1 Bing. N. C. 522., vide etiam *God-son v. Freeman*, 2 C. M. & R. 585.

Costs.

to have the question decided, in order to obtain an equitable administration of assets in a creditor's suit. (1)

In *Maddock v. Phillips* (2) it was held, that where a single judge had made an order under the statute to exempt the plaintiff from liability to costs, such order is final, and cannot be reviewed by the court; but in *Lakin v. Massie* (3), the court of Exchequer dissented from this decision.

Time of application for relief.

The application for relief should regularly be made before the taxation takes place (4); otherwise, if granted, costs of the application will have to be paid.

Costs in error.

Executors and administrators are liable to costs in error, in cases where they are liable to costs in the original action. (5)

Non payment of legacy duties.

In re *Robinson* (6), which was a rule *nisi* calling upon executors to account for and pay over legacy duties, but the executors did not appear to shew cause, and the rule was therefore made absolute, the court ordered, that in future in such cases it should form part of the rule, that if, upon the delivery of the accounts, there should be found to be any duties payable to his majesty, that the executor or administrator should pay the costs of the crown to be taxed in the usual manner.

Order to refer an attorney's bill for taxation.

Where an executor of the client has obtained an order to refer an attorney's bill for taxation, the court has power to compel the executor to pay the costs of the taxation, if less than one sixth be taken off. (7)

Middlesex Court of Requests Act.

Under the Middlesex Court of Requests Act (stat. 23 Geo. 2. c. 33.), an executrix plaintiff is liable to double costs. (8)

Restraining an executor from suing for costs of an attorney due to his testator.

In restraining a plaintiff, suing as executor of a deceased attorney, from proceeding in an action to recover costs due to his testator until they are taxed, the court will require the defendant to leave a blank plea of confession of the then term with the officer, to be filled up by him, with whatever sum he shall find to be due from the defendant to the plaintiff, when the costs have been taxed, and the account regularly taken by the officer. (9)

Levy of costs.

Where an administrator put in a plea verified by affidavit, stating that he had no assets, and judgment was recovered against him *de bonis testatoris, et si non* the costs; *de bonis propriis*: — It was held, that the sheriff might levy the costs immediately *de bonis propriis*, and without holding an inquiry of waste. (10)

JUDGMENT — WRIT OF ERROR — CERTIORARI — SCIRE FACIAS — FIERI FACIAS.

20. JUDGMENT — WRIT OF ERROR — CERTIORARI — SCIRE FACIAS — FIERI FACIAS.

A judgment recovered against an executor or administrator is usually for the debt or damages and costs to be levied of the goods and chattels of the testator or intestate in the hands of the defendant, if he hath so much

De bonis testatoris.

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| (1) <i>Brown v. Croley</i> , 3 Dowl. P. C. 386—389. <i>Godson v. Freeman</i> , 2 C. M. & R. 585. | (7) <i>Jefferson v. Warrington</i> , 8 Dowl. P. C. 880. |
| (2) 3 A. & E. 198. | (8) <i>Bishop v. Marsh</i> , <i>ibid.</i> 1. 6 Bing. N.C. 12. |
| (3) 4 Dowl. P. C. 239. | (9) <i>Kildahl v. Nangle</i> , 1 Crawford & Dix (Irish), 18. |
| (4) <i>Per Parke B. in Ashton v. Pointer</i> , 5 Tyrw. 326. <i>Williams on Executors</i> , 1492. | (10) <i>Ginty v. Costello</i> , 1 Jones (Irish), 86. |
| (5) <i>Williams v. Riley</i> , 1 Hen. Black. 566. | |
| (6) 2 M. & W. 407. | |

thereof in his hands to be administered; and if he hath not, then the costs to be levied of his own proper goods. (1)

If an executor plead judgments obtained against himself, and any one or more of them be avoided by the plaintiff's pleading, the plaintiff can have judgment against the executor *de bonis propriis*. (2) But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided, as to leave assets in the executor's hands. (3)

If the defendant plead a plea which is false within his own knowledge, as *ne unques executor* or *administrator*, or the like, and it be found against him, the judgment is *de bonis testatoris si &c., et si non &c., de bonis propriis*, or perhaps unconditionally *de bonis propriis*. (4)

In an action against an executor or administrator suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis*. (5) But where the action is brought against the executor of an executor, suggesting a *devastavit* by the former executor, the judgment against the defendant will be *de bonis testatoris*. (6)

Where an executor or administrator is charged and made liable as assignee, the judgment is *de bonis propriis*. (7)

If the plaintiff confess the plea of *plene administravit*, or *plene administravit præter*, there shall be judgment in his favour for the debt or damages, and costs to be levied as to the whole or in part, of the goods of the testator or intestate which shall afterwards come to the hands of the defendant to be administered. And such judgment is styled a judgment of assets *quando acciderint*; but in that case execution cannot be had until the defendant shall have goods of the deceased, when the plaintiff may either sue out a *scire facias*, or bring an action of debt on the judgment suggesting a *devastavit*. (8)

If in debt against two executors, they plead severally by several attorneys "fully administered," and the jury find, that the one has assets, and the other has not, the judgment will be against him only who is found to have assets. (9)

The judgment on demurrer, on issue of *nul tiel record*, by confession or *nil dicit*, is interlocutory, or final, as in other cases. (10) It is an interlocutory or final judgment according to the nature of the action; and if it be only interlocutory, there must be a writ of inquiry to complete it. (11) But if the plaintiff take issue on the general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando &c.* (12)

JUDGMENT —
WRIT OF ERROR
— CERTIORARI
— SCIRE FACIAS — FIERI FACIAS.

De bonis propriis.

Action suggesting a *devastavit*.

Executor liable as assignee.

Assets *quando acciderint*.

Judgment on demurrer.

(1) *Farr v. Newman*, 4 T. R. 648. *Bol-lard v. Spencer*, 7 ibid 359.

(2) 1 Saund. 377. (a.) n., vide *Marshall v. Willder*, 9 B. & C. 655.

(3) Vide ibid. Archb. by Chitt. 932.

(4) Bro. Abr. Executors, 39. 1 Saund. 336. (b.)

(5) 1 Saund. 336. (c.) n. (1.)

(6) Ibid, 219. (e.) n. Archb. by Chitt. 933.

(7) *Tilney v. Norris*, 1 Salk. 309. 1 Ld. Raym. 553.

(8) Toller on Executors, 470.

(9) *Parsons v. Hancock*, M. & M. 390., vide etiam *Cousins v. Paddon*, 2 C. M. & R. 558.

(10) Archb. by Chitt. 933.

(11) *Williams on Executors*, 1560. Tidd, 683.

(12) 2 Saund. 217. n. (1.) *Lucas v. Jenner*, 2 Dowl. P. C. 64.

JUDGMENT —
WRIT OF ERROR
— CERTIORARI
— SCIRE FACIAS — FIERI
FACIAS.

Effect of taking judgment
quando &c.

WRIT OF
ERROR.

By taking judgment of assets *quando*, the plaintiff admits that the defendant has fully administered to that time. (1)

No person can bring a writ of error, who is not a party or privy to the record, or who is not injured by the judgment, and so to receive advantage by its reversal. (2)

In real actions, error and attainder always descend to the person to whom the land would descend, if there had never been such a recovery or false oath (3), while in personal actions they lie for the executor or administrator. (4)

In a real action in which both land and damages were recoverable, a dower, the executor of the tenant could have brought a writ of error to have avoided the judgment as to the damages. (5)

If an executor be damnified by an erroneous attainder, he can bring a writ of error. (6)

Where a testator, if he had lived, could not have had a writ of error, neither can his executors. (7)

Bail in error.
Stat. 6 Geo. 4.
c. 96. s. 1.

In consequence of stat. 16 & 17 Car. 2. c. 8. having expressly excepted executors, there were few cases before stat. 6 Geo. 4. c. 96. s. 1. in which executors or administrators were required to give bail in error; but by the latter statute for preventing the delays occasioned to creditors by frivolous writs of error it is enacted, that "upon any judgment hereafter to be given in any of the courts of Record at Westminster in any personal action, execution shall not be stayed or delayed by writ of error or *superaden* thereupon, without the special order of the court, or some judge thereof, unless a recognisance, with condition according to the statute made in the third year of the reign of his majesty King James I., intituled *an Act to avoid unnecessary Delays of Execution*, be first acknowledged in the same court."

CERTIORARI.

But no traverse can be taken to make a man *felo de se* (8); if a finding be obtained by any indirect proceedings of the coroner, the court will grant a *melius inquirendum* before special commissioners, who cannot proceed *super visum corporis*, but on the testimony of witnesses. (9)

Presentment of
felo de se.

A presentment of *felo de se* (10) may be removed by the executors or administrators of the deceased into the Queen's Bench by *certiorari*, and there quashed for want of form (11); or the inquisition may, after such removal, be *traversed* by the executors or administrators. (12)

If it be found by the coroner's inquisition, in case of the death of a person who is not *felo de se*, that the person who committed the offence for it, this finding is conclusive and not traversable.

SCIRE FACIAS.

Where the plaintiff *dies after final judgment* and *before execution*, his executor or administrator can sue execution by *scire facias*. (13) If after:

(1) 2 Saund. 219. (a.). n. (2.) *Parker v. Dec*, 3 Swanst. 532.

(2) 2 Saund. 46. (a.) 3 Bac. Abr. Error, (B.), 63, *et seq.*

(3) *Henningham v. Windham*, 1 Leon. 261. Owen, 68.

(4) 3 Bac. Abr. Error (B.), 63, *et seq.*

(5) *Williams v. Williams*, Cro. Eliz. 558. *Rex v. Ayloff*, Comb. 114.

(6) *Rex v. Ayloff*, 1 Salk. 295. Comb. 114. *Foxley's case*, 5 Co. 111. (a.)

(7) *Wright (Bart.) v. Nutt*, 1 T. R. 388.

(8) *Anon.* 1 Vent. 239. 1 Saund. 363.

(9) *Rex v. Hethersal*, 3 Mod. 80. *Hawk. P. C.* 54. *Rex v. Bunney*, 1 Salk. 190. *Case of the Coroner of Westminster*, Str. 1073.

(10) 3 Inst. 54, 55. 1 Saund. 363.

(11) *Rex v. Aldenham*, 2 Lev. 152. *R. v. Parker*, *ibid.* 140.

(12) 1 Saund. 363. *Garnett v. Forrest*, 6 B. & C. 627.

(13) Com. Dig. Execution (E.). 2 Inst. 395. Toller on Executors, 44.

fiery facias sued out the plaintiff die, the sheriff deriving his authority from the writ can levy the money, and may pay it to the executor; or in case the plaintiff died intestate it shall be brought into court, and remain there until administration be committed, when the administrator, on producing the grant, shall receive it. (1)

JUDGMENT —
WRIT OF ERROR
— CERTIORARI
— SCIRE FA-
CIAS — FIERI
FACIAS.

At common law the death of the plaintiff at any time before final judgment abated the suit; but by stat. 16 & 17 Car. 2. c. 8., if either party die between verdict and judgment, his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict. (2) In the construction of this statute it has been holden, that the party's death before the assizes is not remedied; but if he die after the assizes are commenced, although before the trial, that case is within the act, for being remedial, it is construed liberally. (3) The judgment on this statute is entered as if the party were alive (4), and it must be entered, or at least signed (5), within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out (6); and such *scire facias*, pursuing the form of the judgment, should be general, as on a judgment recovered by or against the party himself. (7)

Stat. 16 & 17
Car. 2. c. 8.

By stat. 8 & 9 Will. 3. c. 11. s. 6. if the plaintiff die after interlocutory, and before the final judgment, the action shall not abate, if such action might originally have been sued by his executor or administrator; but the executor or administrator may have a *scire facias* against the defendant; or, if he die after such interlocutory judgment, against his executor or administrator.

Stat. 8 & 9
Will. 3. c. 11.
s. 6.
Plaintiff or de-
fendant dying
before final
judgment ob-
tained.

This statute has been held not to extend to cases where the party dies before interlocutory judgment, although it be after the expiration of the rule to plead. (8)

If after a *fiery facias* sued out the plaintiff die, the sheriff deriving his authority from the writ may levy the money, and pay it to the executor; or in case the plaintiff died intestate, it shall be brought into court, and remain there until administration be permitted, where the administrator on producing the grant shall receive it. (9)

FIERI FACIAS.

So if under a *fiery facias* the goods are seized, and the plaintiff die before sale, and then the goods are sold, the executor or administrator shall have the money; nor shall it be a sufficient return to state, that the plaintiff is dead, for that is no abatement of the writ. (10)

A defendant administrator cannot traverse the inquisition and return of *devastavit* to a writ of *fiery facias*. (11)

(1) Com. Dig. Execution (E.). 2 Inst. 395.

(2) Toller on Executors, 442.

(3) Ibid. Anon. 1 Salk. 8. Jacobs v. Miniconi, 7 T. R. 31., et vide Helbut v. Held, 2 Ld. Raym. 1415.

(4) Weston v. James, 1 Salk. 42.

(5) Helie v. Baker, 1 Sid. 385.

(6) Earl v. Brown, 1 Wils. 302.

(7) Colebeck v. Peck, 2 Ld. Raym. 1280.

(8) Tidd, 1055. Wallop v. Irwin, 1 Wils. 315.

(9) Clerk v. Withers, 6 Mod. 297. Thoroughgood's case, Noy. 73. Dyer, 76. (b.)

(10) Clerk v. Withers, 6 Mod. 297. 2 Ld. Raym. 1073. Cleve v. Veer, Cro. Car. 459. Harrison v. Bowden, 1 Sid. 29.

(11) Crawford v. Kehoe, 1 Hayes & Jones (Irish), 1. Where there is a judgment against an administrator *de bonis testatoris*, et si non, the costs *de bonis propriis*, and the plaintiff levies the costs *de bonis propriis*, and afterwards an inquiry of waste is held, and the plaintiff obtains judgment and execution for the damages *de bonis propriis*, quare, Whether this latter execution is a continuation of the former one, or is a new execution? Ginty v. Costello, 1 Jones (Irish), 90.

FACTOR.

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Judgment of Lord Tenterden in Taylor v. Kymer — Where East India warrants cannot be pledged by a factor — Judgment of Lord Tenterden in Evans v. Trueman — “Agent entrusted with goods” — Constructions of stat. 6 Geo. 4. c. 94. s. 5.

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1. FACTOR DEFINED.

FACTOR DEFINED.

In *Baring v. Corrie* (1) Chief Justice Abbott said, “A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal.” “But the broker is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name.”

Distinction between factors and brokers.

In *Foster v. Pearson* (2) Mr. Baron Parke observed, “In the absence of evidence as to the nature of such an employment, a bill broker must be taken to be an agent to procure the loan of money on each customer’s bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, a bill broker is not a character known to the law with certain prescribed duties, but his employment is one, which depends entirely upon the course of dealing. It may differ in different parts of the country; it may have powers more or less extensive in one place than in another; what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place.”

Bill brokers.
Judgment of Mr. Baron Parke in *Foster v. Pearson*.

Factors are either foreign or home factors; a foreign factor is a person who resides in one country, with an authority from a principal residing in another.

Foreign factors.

A home factor is a person residing in the same country with the principal, from whom he derives his authority.

Home factors.

A factor is usually paid for his trouble by a commission of so much *per cent.* on the goods he sells or buys; but sometimes in sales, he acts under what is called a *del credere* commission; in which case, for an additional premium beyond the usual commission, he undertakes and becomes answerable for the credit of the person to whom he sells the goods consigned to him by his principal. (3)

(1) 2 B. & A. 143., vide etiam *Haynes v. Foster*, 2 C. & M. 239. *v. Eason*, 2 M. & S. 112. *Bize v. Dickson*, 1 T. R. 285. *Mackenzie v. Scott*, 6 Bro. P. C. 280. *Morris v. Cleasby*, 4 M. & S. 574. *Hornby v. Lacy*, 6 ibid. 171.

(2) 1 C. M. & R. 858.

(3) *Grove v. Dubois*, 1 T. R. 112. *Koster*

GENERAL RESPONSIBILITIES AND IRRESPONSIBILITIES.

Preservation of goods.

Robbery and accidental damage.

Delegating the custody of goods to another.

Incurring a needless responsibility.

2. GENERAL RESPONSIBILITIES AND IRRESPONSIBILITIES.

A factor is not answerable against all events for the safety of goods which he has in charge; but it is sufficient, if he do all that by his industry he can for their preservation. (1) The criterion seems to be, that he keep them with the same care, as he would his own. (2)

He is not liable in cases of robbery (3), fire (4), or any other accidental damage happening without his default: thus, it is a justification, for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast overboard into the sea. (5) But though the immediate cause of the loss be one, which no care could prevent, as lightning or the like, yet if improper delay in the removal of the property had previously intervened, it is not excused by the nature of the accident. (6)

Though it be in general true, that the trust reposed in an agent is personal, and intransferrable, yet reasonable convenience and attention to the benefit of his employer will often justify him in delegating the custody of goods to another; provided due care be taken to select a proper depository. Thus, to an action of accounts for goods delivered to the defendant *ad mercandizandum*, he pleaded, that he carried them to Porto Bello, and in order to keep them safe, he put them into the warehouse of the South Sea Company, which was broken open, and the goods taken away and lost. It was objected, that the defendant having undertaken a special and particular trust, and having committed the goods to the care of a third person, which he could not do, he was answerable for the loss;—but it was decided, that a bailiff *ad mercandizandum* is not obliged to keep the goods always about him; and that if the warehouse were not a place of safe custody, that should have been replied. (7)

An agent may, by his own act, entail upon himself a responsibility, which he would not otherwise incur. Thus, if a broker be employed to sell goods, sell them for a bill at a given date, and draw on the buyer for the amount, he is answerable on the bill to his principal. (8) So when a factor, upon selling goods, takes a security payable to himself from the purchaser, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser, if the latter become insolvent before paying his security, the factor cannot compel the principal to refund the money received by him, as the price of the goods. (9)

INSURANCE, CUSTOMS, DUTIES, &C. ON EXPORTS AND IMPORTS.
INSURANCE.
Where the course of deal-

3. INSURANCE, CUSTOMS, DUTIES, &C. ON EXPORTS AND IMPORTS.

Where the course of dealing between the principal and agent is such, that the latter has been used to effect insurances by directions of the former, he is bound to comply with an order to insure, though he have no

- (1) *Vere v. Smith*, 1 Vent. 121.
(2) *Coggs v. Bernard*, 2 Ld. Raym. 917. Holt, 131., *sed vide Woodlife's case*, Sir F. Moore, 462.
(3) 13 Vin. Abr. Factor, 6. [E. 2.]. Mal. Lex Merc. 83.
(4) *Anon.* 2 Mod. 100.

- (5) 1 Rol. Abr. Accompt (O.), 124.
(6) *Caffrey v. Darby*, 6 Ves. 496.
(7) *Goswill v. Dunkley*, Str. 681., *et vide Bromley v. Corwell*, 2 B. & P. 438.
(8) *Le Fevre v. Lloyd*, 5 Taunt. 749. 1 Marsh. 318.
(9) *Simpson v. Swan*, 3 Camp. 291.

effects in hand at the time of receiving the order, unless notice have been previously given by him, to discontinue that mode of dealing. (1)

But if he have effects in hand, he cannot in any case refuse to comply with the order (2), or, if the bills of lading from which his authority is derived contain an order to insure, this is an implied condition, which the agent must fulfil, if he accept the employment. (3)

If, in any of these cases the agent neglect to make insurance, he is himself by the custom of merchants to be considered as the insurer, and liable as such, in the event of loss. (4)

It has been held that, although no advantage can be taken of a gratuitous promise to procure insurance, in a case of total neglect to do so, yet, that if a voluntary agent actually proceed to make insurance, but through his gross mismanagement the benefit of it be lost, he is answerable for the injury sustained. (5)

In an action against an agent for a failure in making insurance, as he stands in the place of an insurer, so he is entitled to any defence which an insurer could have made; for if nothing could have been recovered on the policy, no actual damage has been sustained by its default.

The plaintiff, therefore, in such an action, must recover according to his interest (6), which, as well as the loss, he must establish in proof, and the defendant may avail himself of a deviation in the voyage (7), or the illegality of the intended insurance (8);—and if the policy be illegal, and cannot in point of law be enforced, the fact that such insurances are frequent, and always paid without objection, is unimportant. (9)

If the neglect complained of be, that, by the non communication of a material fact to the underwriters, in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made it impossible to get insurance at the premium limited in his instructions. Thus, a shipowner in London directed a broker at Hull to insure a ship, then on a voyage from London to Hull, limiting the premium to be given, and communicating the day of the ship's sailing from London. The broker effected the policy without any delay, but concealed the day of the ship's departure. Upon that ground, the assured having been nonsuited in an action brought upon the policy, brought another action against the broker for neglecting to make the proper communication; in which the latter was permitted to shew in his defence, that no insurance could have been made at the limited premium, if the date of the ship's departure had been communicated, that date being such, as would have made her be considered a missing ship at the time the order was received. (10)

INSURANCE,
CUSTOMS,
DUTIES, &c.
ON EXPORTS
AND IMPORTS.

ing has been
to effect in-
surances.

Insurance lost
from gross
mismanage-
ment.

Factor entitled
to every de-
fence, which an
insurer could
have had.

Deviation.
Illegal policy.

Non communi-
cation of a
material fact.

(1) *Smith v. Lascelles*, 2 T. R. 189. Beawes, 43.

(2) *Ibid.*

(3) *Ibid.* As to liabilities of brokers for not effecting insurances according to orders, vide *Glaser v. Cowie*, 1 M. & S. 52.

(4) *Wallace v. Telfair*, 2 T. R. 188. n. Mal. Lex Merc. 86. Beawes, 43. *Delaney v. Stoddart*, 1 T. R. 24. If he limit the broker to too small a premium, by which no insurance is effected, he is liable. *Ibid.* Paley, Principal and Agent, 19. As to liabilities

of brokers, vide *Park v. Hammond*, 2 Marsh. 189. *Mallough v. Barber*, 4 Camp. 150.

(5) *Wilkinson v. Coverdale*, 1 Esp. N. P. C. 74. *Seller v. Work*, Marshall on Insurance, 299.

(6) *Harding v. Carter*, Park on Insurance, 4. *Delaney v. Stoddart*, 1 T. R. 24.

(7) *Delaney v. Stoddart*, 1 T. R. 22.

(8) *Webster v. De Tastet*, 7 *ibid.* 157.

(9) *Ibid.*

(10) *Anon. cor. Chambre J.*, York Sum. Ass. 1808, cit. Paley, Principal and Agent, 21.

**INSURANCE,
CUSTOMS,
DUTIES, &c.
ON EXPORTS
AND IMPORTS.**

Not bound to procure insurance at all events.

If the agent do all that which is usually done to get the insurance effected, it is sufficient, for he is no insurer, and not bound to procure insurance at all events. (1) Accordingly, where an agent, having ineffectually endeavoured to procure an insurance at the usual places, was obliged to employ another person, who got it done but refused to give up the policy, and became insolvent after receiving the money from the underwriters, the first agent was held to be discharged, for it was not incumbent upon him to bring an action for the detention of the policy. (2)

Upon the same principle, if the employer desire to have the insurance made at any certain office in preference to others, he must express it in his instructions; for, under a general order, an agent is justified in applying to any of the accustomed and reputed offices, though, from the nature of the commodity to be insured, a greater risk be covered for the same premium by some, than by other offices. (3)

**CUSTOMS, DU-
TIES, &c. ON
EXPORTS AND
IMPORTS.**

Factor responsible for non-payment of duties.

Where duties are payable upon the importation or exportation of goods, it is the business of the factor or agent employed in the receipt or dispatch of them, to take care that the proper entries are made, and the duties satisfied; for if by reason of a false or imperfect entry (4), or by being landed before the customs are paid or compounded (5), the goods be forfeited, the factor is liable to answer for the loss (6), unless, indeed, the entry be pursuant to the invoice or letter of advice, for then it is not his fault. (7)

Extent of liability.

The extent of this liability is said by Malynes to be, that of the cost price of merchandise to be exported, or the sale price of that, which is to be imported, with reference to the country where the seizure is made. (8)

It is in consideration of this responsibility, it has been thought, that the factor is entitled to charge foreign customs as paid, and to have the benefit to himself, if he can find means to evade the payment of them; but not so of home customs. (9)

**INCAPACITIES
OF FACTORS.**

FACTOR CANNOT DENY THE TITLE OF HIS PRINCIPAL.

CANNOT PURCHASE OR SELL THE GOODS OF HIS PRINCIPAL ON HIS OWN ACCOUNT.

4. INCAPACITIES OF FACTOR.

A factor having had goods consigned to him for sale, cannot in an action by the consignor for not accounting set up as a defence, that the goods were not the property of the consignor but of a third person, he having received no notice to that effect. (10)

The undertaking of an agent employed at a certain commission, or salary, to purchase for the use of his principal, is to buy in the most beneficial manner for him; and therefore it is declared to be contrary to the duty and trust of a person in that situation to be himself the seller, unless

(1) *Smith v. Cologan*, 2 T. R. 188. n.

(2) *Ibid.*

(3) *Moore v. Morgue*, Cowp. 479. *Comber v. Anderson*, 1 Camp. 253.

(4) *Lewson v. Kirk*, Cro. Jac. 265. Ch. Ca. 25.

(5) 5 Bac. Abr. Merchant (B.), 389. 599.

(6) *Lewson v. Kirk*, Cro. Jac. 255.

(7) *Molloy*, 329. 13 Vin. Abr. Factor. 8. [F. 3.].

(8) *Mal. Lex Merc.* 83. 13 Vin. Abr. Factor, 4. [B. 2.].

(9) *Eq. Ca. Abr.* 369, 370. *Smith v. Oxendon and Borr v. Vandall*, 3 Salk. 235. *Boulton v. Arledon*, *sed vide* 13 Vin. Abr. Factor, 4. [B. 2.].

(10) *McClelland v. White*, 1 Hayes (Irish) 240.

it be so understood by plain and express consent. (1) It is obvious, that the character of a seller is incompatible with diligence and exertion in obtaining goods at the lowest price.

INCAPACITIES
OF FACTOR.

An agent, who deals as a merchant, without the express consent of his principal, is accountable to him for the profits made by this indirect dealing, that is, for the surplus charged by him above the prime cost of the article supplied, though not more than the principal must have paid to any other merchant.

Factor clandestinely dealing with principal as a merchant by selling his own goods, liable to refund the profits.

This principle is particularly recognised by Lord Thurlow, where, upon a bill being filed by the East India Company against one of their servants for an account of profits made by supplying the company with silks under a collusive contract with the board of trade, his Lordship stated, "If, being a factor, he buy up goods, which he ought to furnish as factor, and instead of charging factorage duty, or accepting a stipulated salary, he take the profits, and deal with his constituent as a merchant, that is a fraud, upon which an account is due." (2)

Judgment of Lord Thurlow in *East India Comp. v. Henchman*.

And in a subsequent case, an agent employed to furnish timber for a colliery, at a certain stipulated salary, was decreed to account for the profits, which he had made by selling his own timber to his principal, under the name of another person, with whom he had clandestinely engaged in a partnership. (3) And not only the agent himself who betrays his trust, but the merchant who, knowing the agent to be guilty of a breach of duty, enters into the transactions with him (4), or by collusion obtains a price he ought not to have had, is liable to account in equity, as for a fraud. (5)

By stat 31 Geo. 2. c. 40. s. 11. cattle factors are prohibited from buying or selling cattle, either directly or indirectly, on their own account.

Stat. 31 Geo. 2. c. 40. s. 11.

A power to sell, such as is possessed by a factor or broker, can only be executed by way of sale, and does not authorise a disposition in any other manner. (6)

PLEDGING THE
GOODS OF HIS
PRINCIPAL.

Where a factor, the consignee of goods for sale, and indorsee of the bills of lading, had landed and warehoused the goods and taken the wharfinger's certificates and dock warrants in his own name, and then pledged the certificates and warrants for an advance of money on his own account:— It was held, that such pledge was not protected by stat. 6 Geo. 4. c. 94. s. 2., in an action of trover by the real owner of the goods. (7)

Factor no right to pledge.

A bill of lading cannot by a factor be transferred by way of pledge, so as to exclude the principal's right to stop *in transitu*; because a bill of lading, which is an authority to receive the goods, cannot give the factor a greater power over them, than the possession of the goods themselves would do. (8)

Stat. 6 Geo. 4. c. 94. s. 2. does not extend to the pledge of documents, created by the factor himself.

A factor does not acquire an authority to pledge, where bills are drawn

(1) *Massey v. Davies*, 2 Ves. jun. 317. *Day v. Croft*, 2 Beav. 488.

(2) *East India Comp. v. Henchman*, 1 ibid. 289.

(3) *Massey v. Davies*, 2 ibid. 317.

(4) Ibid.

(5) *East India Comp. v. Henchman*, 1 ibid. 289.

(6) *Paterson v. Tash*, Str. 1182. *Daubigny v. Duval*, 5 T. R. 606. *De Bouchout v. Goldsmid*, 5 Ves. 211. *Shipley v. Kymer*,

1 M. & S. 484. *Newsom v. Thornton*, 6 East, 17. *Boyson v. Coles*, 6 M. & S. 14. *Guerreiro v. Peile*, 3 B. & A. 616., *sed vide* stats. 4 Geo. 4. c. 83. and 6 Geo. 4. c. 94., *post*, 1933, 1934.

(7) *Close v. Holmes*, 2 M & Rob. 22. To an action of trover, plea, that one lawfully in possession of goods pledged them to defendant, was held ill. *Jauillery v. Britten*, 4 Bing. N. C. 242.

(8) *Newsom v. Thornton*, 6 East, 17..

INCAPACITIES OF FACTOR.

by the principal in advance of a consignment made to the factor for sale(1); and the fact of a merchant drawing bills upon the factor to whom the goods are consigned, against the consignment, does not raise an authority in the factor to raise money to meet the bills by pledging the goods. (2)

Although the factor himself have a lien upon the property pledged, which would entitle him to retain it, yet this being a personal right, cannot be transferred to the pawnee, so as to give him a title even to the amount of the lien (3); in fact, "the principal is not bound to tender a larger sum to the pawnee, than is due from himself to the factor."

Respecting negotiable securities, the property passes by delivery only.(4)

WHERE FAC- TOR MAY SELL ON CREDIT.

A general power to sell, implies a power to sell in the usual way.

5. WHERE FACTOR MAY SELL ON CREDIT.

In the absence of particular instructions, a general power to sell implies a power to sell in the usual way (5); and therefore, the right of an agent under such a general authority to sell upon credit, depends entirely upon the fact of that being the usual mode of dealing in the particular trade in question: thus, Chief Justice Holt said, "A factor of common right is to sell for ready money, but if he be a factor in a sort of dealing or trade, where the usage is for factors to sell on trust, there, if he sell to a person of good credit at that time, and he after becomes insolvent, the factor is discharged; but otherwise, if it be to a man notoriously discredited at the time of the sale. But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable." (6)

Not warranted in selling to an insolvent.

But notwithstanding any usage of trade, an agent is not warranted in selling upon credit to a person whom he knows at the time to be insolvent, unless specially directed to sell to him. (7) The notorious discredit of the vendee, as appears from the opinion just cited of Chief Justice Holt, is a reason for charging the agent. (8) And if he sell goods of his own to the same person for ready money, that is a strong circumstance from which to argue his knowledge of the vendee's insolvency, though it is said not to be sufficient alone to charge him in an action. (9)

Time of credit must be reasonable and customary.

The time of credit must in all cases be reasonable and customary (10), and the security such as the principal may avail himself of by reasonable diligence, and without extraordinary risk or trouble. (11)

Judgment of Lord Ellenborough in *Wiltshire v. Sims*.

Thus, on the transfer of *stock*, which is usually sold for ready money only, it was held, that a sale for a promissory note at fourteen days could not be enforced, the transaction being conducted by a stock broker to whom a

(1) *Graham v. Dyster*, 6 M. & S. 1. *Kuckein v. Wilson*, 4 B. & A. 443.

(2) *Queiroz v. Trueman*, 3 B. & C. 342.

(3) *Daubigny v. Duval*, 5 T. R. 604., vide etiam *M'Combie v. Davies*, 7 East, 5.

(4) *Goldsmid v. Gaden*, cit. 1 B. & P. 649., ante, 754. tit. *BILLS OF EXCHANGE AND PROMISSORY NOTES*.

(5) 13 Vin. Abr. Factor, 2. [A. 2.]. *Johnston v. Usborne*, 11 A. & E. 549. *Sutton v. Tatham*, 10 ibid. 27. *Houghton v. Matthews*, 3 B. & P. 489., sed vide *Trueman v. Loder*, 11 A. & E. 589.

(6) *Rex v. Lee*, 12 Mod. 514. *Dodderidge v. Anthony*, Winch, 53. *Capp and Tucker's case*, 2 Rol. 427., et vide *Wiltshire v. Sims*, 1 Camp. 258. *Dyer*, 29. (a.)

(7) *Sadock v. Burton*, Yelv. 202. *Mal Lex Merc.* 83.

(8) *Rex v. Lee*, 12 Mod. 514.

(9) *Molloy*, 239.

(10) *Barton v. Sadock*, Bulstr. 103. *Molloy*, 328.

(11) *Dodderidge v. Anthony*, Winch, 53.

general authority was given to sell; upon that occasion Lord Ellenborough said, "When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner; he made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of stock which he agrees to sell? The broker here sold the stock in an *unusual* manner, and unless he was expressly authorised to do so, his principal is not bound by his acts." (1)

WHERE FACTOR MAY SELL ON CREDIT.

In *Heisch v. Carrington* (2) it was conceived, that by custom in the corn market, a buyer may pay the factor upon discount, within the two months which constitutes the ordinary time of payment, either for his own accommodation or that of the factor; and therefore, where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months, it was held, that the principal could not sue the buyer, but must look to the factor; but upon a rule absolute for a new trial (3) Lord Denman said, "It appears to us that in this case there was really no evidence at all of the custom, nor of any authority from the plaintiff to Gibson to receive the money before the expiration of the credit, nor of the plaintiff allowing Gibson to deal with the barley as his own. Gibson did not know of one single instance, in which the custom had been acted on with the knowledge of the principal; he had never received any money upon sales for the plaintiff before the time, except in two instances; and in both the plaintiff was consulted before the money was received, and the money paid over to him directly; and as to the last point, all the world knew him to be factor." (4)

Payment to factor before time of credit has expired.

Judgment of Lord Denman in *Heisch v. Carrington*.

6. RESPONSIBILITY FOR LOSS BY FAILURE OF THIRD PERSONS.

Losses occasioned by the fraud or failure of third persons, to whom an agent has given credit pursuant to the regular and accustomed practice of trade, are not chargeable upon him.

RESPONSIBILITY FOR LOSS BY FAILURE OF THIRD PERSONS.

Thus, a banker who had received bills of exchange from his correspondent to procure payment, instead of receiving payment in money, took the acceptor's check, and delivered up the bills; the check was dishonoured; but as it appeared, that the banker had only pursued the usual course of business, Lord Kenyon held, that he was not answerable for the event. (5)

Factor not responsible for the fraud or failure of third persons, if credit have been given according to the accustomed practice of trade.

The receiver of Lord Plymouth's estate took bills in the country of persons, who at the time were reputed to be of credit and substance, in order to return the rents in London; the bills were dishonoured, and the money lost; and yet the steward was held to be excused. (6) This was

(1) *Wiltshire v. Sims*, 1 Camp. 258.

(2) 5 C. & P. 471.

(3) 11 A. & E. 555. n.

(4) Where goods sold by a broker for a principal not named, upon the terms as specified in the usual bought and sold notes (delivered over to the respective parties by the broker) of "payment in one month, money:" it was held, that they may be paid for by the

buyer to the broker within the month, and that payment may be made by a bill of exchange accepted by the buyer and discounted by him within the month, although such bill had a longer time to run before it became due. *Paterson v. Gandasequi*, 15 East, 68.

(5) *Russell v. Hankey*, 6 T. R. 12.

(6) *Knight v. Plymouth (Lord)*, 3 Atk. 480.

**RESPONSIBILITY
FOR LOSS BY
FAILURE OF
THIRD PER-
SONS.**

Judgment of
Lord Kenyon
in *Warwicke v.
Noakes*.

Factor placing
his principal's
money to his
own account
with his gene-
ral bankers.

mentioned by Lord Hardwicke in support of his opinion, that if a trustee appoint rents to be paid to a banker at that time in credit, and the banker afterwards break, the trustee is not answerable; and none of these cases, his lordship observed, are on account of necessity, but because the persons acted in the usual method of business. (1)

In an action for money had and received, the facts were, that the plaintiff had engaged the defendant as his agent, to receive money due to him from his customers, directing him to remit by the post a bill for such sums. A bill was accordingly remitted to him by the post, but the letter was suppressed, and the money upon the bill received at the banker's by some unknown person, and was not recovered; Lord Kenyon said, "Had no directions been given about the mode of remittance, still, this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent. It was so determined in the court of Chancery forty years ago." (2)

But if an agent place his principal's money to his own account with his general banker, without any mark by which it may be specified as belonging to the trust, and the banker fail, the agent will not be excused, because he cannot so deal with his principal's money, as that if the banker's solvency continue, he may be in a condition to treat it as his own, and, if insolvency happen, he may escape by considering it as belonging to his principal. (3)

And a loss occasioned by any unauthorised disposal or adventure of the principal's money, and not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent. (4)

7. LIABILITY OF JOINT FACTORS, FOR RECEIPTS AND CONSIGNMENTS.

**LIABILITY OF
JOINT FACTORS,
FOR RECEIPTS
AND CONSIGN-
MENTS.**

Joint factors are liable for each other's receipts; and it is no discharge of one of two joint factors, that the business was wholly transacted by the other with the knowledge of the principal. (5)

As a joint consignment makes each liable to account for the whole, so where two agents, though residing in different places, agree to share the profits of their respective commissions, they become liable by such agreement, as joint agents, to all persons with whom each may contract as agents notwithstanding that their agreement between themselves provides, that neither shall be liable for the acts or losses of the other, but each for his own:—because such an agreement essentially constitutes a partnership. (6)

(1) *Exp. Parsons*, Ambl. 219., vide *Routh v. Howell*, 3 Ves. 566. *Adams v. Claxton*, 6 ibid. 226. *Bacon v. Bacon*, 5 ibid. 331. The above rule corresponds with that of the civil law,—“*Si res pupillaris incursu latronum pereat, vel argentarius cui tutor pecuniam dedit, cum fuisset celebrimus, solidum reddere non possit; nihil eo nomine tutor præstare cogitur.*” (Dig. lib. xxvi. tit. 7. s. 50.)

(2) *Warwicke v. Noakes*, Peake's N.P.C. 98.

(3) *Wren v. Kirton*, 11 Ves. 382.

(4) *Antè*, 1866. Judgment of Lord Cottingham in *Clough v. Bond*.

(5) *Godfrey v. Saunders*, 3 Wils. 73. *Goore v. Daubeny*, 2 Leon. 75. (b.)

(6) *Waugh v. Carver*, 2 Hen. Black. 235. Although on a joint consignment, the agents are both liable on their joint undertaking to sell on commission, yet if goods consigned to two for sale on commission be, with the consignee's assent, assumed by one, who sells them, an action for money had and received is well brought against him alone. *Wells v. Ross*, 7 Taunt. 403. Where several underwriters, on a representation of a loss, pay the amount of their different subscriptions into the hands of a broker, who, by their joint

A discharge of one joint factor is a release of the other. (1)

A surviving partner must account for himself and his deceased partner (2); and upon the death of one of the joint principals, the remedy belongs to the survivor alone. (3)

LIABILITY OF
JOINT FACTORS,
FOR RECEIPTS
AND CONSIGN-
MENTS.

Discharge of
one factor re-
leases the
other.

Survivor of
two joint fac-
tors must ac-
count for him-
self and de-
ceased partner.

LIEN OF FAC-
TORS.

GENERALLY.

Defined.

Lien is either
particular or
general.

8. LIEN OF FACTORS.

"A lien is a right in one man to retain that, which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." (4) It is not therefore founded in property, but is an equitable right to retain the property of another; and it was stated by Lord Mansfield, that the "convenience of commerce and natural justice were on the side of liens." (5)

Liens are either *particular* or *general* (6); "particular liens are where persons claim a right to retain goods, in respect of labour or money expended upon them." (7)

"General liens are claimed in respect of a general balance of accounts; and these are founded in custom only, and are therefore to be taken strictly."

The first is a right, recognised by the common law with some excep-
tions (8), to keep possession of that upon which a man has expended his
labour or money till his demand be satisfied. (9) But the latter being an
extension of the general right (10), is only to be established either by express
contract, or by that which operates as evidence of a contract (11), the
usage of trade (12), or previous dealings between the same parties on the
footing of such a right. (13)

It would obviously be detrimental to the free course of trade, if factors,
who are employed for the facility of merchandise, could not part with the
possession of property in their hands, without parting with their best se-
curity for the advances necessarily made by them upon that property, which
would be the consequence, if they had only a particular lien; consequently,
a factor has a lien upon each portion of goods in his possession for his
general balance, as well as for charges arising upon those particular
goods (14), such lien attaching not only upon goods in specie, but upon the
proceeds (15) and securities received in the course of his business. (16)

WHERE IT
EXISTS.

authority, pays over a part, if the loss turn
out to be fraudulent, and the sum paid over
exceed the subscription of one of the under-
writers, that underwriter cannot maintain
an action at law to recover from the broker
the amount of his subscription, since the
sum paid over forms a distinct set-off against
the sum claimed. *Silva v. Linder*, 2 Marsh.
437.

(1) Bro. tit. CHARGE, pl. 49. *Godfrey v. Saunders*, 3 Wils. 106.

(2) Eq. Ca. Abr. 5. Ch. Ca. 127.

(3) *Martin v. Crompton*, 1 Ld. Raym. 340. *Smith v. Stokes*, 1 East, 366.

(4) Per Grose J. in *Hammonds v. Barclay*, 2 East, 235.

(5) *Kirkman v. Shawcross*, 6 T. R. 19. *Green v. Farmer*, 4 Burr. 2220.

(6) Per Heath J. in *Houghton v. Matthews*, 3 B. & P. 494.

(7) *Green v. Farmer*, 4 Burr. 2214. 2223. 1 Atk. 236. *Rushforth v. Hadfield*, 7 East, 230.

(8) Exp. *Deeze*, 1 Atk. 228., sed vide *Wilkins v. Carmichael*, Doug. 101.

(9) Ibid.

(10) *Houghton v. Matthews*, 3 B. & P. 494.

(11) *Kirkman v. Shawcross*, 6 T. R. 14.

(12) *Rushforth v. Hadfield*, 7 East, 224.

(13) Exp. *Hockenden*, 1 Atk. 236. *Green v. Farmer*, 4 Burr. 2221. *Newsom v. Thornton*, 6 East, 28.

(14) *Kruger v. Wilcox*, Ambl. 252. Per Lord Mansfield in *Chapman v. Darby*, 4 Burr. 2218.

(15) *Drinkwater v. Goodwin*, Cowp. 251. 255. *Hammonds v. Fentham*, 2 East, 227.

Houghton v. Matthews, 3 B. & P. 489.

(16) *Scott v. Scott*, Willes, 400.

LIEN OF FACTORS.

DEBT MUST BE DUE TO FACTOR IN HIS OWN RIGHT.

Must be a debt due from the person for whose benefit the factor is acting.

Factor unnecessarily making himself liable to others.

Factor becoming surety for his principal, and compelled to pay the debt.

Balance of a general account.

The property must be in possession of factor.

The debt in respect of which a lien is claimed by a factor or other agent, must be due to him in his own right, and not as agent for another person: thus, in a case where Matthews and Co. as brokers for G. and D., had sold goods to one Jackson upon credit, who afterwards committed to them some goods of his own to sell as his brokers, it became a question upon the insolvency of Jackson, whether the brokers had any lien upon the latter goods for the price of the former (there being a balance due to him from G. and D.): — which was decided in the negative. (1)

A factor has not a lien for debts which have accrued before the period at which his character of factor commenced (2); and the debt must also be a debt due from the person for whose benefit he is acting: thus, where an agreement was made between the owner of goods and a creditor, that they should be sold to pay the creditor, and the factor of the owner was fixed upon to sell them, with knowledge of the agreement: — It was held, that the factor had no lien for another debt due to him by the owner of the goods. (3)

So, also, if an agent unnecessarily make himself liable to others for work done to his employer's property, he does not acquire a right to retain the property, for the amount he pays under such liability. As if a servant deliver cloth to a tailor to make into clothes, the tailor, indeed, will have a lien on the cloth for his work; but, though the servant pay the tailor his charge, that will not give the servant a lien on the clothes. (4)

But, if a factor, having become surety for his principal, have been compelled to pay the debt, he has a right to consider it as part of the general account, for which he is entitled to retain. (5)

Though a factor have undoubtedly a lien for the balance of a general account, connected with his employment as factor, yet "the doctrine of liens applies only to cases, where goods have been deposited in the nature of a pledge;" and if the persons claiming the lien have never, before the transactions in question, acted as brokers of the party against whom they claimed, it cannot be considered, that the goods were deposited as a general pledge. (6)

And if it were held, that all debts whatsoever were supposed to be included in a factor's lien, it might be extended to such as have no reference to trade or mutual dealing; as, for instance, to a demand for rent, which would be at variance from the rule of law which says, "that nothing can fall within the custom of trade, but what concerns trade." (7)

In order to found the lien of a factor, it is necessary, that the property upon which it is claimed, should have been in his possession; for if goods, after being consigned to a factor, are stopped *in transitu*, no such right rests in him; and the owner may exercise the power of stopping the goods, so as to prevent the factor gaining any lien upon them, notwithstanding he have accepted bills drawn upon him, on the faith of the consignment; because there is an essential distinction between payment, and a liability to pay. (8)

It has been held, however, that a factor who is in advance to his prin-

(1) *Houghton v. Matthews*, 3 B. & P. 485.

(2) *Ibid.*

(3) *Weymouth v. Boyer*, 1 Ves. jun. 416.

(4) *Hussey v. Christie*, 9 East, 426. 433.

Gurney v. Sharp, 4 Taunt. 242.

(5) *Drinkwater v. Goodwin*, Cowp. 251.

(6) *Walker v. Birch*, 6 T. R. 258., et vide *Drinkwater v. Goodwin*, Cowp. 251.

(7) Per Heath J. in *Houghton v. Matthews*, 3 B. & P. 485.

(8) *Kinlock v. Craig*, 3 T. R. 119.

principal, has such an interest in the goods consigned to him, upon which he would have a lien if they arrived, as entitles him to recover upon a general policy on goods, effected by him for his own security. (1)

LIEN OF FACTORS.

So if goods come into the possession of a factor, not by the consignment of the owner, but by consignment or delivery of the person to whom he has transferred the property in them, the factor can have no lien upon them for advances made to the owner (2); and where the master of a ship, at the request of the factor for the owner, delivered the certificate of registry of the ship to the factor, in order that he might pay the tonnage duties, it was held, that the latter had no lien upon the certificate for the general balance due to him in respect of the ship, because he had no right to the possession of it, for the purposes of a lien. (3)

Goods coming into the possession of the factor, not by the consignment of the owner.

The death of the principal between the consignment and arrival of the cargo, does not divest the lien which a factor may have acquired, by the acceptance of bills upon the faith of the consignment. (4)

Where the lien is not prevented by the exercise of the owner's right to stop them *in transitu*, yet the nature of the contract between the principal and the factor may be such, as to exclude the lien which would otherwise exist, because "the lien which a factor has on the goods of his principal, arises upon an agreement which the law implies; but where there is an express stipulation to the contrary, it puts an end to the general rule of law." (5)

Where nature of contract excludes factor's right of lien.

So where goods were placed in the hands of a factor, in consequence of an agreement communicated to him, that they were to be sold for the benefit of a particular creditor of the owner, the factor, it was held, could not retain for a demand against the owner. (6)

Goods subject to a lien are in the nature of a pledge (7), which being personal, cannot be transferred (8), so that if goods be parted with, the lien is in general lost. (9) Thus, if the merchant come over, and the factor deliver goods to him, by his parting with the possession, he parts with the specific lien. (10)

WHERE A LIEN MAY BE LOST OR DESTROYED AFTER A LIEN HAS ATTACHED. If goods be parted with, lien lost.

Where a factor has not any special claim on the goods, and has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered as the debt of the principal, and the factor has no lien on the price. (11)

These rules are subject to the following qualifications:—1. If a factor in a foreign country procure goods on his own credit, he is considered as the consignor, and entitled to stop them *in transitu* after a shipment to the principal (12), and has a lien on the price, although he may have parted with the possession of the goods. (13)

Where factor procures goods on his own credit.

So likewise where money has been advanced by the factor on the goods

(1) *Godin v. London Assurance Comp.* 1 Burr. 489. 494., vide etiam *Barclay v. Cousins*, 2 East, 544.

(2) *Kinloch v. Craig*, 3 T. R. 787.

(3) *Burn v. Brown*, 2 Stark. 272.

(4) *Hammonds v. Barclay*, 2 East, 227.

(5) Per Lord Kenyon in *Walker v. Birch*, 6 T. R. 258.

(6) *Weymouth v. Boyer*, 1 Ves. jun. 416.

(7) *Daubigny v. Duval*, 3 T. R. 123. *Walker v. Birch*, 6 ibid. 263.

(8) *Daubigny v. Duval*, 5 ibid. 606. *Maass v. Henderson*, 1 East, 337.

(9) *Godin v. London Assurance Comp.* 1 Burr. 494. *Sweet v. Pym*, 1 East, 4.

(10) *Kruger v. Wilcox*, Ambl. 254. *Godin v. London Assurance Comp.* 1 Burr. 494., vide etiam *Sweet v. Pym*, 1 East, 4. *Lickbarrow v. Mason*, 6 ibid. 20. n.

(11) *Scott v. Surman*, Willes, 405. Bull. N. P. 42. *Taylor v. Plumer*, 3 M. & S. 575.

(12) *Feise v. Wray*, 3 East, 93. *D'Aquila v. Lambert*, Ambl. 400. *Snee v. Prescott*, 1 Atk. 245. *Usparicha v. Noble*, 13 East, 338.

(13) *Drinkwater v. Goodwin*, Cowp. 251. *Hudson v. Granger*, 5 B. & A. 27.

LIEN OF FACTORS.

Constructive possession.

Lien restored, where goods in the course of dealing return into the same possession.

WHERE NO LIEN EXISTS.
When goods delivered for a specific purpose.

Agent employed by another agent, cannot avail himself of a general lien against the principal.

in question, even at a time when he knew his principal to be in insolvent circumstances, the factor has a lien to the amount of such advances, although he may have parted with the possession; because "there cannot be a greater paradox, than that a man should be guilty of a *fraud*, in lending his money, with no *other prospect* but the *chance* of being repaid it." (1)

2. Though the actual possession be parted with, yet there may remain such a constructive possession, as will continue the lien. Thus, though a shipment by one who has a general lien to the order of the principal, be an abandonment of the lien, yet it would be otherwise, if the shipment were to his own order. (2)

So when an agent who has a lien upon property to a certain amount, deposits it with a third person as a security to that amount, apprising him of the lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished. (3)

3. It appears to follow from the nature of a general lien, that though the goods which are subject to it, have once been parted with, yet if they return into the same possession in the course of dealing, the lien would be restored; because, as the right would attach upon any fresh goods coming into possession, which is the character of a general lien, there seems to be no reason why, it should not equally attach upon the same goods coming back again. (4)

It was held in *Drinkwater v. Goodwin* (5) that, a factor by parting with the possession of goods, does not forfeit the benefit of his lien, if he sell them according to his authority; as it would be productive of great inconvenience, if a factor could not sell goods committed to him for sale, without losing the security which he has by the possession of them. Thus, the proceeds or securities are subject to the same deductions or lien, which the goods in specie were.

If the security be delivered to the factor for a particular purpose, he does not acquire a lien upon it for his general balance. Thus, where a factor, for the owner of a ship at an English port, requests the master to deliver the certificate of registry to him, in order that he may pay the tonnage duties at the custom-house, he cannot, having thus obtained the possession of the certificate, retain it as a security for the general balance due to him, as factor, in respect of the ship. (6)

An agent, employed by another, who is himself an agent with notice, cannot avail himself against the principal of a general lien, which he may be entitled to, as against the person immediately employing him. (7)

(1) *Per* Lord Mansfield in *Foxcroft v. Devonshire*, 2 Burr. 931. *Hudson v. Granger*, 5 B. & A. 27.

(2) *Sweet v. Pym*, 1 East, 4.

(3) *McCombie v. Davies*, 7 East, 7. *Man v. Shiffner*, 2 East, 523.

(4) *Whitehead v. Vaughan*, Co. B. L. 579. Paley, Principal and Agent, 124, 125.

(5) Cowp. 251. *Hudson v. Granger*, 5 B. & A. 27.

(6) *Burn v. Brown*, 2 Stark. 272.

(7) *Maunss v. Henderson*, 1 East, 335. As to the qualified sense in which this rule is to be received, vide *Man v. Shiffner*, 2 East, 523. 529. Where a broker, employed to effect policies of insurance, employs a sub-agent for that purpose, at the same time informing him, that they are for a correspondent in the

country, the sub-agent has not a lien upon the policies for the general balance due to him from the broker, but is only entitled to retain them as against the principal, until the premiums and commissions are paid. *Snook v. Davidson*, 2 Camp. 218., vide etiam *Lanyon v. Blanchard*, ibid. 597. But insurance brokers who have effected a policy without notice, that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply, to the satisfaction of that balance, money received upon the policy, as well after as before notice, that it belongs to a third person. *Mann v. Forrester*, 4 Camp. 60. *Westwood v. Bell*, ibid. 349.

The principle under which agents justify the detention of property in their hands, is founded upon their own rights. If an agent, however, be placed in the character of a mere stakeholder, and asserts no interest in the property, but cannot, on account of conflicting claims, safely give it up, he may under particular circumstances be protected in its detention. (1)

LIEN OF FACTORS.

Where a stakeholder.

9. WHEN FACTOR MAY SUE AND BE SUED.

Although a mere servant or agent with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon (2), yet, if an agent have a beneficial interest in the performance of the contract, as for commission, or a special property or interest in the subject-matter of the agreement, he can support an action in his own name upon the contract; consequently, factors and brokers have capacity to sue; in fact, when a contract not under seal is made with an agent in his own name, for an indorsed principal, either the agent or principal may sue upon it. (3)

WHEN FACTOR MAY SUE AND BE SUED.

When either agent or principal may sue.

In *Short v. Spackman* (4) the plaintiffs, who were brokers, bought goods of the defendant on account of H. and by his authority. The purchase was made in their own names, but the vendor was told, that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H., contracted to sell the same goods, which the defendant had not yet delivered; H. on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller, and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiff sued him for damages sustained by them in consequence: — It was held, that the renunciation of the contract by H. and the plaintiff's acquiescence in it, formed no objection to the right of the plaintiff's to recover; because, upon the bought and sold notes, the plaintiffs appeared as principals, and the defendant could have enforced the contract against them, or against H., and the subsequent renunciation of H. was no more in effect, than if he had thought proper to sell the benefit of his contract to any other person, and which could not have determined the contract.

The right of the agent to sue on a contract made by him for his principal, whether it be expressed that the agent contracts personally, or on the behalf of another, is subservient to the right of the principal to interfere, and to bring the action in his own name upon the unperformed agreement, in exclusion of the agent's right, notwithstanding the agent has not expressly disclaimed. (5) But if the contract be *under seal*, entered into with the agent personally, in a matter within the scope of his authority, in this instance the implied right of action of the principal merges in the higher security taken, by his authority, by the agent, and the remedy is in the name of the latter only. (6)

When right of agent to sue, subservient to the right of the principal to interfere.

(1) *Langston v. Boylston*, 2 Ves. jun. 101. *Edwards v. Minett*, 1 Taunt. 166., vide etiam *Field v. Todd*, cit. 2 Ves. jun. 106.

(2) *Evans v. Evans*, 1 H. & W. 239.

(3) *Sims v. Bond*, 2 N. & M. 616.

(4) 2 B. & Ad. 962.

(5) *Scrimshire v. Alderton*, Str. 1182.

Norfolk (Duke of) v. Worthy, 1 Camp. 337.

Morris v. Cleasby, 1 M. & S. 579, 580.

Bickerton v. Burrell, 5 ibid. 385, 386, 390.,

vide *Coppin v. Walker*, 7 Taunt. 237.

(6) *Schack v. Anthony*, 1 M. & S. 575.

Berkeley v. Hardy, 5 B. & C. 355.

**WHEN FACTOR
MAY SUE AND
BE SUED.**

Distinction between an action for the recovery of damages for non performance of a contract, and an action to recover back a specific sum of money.

Covenant by agent under seal.

Where credit given personally to agent.

Agent acting as principal.

Where a factor is warranted in selling in his own name.

Where an agent does not pursue the principal's authority.

There is a material distinction between an action against an agent for the recovery of damages for the non performance of the contract, and an action to recover back a specific sum of money received by him; for when a contract has been rescinded, or a person has received money as agent of another who had no right thereto, and has not paid it over, an action may be sustained against the agent to recover the money; and the mere passing of such money in account with his principal, or making a rest, without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not equivocal to a payment of the money to the principal. (1) But in general, if the money be paid over before notice to retain it, the agent is not liable (2), unless his receipt of the money was obviously illegal, or his authority utterly void. (3)

If an agent covenant under his own hand and seal for himself, his heirs, &c. for the act of another, though he describe himself in the deed as contracting for, and on the part and behalf of, such other person (4), or if he accept or draw a bill of exchange generally, and not as agent, he is personally liable (5); and in general, where an agent enters into a written agreement as if he were the principal, and the *credit is given to him, he is personally liable* (6); but this liability must be collected from the instrument upon a reasonable exposition of the whole of its terms. (7) So, if an agent act as a principal, and do not disclose his principal, or declare that he acts as agent at the time of making a verbal contract, and the credit be given expressly to him, he will be personally responsible (8); and it seems, that a policy broker can be sued *per se*, for the premiums of insurance. (9)

In *Johnston v. Usborne* (10) the defendant, a corn merchant in Ireland, sent written instructions to the plaintiff, a corn factor and *del credere* agent of the defendant in London, to sell oats of a certain quality at a certain price on his, defendant's, account. The plaintiff sold them, as described by the defendant, in his own name. The oats proved to be of inferior quality, and the plaintiff was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected to by the defendant, that the plaintiff had no right to sell in his own name, and thereby to incur liability:—But it was held, that evidence was admissible for the plaintiff to shew that, by the custom of the London corn trade, a factor was warranted by such instructions in selling in his own name.

Where an agent does not pursue in any degree the principal's authority (11), or so far exceeds it, as to discharge the principal from respon-

(1) *Cox v. Prentice*, 3 M. & S. 344. *Buller v. Harrison*, Cowp. 565. *Cary v. Webster*, Str. 480. *Edwards v. Hodding*, 5 Taunt. 815.

(2) *Buller v. Harrison*, Cowp. 565. *Sadler v. Evans*, 4 Burr. 1986. *Pond v. Underwood*, 2 Ld. Raym. 1210. *Greenway v. Hurd*, 4 T. R. 553. *Carey v. Webster*, Str. 480. Bull. N. P. 133. *Jons v. Perchard*, 2 Esp. N. P. C. 507.

(3) *Townson v. Wilson*, 1 Camp. 396. 564. *Drummond v. Deey*, 1 Esp. N. P. C. 153. *Cary v. Webster*, Str. 480. *Whitbread v. Brooksbank*, Cowp. 69. *Snowdon v. Davis*, 1 Taunt. 359.

(4) *Appleton v. Binks*, 5 East, 148.

(5) *Sowerby v. Butcher*, 2 C. & M. 368.

(6) *Wilks v. Back*, 2 East, 142. *White v. Cuzler*, 6 T. R. 176. *Unwin v. Wolsley*, 1 ibid. 674. *Paterson v. Gandasequi*, 15 East, 62. *Schmaling v. Thomlinson*, 6 Taunt. 147. 1 Marsh. 500.

(7) *Bowen v. Morris*, 2 Taunt. 374. 387.

(8) *McBrain v. Fortune*, 3 Camp. 317. *Paterson v. Gandasequi*, 15 East, 63. 66. *Exp. Hartop*, 12 Ves. 352. *Wilson v. Backhouse*, Peake's Add. Cas. 120. *Simon v. Mativos*, 3 Burr. 1921.

(9) 1 Chitt. Pl. 36.

(10) 11 A. & E. 549.

(11) 1 Eq. Abr. tit. MASTER AND SERVANT, 308.

sibility for his acts (1), or where he acts under an authority, which he knows the principal has no right to give, as an agent selling property under a notice, that it does not belong to his principal, he is personally responsible. (2)

Where a person assumes, on the face of the contract, the character, not of a principal, but of an agent to another named person, he cannot retract that assumed capacity and sue as a principal, without previously undeceiving the defendant, and giving him notice of the real nature and extent of his, the plaintiff's, claim and interest. (3)

A factor having a special property in the goods, can support trover against a stranger, who takes them out of his actual possession. (4)

WHEN FACTOR
MAY SUE AND
BE SUED.

When principal has no right to give a power.

Where a person assumes the character of an agent.

When factor can maintain trover.

10. RIGHTS AND LIABILITIES OF PRINCIPALS; AND HEREIN OF STATS. 4 GEO. 4. C. 83. AND 6 GEO. 4. C. 94.

RIGHTS AND
LIABILITIES OF
PRINCIPALS;
AND HEREIN OF
STATS. 4 GEO. 4.
C. 83. AND 6
GEO. 4. C. 94.

A sale by a factor, whether acting under a *del credere* commission or not, creates a contract between the owner and the buyer. (5) Thus, if a factor sell goods, and the owner gives notice to the buyer to pay the price to him and not to the factor, the buyer will not be justified in afterwards paying the factor, and the principal will be entitled to recover the price in an action against the buyer, unless the factor has a lien on such price. (6)

Sale by factor creates a contract between owner and buyer.

In *Thomson v. Davenport* (7) Mr. Justice Littledale said, "The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought by an agent, who does not at the time disclose, that he is acting as agent, the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller, at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case: the seller may, in his invoice and bill of parcels, mention both principal and agent; he may debit A. as a purchaser for goods bought through B. his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other

General rights and liabilities of principal from acts of his agent.

Judgment of Mr. Justice Littledale in *Thomson v. Davenport*.

(1) *Fenn v. Harrison*, 3 T. R. 761. *Mertens v. Winnington*, 1 Esp. N. P. C. 112. *Eaton v. Bell*, 5 B. & A. 34. *Bowen v. Morris*, 2 Taunt. 386.

(2) *Buller v. Harrison*, Cowp. 565, 566. *Saller v. Evans*, 4 Burr. 1984. Bull. N. P. 133. (a.) *Snowdon v. Davis*, 1 Taunt. 359.

(3) *Bickerton v. Burrell*, 5 M. & S. 383.

(4) *Martini v. Coles*, 1 ibid. 147.

(5) *Scrimshire v. Alderton*, Str. 1182. *Hornby v. Lacy*, 6 M. & S. 166.

(6) *Drinkwater v. Goodwin*, Cowp. 250.

(7) 9 B. & C. 90.

RIGHTS AND
LIABILITIES OF
PRINCIPALS, &c.

Notice to principal binds his agents.

RIGHT OF SET-OFF.

Consequences if principal allow his agent to appear as the principal.

person; to hold in this case, that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to *debit* any other individual."

In *Willis v. England (Bank of)* (1) Lord Denman said, "The general rule of law is, that notice to the principal, is notice to all his agents; at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens." (2)

The different situations in which the buyer and seller, and their factor or broker, are placed in relation to each other, afford frequent discussions as to the right of set-off, especially where the bankruptcy of one of the parties has intervened. The principle upon which many of these cases have been decided is this, that if the name of the principal be disclosed, the principal vendor and vendee are the creditor and debtor, although the agent in selling acted under a *del credere* commission.

If a factor, under a *del credere* commission, sell goods as his own, and the buyer *know nothing* of the principal, the buyer may set-off any demand which he may have on the factor, against a demand for the goods made by the principal. (3)

A broker in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and the buyer cannot set-off the debt from the broker. (4)

Where a broker sold goods to Smith and Co. on a commission *del credere* from Mesurier and Co., and resold the goods by direction of Smith and Co., and afterwards disclosed the name of his principal to Smith and Co., and after the expiration of the credit to Smith and Co. paid the proceeds to Mesurier and Co.:—It was held, that the broker could not, in an action by the assignees of Smith and Co. who became bankrupts, set-off the payment to Mesurier and Co. (5) For the defendant having sold to Smith and Co. as broker, and having disclosed the name of his principal to Smith and Co. before the relative rights and situation of the parties were altered, it was the same thing, as if the disclosure had taken place at the time of the sale. (6)

If a principal allow his agent to appear to be the principal, and to contract in the latter character, and the defendant has thereby been induced to give credit to the agent, the principal's right of action in his own name

(1) 4 A. & E. 39.

(2) *Mayhew v. Eames*, 3 B. & C. 601. *Doe v. Martin*, 4 T. R. 66. *Hern v. Nicholls*, 1 Salk. 289.

(3) *George v. Claggett*, 7 T. R. 359. *Rabone v. Williams*, *ibid.* 360. n. If goods are bought by a broker, who does not mention the name of his principal until he, the broker, has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor. *Waring v. Favenck*, 1 Camp. 85.

(4) *Baring v. Corrie*, 2 B. & A. 137.

(5) *Morris v. Cleasby*, 4 M. & S. 566.

(6) *Ibid.* et vide *Gurney v. Sharp*, 4 Taunt. 242. *Cumming v. Forrester*, 1 M.

& S. 495. *Koster v. Eason* (2 *ibid.* 112.) is distinguishable from that of *Morris v. Cleasby* in this respect, that, in the latter, the name of the principal was disclosed before any transaction on which the defendant's claim was founded took place (vide etiam *Morris v. Cleasby*, 4 M. & S. 566.), except that it was doubtful, whether the defendant had disclosed the name of his principal before or after the payment to Mesurier; and the court granted a new trial in order to ascertain the fact. But if the factor have a lien upon the goods, the vendee cannot set off a debt due to him from the principal, although the name of the principal be disclosed at the time of the sale. *Atkins v. Amber*, 2 Esp. N. P. C. 493.

is subject to the set-off, which the defendant has against the agent, and which would be available, if the latter were the plaintiff. (1)

Before the enactment of stat. 4 Geo. 4. c. 83., a factor, or agent for sale, had no power to pledge, whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading, in which he was the consignee or indorsee. This was in accordance with the general rule, that he who deals with one acting *ex mandato*, can obtain from him no better title than his mandate enables him to bestow.

But this rule was thought by some to be attended with hardship on merchants and others dealing with factors, on the faith of their being principals; and the legislature, by stat. 4 Geo. 4. c. 83., first relaxed this rule, and by the stat. 6 Geo. 4. c. 94. extended that relaxation.

Stat. 4 Geo. 4. c. 83. s. 1. after reciting, that the law, as it now stands, relating to goods shipped in the names of persons, who are not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves, in its effects, highly injurious to the interests of commerce in general," enacts, that any person entrusted, for the purpose of sale, with any goods, wares, or merchandise, and by whom such goods &c. shall be shipped in his own name, or in whose name any goods, &c. shall be shipped by any other person, shall be deemed to be the true owner, so far as to entitle the consignee of such goods, &c. to a lien thereon, in respect of any money or negotiable security advanced or given by such consignee to or for the use of the person in whose name such goods, &c. shall be shipped, or in respect of any money or negotiable security received by him to the use of such consignee, in the like manner, as if such person was the true owner of such goods: provided such consignee shall not have notice, by the bill of lading for the delivery of such goods, at or before the time of any advance or receipt of such money or negotiable security, in respect of which such lien is claimed, that the person shipping, or in whose name any goods shall be shipped, is not the actual and *bond fide* owner: provided also, that the person in whose name any such goods are so shipped, shall be taken for the purposes of this act to have been entrusted therewith, unless the contrary thereof shall appear or be shewn in evidence by any person disputing such fact.

By sect. 2. any person, body politic or corporate, can accept and take any goods, &c., or the bills of lading for the delivery thereof, in deposit or pledge from any consignee thereof; but then and in that case, such person or body politic or corporate shall acquire no further or other right, title, or interest, in or upon or to the said goods, &c., or any bill of lading for the delivery thereof, than was possessed, or could or might have been enforced by the said consignee at the time of such deposit or pledge as a security as aforesaid; but such person, body politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed, and might have been enforced, by such consignee at the time of such deposit or pledge as aforesaid.

RIGHTS AND
LIABILITIES OF
PRINCIPALS, &c.

Incapacities of factors to pledge, before the enactment of stats. 4 Geo. 4. c. 83. and 6 Geo. 4. c. 94.

Stat. 4 Geo. 4. c. 83.

Sect. 1.

Persons in whose names goods shall be shipped, shall be deemed to be the true owners, so as to entitle consignees to a lien thereon in respect of their advances, or of money or negotiable securities received by the shippers to the use of the consignees, provided the consignees have no notice that the consignors are not the actual proprietors of such property.

Sect. 2.

Any person may take goods or bill of lading in deposit from any consignee; but such person shall not acquire any further right than the consignee possessed.

(1) *George v. Clugett*, 7 T. R. 359. *Wa- ring v. Favenck*, 1 Camp. 85. *Westwood v. Bell*, Holt's N. P. C. 124. *Stat. 6 Geo. 4. c. 94. s. 6. Carr v. Hinchliff*, 4 B. & C. 547. *Taylor v. Kymer*, 3 B. & Ad. 334.

**RIGHTS AND
LIABILITIES OF
PRINCIPALS, &c.**

Sect. 3.

Right of the true owner to follow his goods while in the hands of his agent, or of his assignees in case of bankruptcy, or to recover them from assignees, &c. upon paying his advances secured upon them, &c.

**Stat. 6 Geo. 4.
c. 94. s. 1.**

Factors or agents having goods or merchandise in their possession shall be deemed to be the true owners, so as to give validity to contracts with persons dealing *bond fide* upon the faith of such property.

Sect. 2.

Persons in possession of bills of lading, &c. to be the owner, so far as to make valid contracts.

The 3d section provides that nothing therein contained, shall be construed to prevent the true owner of such goods, from recovering the same from his factor or agent before the same shall have been so deposited or pledged, or from the assignee of such factor or agent in the event of his bankruptcy; nor to prevent any such owner from recovering from any person, or from the assignees of any person in case of his bankruptcy, or from any body politic or corporate, such goods, so consigned, deposited, or pledged, upon repayment of the money, or on restoration of the negotiable security, or on payment of a sum of money equal to the amount of such security, for which money or negotiable security such person, his assignee, or such body politic or corporate, may be entitled to any lien upon such goods; nor to prevent the said owner from recovering from such person, body politic or corporate, any balance or sum of money remaining in his hands, as the produce of the sale of such goods, after deducting thereout the amount of the money or negotiable security so advanced upon the security thereof as aforesaid: provided always, that in case of the bankruptcy of such factor or agent, the owner of the goods so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him to the bankrupt's estate.

The foregoing statute was amended by stat. 6 Geo. 4. c. 94., the first section of which enacts, that any person entrusted, for the purpose of consignment or of sale, with any goods, wares, or merchandise, and who shall have shipped such goods, &c. in his own name, and any person in whose name any goods shall be shipped by any other person, shall be deemed and taken to be the true owner thereof, so far as to entitle the consignee of such goods to a lien thereon in respect of any money or negotiable security advanced or given by such consignee to or for the use of the person in whose name such goods shall be shipped, or in respect of any money or negotiable security received by him to the use of such consignee, in the like manner as if such person was the true owner of such goods: provided such consignee shall not have notice, by the bill of lading for the delivery of such goods, or otherwise, at or before the time of any advance or receipt of such money or negotiable security in respect of which such lien is claimed, that such person so shipping in his own name, or in whose name any goods shall be shipped by any person, is not the actual and *bond fide* owner of such goods so shipped as aforesaid: provided also, that the person in whose name any such goods are so shipped as aforesaid, shall be taken, for the purposes of this act, to have been entrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear, or be shown in evidence by any person disputing such fact.

By sect. 2. any person entrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed the true owner of the goods described and mentioned in the such several documents, or so far as to give validity to any contract or agreement thereafter to be made by such person so entrusted and in possession as aforesaid, with any person or body politic or corporate, for the sale or disposition of the said goods, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument advanced or given by such person, body politic or corporate, upon such

documents: provided such person, body politic or corporate, shall not have notice by such documents or otherwise, that such person so entrusted as aforesaid, is not the actual and *bond fide* owner or proprietor of such goods.

In reference to proving the contract under this section, Lord Tenterden in *Evans v. Truman* (1) observed, "It appears to us from the provisions of this act, that the persons who would avail themselves of it, must prove the contract which they have made."

In *Phillips v. Huth* (2) it appeared that the plaintiffs were owners of a cargo of tobacco, and on the arrival of the vessel placed the bill of lading (indorsed in blank) in the hands of W. as their factor for sale. W. entered the goods at the custom-house in his own name, and (before the cargo was weighed, and without the plaintiff's knowledge) obtained a dock warrant for it in his own name. W. had previously agreed with the defendants for the advance to him (W.) of 20,000*l.* on the deposit of other dock warrants as a security. The defendants, thinking that security insufficient, refused to advance more than 12,000*l.*; whereupon W. pledged with him the dock warrant of the plaintiff's tobacco as a security for, and obtained thereon, the remaining 8,000*l.*: — It was held, that under these circumstances it did not sufficiently appear that W. was *entrusted* with this dock warrant within the meaning of the Factor's Act, 6 Geo. 4. c. 94. s. 2., and therefore that the plaintiffs were entitled to recover from the defendants the proceeds of the tobacco which was sold by the defendants on W.'s becoming bankrupt.

It also appeared, that the defendants had advanced to W. the sum of 14,000*l.* on the deposit of American state bonds. W. and C. afterwards entered into partnership, and agreed with the defendants, in consideration of their discounting W. and C.'s acceptances for 14,400*l.*, to deposit with them as a security dock warrants for goods held by them. W. and C. accordingly deposited with defendants the dock warrant of another cargo of tobacco belonging to the plaintiffs, which they had taken out in their own names, under similar circumstances with the former. The defendants gave up to W. the American bonds, and paid over to W. and C. the balance, after deducting the debt due to them from W., and the discount: — It was held, that if according to the intention of both parties the 14,400*l.* was to be placed wholly at the disposal of W. and C., to apply it to any purpose of their own as they pleased, and they directed its payment in account to the defendants in satisfaction of W.'s debt, this was an advance of money to W. and C. within the meaning of stat. 6 Geo. 4. c. 94. s. 2.; but if their intention was, that the new advance was only for the purpose of satisfying W.'s former debt, and it would not have been made, except upon the understanding that it should be so applied, and the application of it otherwise would have been a breach of the agreement, then it was not an advance within the meaning of the statute; Mr. Baron Parke observing, "It is very clear, that this section relaxes the rule of the common law, only with respect to those, who deal with persons who are not merely in possession of, but are also '*entrusted*' with, the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the indicia of property in himself, still the statute does not apply, and they can acquire no title by virtue of it, unless the docu-

(1) 2 B. & Ad. 888.

(2) 6 M. & W. 572.

RIGHTS AND
LIABILITIES OF
PRINCIPALS, &c.

Judgment of
Mr. Baron
Parke in *Phil-
lips v. Huth*.

ment has been '*entrusted*' to that person. If the legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him, would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be '*entrusted*' as well as in possession, the inconvenience is obviated. The statute applies only to written documents relating to goods, and not to goods themselves; and for this reason,—these documents may be made to designate the owner's name, which the goods themselves generally speaking, cannot; and it is clear, that the legislature intended that those persons only should suffer by the frauds of their agents, who have entrusted them with the evidence of title, and omitted to take those precautions, which might have prevented them from deceiving others. It is therefore necessary, in order to give effect to this clause, that the owner should have '*entrusted*' the factor with the document; not that it is necessary, that the owner should have had personal possession of the document, so as to be able to mark it with his name, and himself deliver it to the factor; for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is '*entrusted*' by the owner, with it, within the meaning of the act. But in order to constitute an *entrusting* of such a document, it is necessary that the owner should have intended the factor to possess it, in that form, at the time, when he had the possession. *Entrusting* with the document, is essentially different from *enabling* a person to become possessed of it,—from giving him the means of obtaining it. An instance of the difference was well put in the argument, when it was said by Mr. Crompton, that one who gives another the key of his bureau to get out one paper, may enable him to procure any other that he pleases to take, but does not *entrust* him with it. It is not enough, therefore, to shew that the plaintiffs empowered Warwick, or Warwick and Clagett, to possess themselves of the warrants whenever they chose: it must be shewn, that the plaintiffs really intended that the factors should be possessed of them at the time they pledged them, or it must be shewn, that the plaintiffs meant them not merely to have the power which the possession of the bill of lading would give—of getting the warrants when they liked—but *to exercise that power* by obtaining it *whenever they in their discretion might think fit*. If either of these intentions were proved, it would be sufficient; but if the factors were proved to be in possession of the warrants, under such circumstances as that the plaintiff, if they had been informed of that fact, might justly have said, 'we never meant this,' it is impossible to say, that they entrusted the factors, with these warrants. The principals can never be deemed to have '*entrusted*' the agents with a document, which the agents obtained in breach of their trust, against the intention of their principals, in violation of their duty towards them, and which document never would have existed at all, if it had not been for the fraud of the agents against their employers. It was well observed by Mr. Crompton, that it is impossible to suppose a confidence reposed by the employer with respect to a document, the very existence of which, is a fraud upon him."

RIGHTS AND
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What is not a
sale or dis-
position by
factor within
stat. 6 Geo. 4.
c. 94. s. 2.

Judgment of
Lord Tenter-
den in *Taylor*
v. *Kymer*.

Sect. 3.
No person to
acquire a secu-
rity upon
goods in the

In *Taylor v. Kymer* (1) it appeared that N. and Co. purchased and paid for twenty-three chests of indigo on behalf of the same principal, and were paid the amount by him, but retained the warrants, and the chests remained in the East India Company's warehouses. Being desirous of withdrawing some other warrants, which they had in the hands of the defendants, they deposited these in lieu of them; and they afterwards authorised the defendants to sell the twenty-three chests, and appropriate the proceeds, which they did, not knowing that any party was interested in them but N. and Co. At the time of this transaction, N. and Co. were creditors in account with their principal to an amount, much below the value of the indigo:—It was holden, that the sale of the twenty-three chests was a conversion, and that the defendants were liable to the principal in trover; for that the transfer of these warrants by N. and Co. was not a *sale* or *disposition* by factors within stat. 6 Geo. 4. c. 94. s. 2., nor a pledge as security for negotiable instruments within the same clause, East India warrants not being “negotiable instruments:” — and that if the warrants were deposited as security for a previously existing debt, the defendants by stat. 6 Geo. 4. c. 94. s. 3. could have no greater right in respect of them, than the factors had at the time of the deposit:—Lord Tenterden observing, “We are of opinion that the delivery of the twenty-three warrants does not, under any of the provisions of this act of Parliament, give the defendants any right to hold these warrants from the plaintiff as a security for the debt owing to him by Nevett and Sons. It is not a contract for the sale of the goods within the second section, neither is it a disposition; for to make it a disposition, there must be something in the nature of a sale. It is, however, a deposit or pledge of the warrants; but then is it such a deposit or pledge, as is in the contemplation of the second section? To come within that section, it must be a deposit or pledge for money, or a negotiable instrument advanced or given by such person upon the faith of such documents.

“Now, no money is advanced or given upon the faith of these documents. Then is any negotiable instrument, given upon the faith of the twenty-three warrants? Other warrants are given upon the faith of these; but we are of opinion, that these warrants are not negotiable instruments within the meaning of the act.

“The third section will not assist the defendants, for if the warrants are considered to be deposited as a pledge, not upon the faith of the documents as under the second section, but for any debt due and owing from the person making the deposit or pledge before the time of the deposit or pledge, the person who accepts the goods under such circumstances will acquire no further right than the person had who made the deposit or pledge. The fifth section applies to cases of deposits or pledges with notice, and there the person with whom the goods are pledged, acquires no further right than the party pledging had.”

By sect. 3. in case any person, or body politic or corporate, shall accept and take any such goods, &c. in deposit or pledge from any such person so in possession and entrusted without notice, as a security for any debt or demand due and owing from such person so in possession to such person, or

(1) 3 B. & Ad. 321.

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hands of an agent for an antecedent debt, beyond the amount of the agent's interest in the goods.

Sect. 4.
Persons may contract with known agents in the ordinary course of business, or out of that course if within the agent's authority, notwithstanding notice.

Judgment of Lord Tenterden in *Evans v. Trueman*.

"Agent entrusted with goods."

Sect. 5.
Persons may accept and take

body politic or corporate, before the time of such deposit or pledge, then such person or body politic or corporate, so accepting or taking such goods in deposit or pledge, shall acquire no further or other right to the said goods, or any such document, than was possessed, or could or might have been enforced by the said person so possessed and entrusted at the time of such deposit or pledge as a security; but such person, or body politic or corporate, so taking such goods in deposit or pledge, shall acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such person so possessed and entrusted.

By sect. 4. any person, or body politic or corporate, may contract with any agent entrusted with any goods, or to whom the same may be consigned for the purchase of any such goods, and to receive the same of, and pay for the same to, such agent; and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person, or body politic or corporate, shall have notice that the person making such contract is an agent: provided such contract and payment be made in the usual and ordinary course of business, and that such person, or body politic or corporate, shall not, when such contract is entered into or payment made, have notice that such agent is not authorised to sell the said goods, or to receive the said purchase money.

A party receiving East India warrants from a factor in pledge for money advanced to him, cannot retain them under stat. 6 Geo. 4. c. 94. against the true owner, if from the circumstances he must, as a reasonable man, have known them not to belong to the factor, although no direct communication of that fact is made to him. Thus, in *Evans v. Trueman* (1) Lord Tenterden said, "The expression of the statute is, that a party is to be entitled to its protection, if 'he shall not have notice by the documents or otherwise' that the pledger was not the actual and *bond fide* owner of the goods pledged. A person may have knowledge of a fact, either by direct communication, or by being aware of circumstances, which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge, acquired in either of these ways, is enough, I think, to exclude a party from the benefit of the provisions of this statute; slight suspicion, I think, will not. The question I shall leave to the jury in this case, where there is no evidence of direct communication, is, whether the circumstances were such, that a reasonable man, and a man of business, applying his understanding to them, would *know* that the goods were not Nevitt's. If so, the defendants are not entitled to retain them."

In *Monk v. Whittenbury* (2) Lord Tenterden observed, "It is difficult to say precisely, what is meant in this section, by an 'agent entrusted with goods;'—but it has been holden, that a wharfinger, who was also a flour factor, having flour sent to him to keep till further orders, was not an 'agent entrusted with' the flour within stat. 6 Geo. 4. c. 94. s. 4., so as to give validity to a sale by him of the flour.

By sect. 5. any person or body politic or corporate, can accept and take any such goods, or any such document in deposit or pledge from any such

(1) 1 M. & Rob. 10. 2 B. & Ad. 886.

(2) 2 B. & Ad. 486. 1 M. & Rob. 81.

factor or agent, notwithstanding such person, or body politic or corporate, shall have such notice, that the person making such deposit or pledge is a factor or agent; but in that case such person, or body politic or corporate, shall acquire no further or other right, title, or interest in or upon or to the said goods, or any such document for the delivery thereof, than was possessed or could or might have been enforced by the said factor or agent at the time of such deposit or pledge as a security; but such person, or body politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such factor or agent at the time of such deposit or pledge.

The foregoing section only refers to a pledge made distinctly as such (1), and the right of a factor depends upon the question whether, upon the face of the whole account between the principal and factor, the principal is indebted to the factor. (2)

In *Fletcher v. Heath* (3) it was holden, that where a broker having accepted bills for his principal on the security of goods then in his hands, and pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction, the broker under stat. 6 Geo. 4. c. 94. s. 5. could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted; and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged.

By sect. 6. nothing therein contained is to be deemed, construed, or taken to deprive or prevent the true owner of such goods from demanding and recovering the same from his factor or agent before the same shall have been so sold, deposited, or pledged, or from the assignee of such factor or agent in the event of his bankruptcy; nor to prevent such owner from demanding or recovering of and from any person, or body politic or corporate, the price or sum agreed to be paid for the purchase of such goods, subject to any right of set-off on the part of such person, or body politic or corporate, against such factor or agent; nor to prevent such owner from recovering from such person, or body politic or corporate, such goods so deposited or pledged, upon repayment of the money, or on restoration of the negotiable instrument so advanced or given on the security of such goods by such person, or body politic or corporate, to such factor or agent, and upon payment of such further sum of money, or on restoration of such other negotiable instrument (if any) as may have been given by such factor or agent to such owner, or on payment of a sum of money equal to the amount of such instrument; nor to prevent the said owner from recovering from such person, or body politic or corporate, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting thereout the amount of the money or negotiable instrument given upon the security thereof: provided always, that in case of the bankruptcy of any such factor or agent, the owner of the goods so pledged and redeemed, shall be held to have discharged *pro tanto* the debt due by him to the estate of such bankrupt. (4)

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goods, &c. in
pledge from
known agents;
but in that
case shall ac-
quire no fur-
ther interest
than was pos-
sessed by such
agent at the
time of such
pledge.

Sect. 6.
Right of the
true owner to
follow his
goods while in
the hands of
his agent or of
his assignee, in
case of bank-
ruptcy, or to
recover them
from a third
person, upon
paying his ad-
vances secured
upon them.

In case of
bankruptcy of
factor, the
owner of goods
so pledged and
redeemed shall
be held to have
discharged *pro
tanto* the debt
due from him
to bankrupt.

(1) *Thompson v. Farmer*, M. & M. 48.

(2) *Robertson v. Kensington*, 5 M. & R. 381.

(3) 7 B. & C. 517.

(4) As to the general effect of a factor's
bankruptcy, upon the goods of his principal,
vide *Solly v. Rathbone*, 2 M. & S. 298.
Cochran v. Irlam, *ibid.* 301. n. *Bailey v. Cul-*

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By sects. 7. & 10., agents fraudulently pledging the goods of their principals are to be deemed guilty of a misdemeanor, and may be transported not exceeding fourteen years, but not in cases in which the agent has not made the goods a security for any sum beyond the extent of his own lien.

And that acceptance of bills by an agent is not to create a lien so as to excuse the pledge, unless the bills are paid when due; and that the act is not to extend to partners not being privy to the offence, nor to lessen any remedy at law or equity, which the party aggrieved may be entitled to adopt.

EVIDENCE.

11. EVIDENCE.

**COMPETENCY
OF FACTOR.**

Bound to disclose the secrets of his principal.

Agent can prove his authority.

Principal can prove the contract by his agent.

No agent or factor, however confidentially employed, is privileged from disclosing the secrets of his principal unless he be counsel or attorney. (1)

Payment to an agent properly authorised is equivalent to payment to the principal, in equity as well as in law; and the fact of the authority may be proved by the agent—because, the witness stands indifferent in point of interest between the parties. (2)

If the authority be embodied in a written instrument it should be produced, or its non production accounted for; but in other cases it is sufficient to prove, that the agent has acquired credit by acting in that capacity, which has been recognised by the principal in other instances.

The agent in actions instituted by the principal to enforce contracts, is a competent witness for his employer (3); and there is no difference between an agent taking to himself a part of the price for which he bargains, and taking a commission from his employer upon that price. (4) But if an agent have entered into the contract in his own name, he is incompetent to prove that he purchased the goods as agent. (5)

In *Hunter v. Leathley* (6), it was held, that a broker who had effected a policy, and had a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters, and that he was a competent witness, notwithstanding his lien, to prove all matters connected with the policy, Mr. Justice Parke observing, "I think that the witness was competent. The first objection is, that he was a creditor of the plaintiff; but it seems to me, that the defendant has nothing to do with that. If it be said, that he is interested as agent, it is clear, that an agent is admissible *ex necessitate* to prove all matters connected with a contract made by himself. But then it is said, that he had a special interest in the policy. That might have been a sufficient objection, if he had been assignee or mortgagee of the policy; but that did not appear to be the case; he had a mere lien, and an attorney, although he has a lien on the judgment, is competent; and

Judgment of Mr. Justice Parke in *Hunter v. Leathley*.

verwell, 8 B. & C. 448. Stat. 6 Geo. 4. c. 16. s. 12.

(1) *Cobden v. Kendrick*, 4 T. R. 431.

(2) *Ilderton v. Atkinson*, 7 *ibid.* 480.
Robson v. Eaton, 1 T. R. 62.

(3) *Dixon v. Cooper*, 3 Wils. 40.

(4) *Benjamin v. Porteus*, 2 Hen. Black. 592.

(5) *M^r Brain v. Fortune*, 3 Camp. 317.

(6) 10 B. & C. 858.

I take the reason of the rule to be, that, whatever be the result of the action, his legal rights remain the same. If he looks to the judgment alone for payment, that may affect his credit, but not his competency."

EVIDENCE.

If the money of the principal have been fraudulently applied by the agent to an illegal and prohibited purpose, it may be recovered back by the principal from the fraudulent holder, if it can be clearly traced; because the plaintiff does not stand in the place of his agent, but sues for his identified property, which has come to the hands of the defendant iniquitously and illegally (1); and the agent is a competent witness after a release to prove such fraud (2);—so also in an action to recover goods against one who had received them by the tortious delivery of the servant, the latter was admitted to prove the fact,—although it is not stated, that he had a release. (3)

Fraudulent application of moneys.

The vendor of goods to a factor for the use of his principal may make the factor a witness. (4) Thus, in an action for money had and received, to charge a person with the receipt of money, the servant who received it, is a good witness without a release (5); because he stands indifferent between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant. So, likewise, in an action against the owners of a ship for money borrowed by the captain, the latter was held by Lord Kenyon to be a good witness for the plaintiff to prove, that the money was borrowed for the use of the ship, and not for his own use. (6)

Factor is a competent witness against his principal.

Receipt of money.

Where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time (*e. g.* fourteen years) has elapsed, that he has accounted. (7)

Presumptive evidence of having accounted.

(1) *Clarke v. Shee*, Cowp. 197. *Jaques v. Golightly*, 2 W. Black. 1073.

(2) Ibid., vide etiam *Corking v. Jarrard*, 1 Camp. 37.

(3) Bull. N. P. 90. (a.) *Anon.* 1 Salk. 289.

(4) *Matthews v. Haydon*, 2 Esp. N. P. C. 509. *Jons v. Perchard*, ibid. 507.

(5) *Matthews v. Haydon*, ibid. 509.

(6) *Evans v. Williams*, 7 T. R. 481. n.

(7) *Topham v. Bruddick*, 1 Taunt. 572.

FISHERY.

1. GENERALLY, pp. 1942—1944.

Public and private fisheries — The crown has no general property in fish — Ownership of the soil prima facie evidence of a right of fishery — Distinctive rights of fishery — WHALE FISHERY — Customary rights of fishermen — Act of fishing, sufficient to maintain an action, although no fish were caught — Right of fishery may be exercised, so as not to impede navigation.

2. FREE FISHERY, p. 1944.

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How claimed — Where it cannot be created — Judgment of Lord Mansfield in Seymour v. Courtenay (Lord) — Nature of several fishery — Appurtenant to a man — What is an incorporeal and not a territorial hereditament — Rights of joint owners under a canal act — Claimant must prove his right to a free or several fishery.

4. COMMON OF FISHERY, pp. 1946, 1947.

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5. DECLARATION — PLEADINGS — EVIDENCE — COSTS, pp. 1947—1950.

DECLARATION — Venue — FORM OF ACTION — Case — Trespass — Assumpsit — Averment that defendant "took plaintiff's fish" — Unnecessary specially to state public right of fishery — PLEADINGS — Librum tenementum — Prescriptive right — EVIDENCE — Crown seized in fee — Where user will support the presumption of a grant — Admissibility of old licenses and leases — Misdirection as to the exercise of rights, in relation to ancient weirs — When objection must be made to the production of a copy — Costs.

GENERALLY.

Public and private fisheries.

Fisheries are public or private. The former are either fisheries in distant seas, in which all nations have a right to fish, and some of which are encouraged by act of parliament, or they are fisheries within the four seas, or within public navigable rivers, in which all British subjects have a right to fish in exclusion of other nations, subject, in some particular instances, to modifications by acts of parliament, or the prescriptive rights of individuals. Private fisheries are those in which some particular persons are entitled to an exclusive right of fishing.

The crown has no general property in fish.

The crown has no general property in fish, except whales and sturgeons, which, it is said, belong to the king. (1) But to give to the crown a right to such fish, they must be taken within the seas, parcel of the dominions and crown of England, or in creeks or arms thereof; for if taken in the wide seas, or out of the precinct of the seas subject to the crown of England, they belong to the taker. (2)

(1) Bract. lib. iii. c. 3. s. 5. Britt. 266. Calvin's case, 7 Co.-16.

(2) Fennings v. Grenville (Lord), 1 Taunt. 241.

GENERALLY.

Prima facie, every subject has a right to take fish found upon the sea-shore between high and low water mark. (1) But such general right may be abridged by the existence of an exclusive right in some individual.

Ownership of the soil, *prima facie* evidence of a right of fishery.

Ownership of the soil is *prima facie* evidence of a right of fishery; and a man may prescribe for a general fishery in a navigable river, without shewing a grant from the crown (2); but a prescription to fish in the sea is idle and void. (3).

A man may have a proper and several interest as well in a fishery, as in water or a river, for a man may grant *aquam suam*, and the fishery shall pass. (4)

Distinctive rights of fishery.

The sea belongeth to the king; and also every navigable river, so high as the river ebbs and flows, is a royal river; so far it is considered as a branch of the sea, and belonging to the crown: but rivers not navigable, are the property of the proprietors of the lands on both sides the river; that is, if both sides belong to one owner, the whole river is his; if to two persons, the river is in moieties. But in the case of the crown, there is a difference in respect to granting the land from that of a subject; for by a grant of the land in the case of a subject, the fishery would pass; but in the case of the crown, by a grant of the land adjoining a navigable river or royal fishery, the fishery would not pass, for it is an inheritance in gross in the crown, and parcel of the inheritance of the crown itself; but it may be specially granted by grant of the fishery from the crown. (5)

WHALE FISHERY.

Companies and societies have been established by statutes, and invested with certain privileges; and by the courtesy of nations, boats employed in the fisheries are excepted from capture:—likewise, with a view to encourage fisheries in distant seas, bounties are given on the importation of fish; and foreigners are prohibited from bringing fish of particular descriptions to a British market.

The information in the books relative to the “whale fishery” is of a very limited extent, and those which have been decided, relate to the property in the fish. (6)

Customary

Fishermen may by custom justify going on the adjoining land to the sea,

(1) *Bagott v. Orr*, 2 B. & P. 472. *Quere*, If there be a *prima facie* right in the subject to take fish shells found on the sea-shore between high and low water mark?

(2) *Rogers v. Allen*, 1 Camp. 312.

(3) *Ward v. Creswell*, Willes, 265.

(4) *Banne Fishery*, Dav. 149.

(5) Exp. *Lord Gwydir*, 4 Madd. 281. *Chad v. Tilsed*, 2 B. & B. 403. *Orford (Mayor of) v. Richardson*, 4 T. R. 439. *Lord Fitzwalter's case*, 1 Mod. 105. *Rogers v. Allen*, 1 Camp. 312. *Gray v. Bond*, 2 B. & B. 667. *Wells v. Watling*, 2 W. Black. 1293. *Hobson v. Todd*, 4 T. R. 71.

(6) By the usage of the whale fishery, a fish is to be considered as a fast fish, which is attached by any means (such as the entanglement of the line round it, &c.) to the boat of the first striker, though the harpoon does not continue in the body of the fish. *Hogarth v. Jackson*, 2 C. & P. 595.

If, while the fish is fast to the harpoon of the first striker, another, comes up unsolicited, and so disturbs the fish, that she breaks from the first harpoon, and then he strikes her with a harpoon himself, and secures her, the fish belongs to the first striker. *Skinner v. Chapman*, M. & M. 59. n., sed vide *Fennings v. Grenville (Lord)*, 1 Taunt. 241. *Littledale v. Seait*, ibid. 243. n. For the encouragement of the public, persons employed in the public fisheries are, by stat. 50 Geo. 3. c. 108., exempted from all liability to be impressed, and which extends to those employed in the lobster fishery upon the coast of Heligoland. *Payne and Thoroughgood's case*, 1 M. & S. 233.

By stats. 26 Geo. 3. c. 81. and 28 Geo. 3. c. 20., bounties are given to those engaged in the fisheries. Vide etiam *Lacon (Knt.) v. Hooper*, 6 T. R. 224. 1 Esp. N. P. C. 246. *Edgar v. Miller*, 3 Anst. 926.

GENERALLY.
rights of fishermen.

to fish in the sea (1); and a custom to dry nets upon the land of another seems legal (2); but no right vests in the public of erecting on the seashore any building for drying their nets. (3)

If a weir was granted before the reign of Edward I., and it then obstructed the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only passage remaining. (4)

Act of fishing, sufficient to maintain an action, although no fish were caught.

It is a general rule, that wherever an act injures another's right, and would be evidence in future in favour of the wrongdoer, an action can be maintained for the invasion of the right, without proof of any specific damage (5); consequently, an action can be maintained for the act of wrongfully fishing in a several fishery, although it be neither alleged nor proved that the defendant caught any fish. (6)

Right of fishery must be exercised, so as not to impede navigation.

A right of fishery must be so exercised as not to impede navigation (7); because a navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please, provided it be not done wantonly and maliciously for the purpose of injuring the fishery of the plaintiff. (8)

FREE FISHERY.

2. FREE FISHERY.

Free fishery must be claimed by prescription or grant from the crown.

A free fishery is the exclusive right of fishing in a navigable river or arm of the sea; and this must be claimed by prescription or grant from the crown; because the right of fishing in navigable rivers is common to all the king's subjects, and therefore an exclusive right must be derived from the grant of the crown, in whom that exclusive right originally resided: but the prescription should be as old as the reign of Henry II.; for the charters of King John and Henry III. avoid all such grants from the beginning of the reign of Richard I., and prohibit the fencing of rivers in future, so that no grant of a free fishery shall be good, if made since that time. (9)

SEVERAL FISHERY.

3. SEVERAL FISHERY.

How claimed.

"Several fishery" is also an exclusive right, derived in the same manner as "free fishery," but with this additional circumstance, that it should be claimed by a person who owns the soil, as the land adjoining to a navigable river (10):—It was held to be good, where the plaintiff claimed a several

(1) Bro. Abr. Customs, pl. 46. 3 Edw. 4. 19. *Blundell v. Catterall*, 5 B. & A. 268.

(2) *Fitch v. Rawling*, 2 Hen. Black. 395.

(3) *Blundell v. Catterall*, 5 B. & A. 286. 293.

(4) *Williams v. Wilcox*, 8 A. & E. 314.

(5) 1 Saund. 346. (a.)

(6) *Puttick v. Greenway*, *ibid.* *Wells v. Watling*, 2 W. Black. 1233. *Hobson v. Todd*, 4 T. R. 71.

(7) *Anon. Durham Ass.* 1808, 1 Camp. 517. n.

(8) *Ibid.*

(9) *Banne Fishery*, Dav. 149. *Warren v. Matthews*, 1 Salk. 357., *vide etiam* Seld. Mar. Claus. I. 24. Dufresne, V. 503. Crag. de Jur. feod. II. 8. 15. Stat. 9 Hen. 3. c. 16. Harg. Co. Litt. 122. (a.) n. 7.

(10) 17 Edw. 4. 6. (b.) 18 Edw. 4. 4. (b.) 10 Hen. 7. 24. 26. *Smith v. Kemp*, 2 Salk. 637. 2 Black. Com. 39.

fishery in the river Severn, where it is navigable, as part of his manor of Arlingham which adjoined the river, and recovered accordingly (1); and it seems, that the owner of a several fishery in ordinary cases, and where the terms of the grant are unknown, may be presumed to be owner of the soil. (2)

Seemingly, since Magna Charta, the crown in Ireland cannot create a several fishery in a navigable river. (3)

In *Seymour v. Courtenay (Lord)* (4) Lord Mansfield said, "We agree in the position, that in order to constitute a *several* fishery, it is requisite, that the party claiming it, should so far have the right of fishing, independent of all others, as that no person should have a co-extensive right with him in the subject claimed; for, where any person has such co-extensive right, there it is only a free fishery. But we think that a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner."

Where the plaintiff was grantee of a several fishery, but the grantor had reserved to himself the oysters and fish for his own table; and having declared as possessed of a several fishery, the judge nonsuited him, which was subsequently confirmed *in banco*, the right so reserved to the grantor being deemed, as destroying the nature of a several fishery, which should be exclusive of all others. (5)

Where A. was seised of a mill, and having a sole fishery in the waters, granted the mill, with all waters, streams, &c. necessary in working the same, "except, and always reserving the right and privilege of fishing in the waters of the said mill":—It was held, that this was an exception of the sole fishery, and not a reservation of a new easement. (6)

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor. (7)

Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before Magna Charta, by the description of *separalem piscariam*, that is an incorporeal and not a territorial hereditament, and a term of years in it cannot be created without deed. (8)

Where a canal act provided, "that it should be lawful for the owners of the lands on which any reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein":—It was held, that each owner had separate interests, and a several right of fishery in the water which covered his own land, and were not tenants in common of such fishery. (9)

Where a man claims such free or several fishery he must shew his title, and the *onus* lies on him; for the claim is derogatory to the common right of the subject (10); and he who has either of these species of fishery may have trespass for taking the fish, for he has a property in them. (11)

SEVERAL FISHERY.

Where a several fishery cannot be created.

Effect of co-extensive rights.

Judgment of Lord Mansfield in *Seymour v. Courtenay (Lord)*.

Nature of several fishery.

Appurtenant to a manor.

What is an incorporeal and not a territorial hereditament.

Rights of joint owners under a canal act.

Claimant must prove his right to a free or several fishery.

(1) *Carter v. Murcot*, 4 Burr. 2162.

(2) *Somerset (Duke of) v. Fogwell*, 5 B. & C. 875. 1 D. & R. 747. *Partheriche v. Mason*, 2 Chitt. 658. *Anon. Lofft*, 364.

(3) *Devonshire (Duke of) v. Hadnott*, 1 Hudson & Brooke (Irish), 322.

(4) 5 Burr. 2817.

(5) *Seymour v. Courtenay (Lord)*, *ibid.* 814.

(6) *Paget (Lord) v. Milles*, 3 Doug. 43.

(7) *Rogers v. Allen*, 1 Camp. 309.

(8) *Somerset (Duke) v. Fogwell*, 5 B. & C. 875. 1 D. & R. 747.

(9) *Snape v. Dobbs*, 8 Moore, 23. 1 Bing. 202.

(10) *Warren v. Matthews*, 1 Salk, 327. *Anon.* 1 Mod. 105.

(11) *Smith v. Kemp*, 2 Salk. 637.

SEVERAL
FISHERY.

The water bailiff of the river Thames has no right to take the nets of a person fishing in his own fishery. (1)

COMMON OF
FISHERY.

Defined.

Common of piscary is a right of fishing in the waters of another in common with others (2), and it differs from a several fishery, that in this last, the owner has a property in the fish before they are caught; but in the case of common of piscary, not till they are taken.

Judgment of
Lord Ellen-
borough in
Weld v. Hornby.

In *Weld v. Hornby* (3) Lord Ellenborough observed, "It is impossible to sustain this verdict. The right set up by the defendant to have a stone weir is plainly founded upon encroachment. The erection of weirs across rivers was reprobated in the earliest periods of our law. The words of Magna Charta (4) are, 'that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England,' &c. And this was followed up by subsequent acts (5) treating them as public nuisances; forbidding the erection of new ones; and the enhancing, straitening, or enlarging of those which had aforesaid existed. I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this court, upon a motion for a new trial, to be illegal, and a public nuisance. Now here it appears that, previous to the erection of this complete stone weir, there had always been an escape for the fish through and over the old brushwood weir, in which those in the stream above had a right; and it was not competent for the defendant to debar them of it, by making an impervious wall of stone through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence, that the fish could not pass, except in extraordinary times of flood. And, however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing. No objection, however, of this sort can apply to the present case, where the action was commenced within twenty years after the complete extension of the stone weir across the river, by which it is proved, that the plaintiff has been injured. Then, however general the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by the evidence of the manner in which the thing has been always possessed and used." (6)

Where the
crown has no
right to erect a
weir.

Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore, in such a case, the weir would become illegal upon the rest of the river being so choked, that there could be no passage elsewhere. (7)

Scotch weirs.

The prohibition contained in stat. 10 Car. 1. (Irish) c. 14. extends to

(1) *Bulbrook v. Goodere* (Sir Robert), 3 Burr. 1768.

(2) Co. Litt. 122.

(3) 7 East, 198.

(4) Ch. 23.

(5) *Vide* 12 Edw. 4. c. 7.

(6) *Quare*, Whether a weir which does not destroy the fry of fish, nor impede navigation, and has existed from time immemorial, is illegal within the stat. 2 Hen. 6. c. 15. *Robson v. Robinson*, 3 Doug. 307.

(7) *Williams v. Wilcox*, 8 A. & E. 314.

Scotch weirs erected in rivers between high and low water mark, and also to places in rivers, where the water is perfectly salt. (1)

COMMON OF
FISHERY.

5. DECLARATION—PLEADINGS—EVIDENCE—COSTS.

The venue is local. (2)

In the earlier cases it was holden, that an ejectment would not lie for a fishery, because it was only a profit *apprendre* (3); though it was said by Mr. Justice Ashhurst (4), "There is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment." This however must, it seems, be understood of a several fishery. (5)

Case will lie for disturbing a party in his right of fishery. (6)

Trespass lies for an injury to plaintiff's land covered with water, but if the interest be merely in the water, case is the only remedy (7); when the trespass is in the plaintiff's river or pond, &c. it may be described, that the defendant broke and entered the several fishery of the plaintiff, &c. and fished therein for fish;—but it is disputed, whether it lies for fishing in a free fishery. (8)

To an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded, that the *locus in quo* was the soil and freehold of I. S., and that he ought to have a common fishery there:—but it was held, that such plea was bad, as a common fishery might be applicable to the sea, and extends to all mankind, and that a common of fishery implied a right of enjoyment with certain other persons. (9) It should have been a right of common of fishery. (10)

To an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded, that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing; the plaintiff replied, a prescription for the sole and several right of fishing, and traversed, that every subject had the liberty and privilege of free fishing in the *locus in quo*: this was held to be a bad traverse, and that the defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff, stated in the replication. (11)

An *indebitatus* count can be brought to recover a remuneration for the use and occupation or enjoyment of a fishery (12), and also for fish claimed as toll, for the use of a capstan and windlass in drawing fishing-boats up on the beach out of the sea. (13)

In actions for injuring or taking away goods or chattels, it is in general

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COSTS.

VENUE.

FORM OF ACTION.

Ejectment will lie for a fishery.

Case for disturbance of a right of fishery.

Trespass for injury to plaintiff's land covered with water.

Indebitatus count for the use and occupation of a fishery.

For injuries to

(1) *M'Adam, q. t. v. Halliday*, 1 Alcock & Napier (Irish), 459. n. *Devonshire (Duke) v. Smith*, *ibid.* 442.

(2) 2 Chitt. Pl. 621.

(3) *Molineux v. Molineux*, Cro. Jac. 144. *Herbert v. Laughllyn*, Cro. Car. 492. *Challenor v. Thomas*, Yelv. 143. *Waddy v. Newton*, 8 Mod. 277.

(4) *Rex v. Alresford (Inhab. of)*, 1 T. R. 358—361.

(5) Co. Litt. 4. (b.) 2 Tidd, 1193.

(6) 1 Chitt. Pl. 142.

(7) *Challenor v. Thomas*, Yelv. 143.

(8) *Smith v. Kemp*, 2 Salk. 637. Co.

Litt. 4. (b.) 122. (a.) F. N. B. 88. *Upton v. Dawkin*, 3 Mod. 97. Lil. Ent. 419. 2 Black. Com. 40. *Richardson v. Orford (Mayor of)*, *ibid.* 182. *Child v. Greenhill*, Cro. Car. 554. 1 Chitt. Pl. 175. 2 *ibid.* 622.

(9) *Benett v. Costar*, 8 Taunt. 183. 1 B. & B. 465.

(10) *Ibid.*

(11) *Richardson (Mayor of) v. Orford*, 2 Hen. Black. 182. 1 Anst. 231. 4 T. R. 437.

(12) 1 Chitt. Pl. 345.

(13) *Falmouth (Earl) v. Penrose*, 9 D. & R. 452.

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COSTS.

goods or chattels, it is expedient to describe the quality, quantity, number, and value or price.

Averment that defendant took "plaintiff's fish."

Unnecessary specially to state a public right of fishery.

necessary that their quality, quantity, or number, and value or price should be stated (1); because a former recovery could not otherwise be pleaded in bar of a second action for the same goods, neither could the defendant properly defend himself. (2) Therefore, in an action for a tort to goods, it is in general insufficient, even after judgment by default or verdict, to allege, that the defendant injured or took, &c. "divers goods and chattels" of the plaintiff, without giving any description of them (3); and an averment, that the defendant took the plaintiff's "fish," not showing their number or nature, was considered to be substantially defective. (4)

But this omission, it should seem, would now be holden to be cured after verdict, either at common law (5), or by the Statute of Jeofails (6), and after a general demurrer or judgment by default by stat. 4 Anne, c. 16. s. 1. and even if the action were merely for taking the plaintiff's fish; but if the declaration were for breaking the close, as well as for taking his fish, without specifying their number or kind, it seems it would be good, even on special demurrer, because breaking the close is considered as the principal ground and foundation of the action, and taking the fish as matter of aggravation only. (7)

Where the law gives a general or public right, as for all persons to fish in a public navigable river, it is at least unnecessary specially to state such public right, and it will suffice to show with brevity, that there was a public right, that such a particular place was a public navigable river, and that the defendant prevented the plaintiff from fishing, &c. (8)

(1) Oportet quod petens rem designet, quam petit, — videlicet, qualitatem, &c. item quantitatem, &c. Bract. 431. (a.) 1 Saund. 333. n. (7.) 2 ibid. 74. n. (1.) Stephen, Pl. 347.

(2) Ibid.

(3) Ibid. *Pope v. Tillman*, 7 Taunt. 642.

(4) *Playter's case*, 5 Co. 34. (b.) *Keeble v. Hickeringill*, 11 East, 576. 1 Chitt. Pl. 377. 621., *sed vide* 2 Saund. 74. (a.) n. (1.)

(5) *Johns v. Wilson*, Cro. Jac. 435.

(6) Stat. 16 & 17 Car. 2. c. 8.

(7) 2 Saund. 74. n. (1.) 2 Chitt. Pl. 621. n.

(8) *Ward v. Creswell*, Willes, 268. 17 Vin. Abr. Prescription, 280. [W.]. *Tenant v. Goldwin*, 2 Ld. Raym. 1091. 1 Chitt. Pl. 378.

By stat. 7 & 8 Geo. 4. c. 29. s. 34. taking or destroying fish is a misdemeanor, punishable by fine or imprisonment or both. The statute extends to the taking or destroying any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishing therein; the taking or destroying any fish in any water not adjoining or belong to any dwelling-house, but which shall be private property, or in which there shall be any private right of fishery, is punishable on conviction before a justice of the peace, by a fine of 5*l.* above the value of the fish. Persons angling in the daytime in water belonging or adjoining to any dwelling-house, are on conviction before a justice of the peace liable to forfeit a sum not exceeding 5*l.*, and if in water not adjoining any

dwelling-house, but which shall be private property, liable to forfeit 2*l.*

If a person take fish in a river that runs through an enclosed park, but that no means have been taken to keep the fish within that part of the river which runs through the park, and that they can pass down or up the river beyond the limits of the park at their pleasure; — it will not be a case within the statute, as the fish could not be said to be *bred, kept, or preserved* in that part of the river which was within the park.

If the boundary of any parish, township, or vill shall happen to be in or by the side of any such water, it will be sufficient to prove, that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto. Stat. 7 & 8 Geo. 4. c. 29. s. 34.

Semble, that it should appear on the face of the conviction, that the intermediate course of a stream between the termini in which the offence was committed, was within the jurisdiction of the convicting magistrate. *Rex v. Edwards*, 1 East, 278.

It was held, that a person who fished in a fishery belonging to another, but to which he had a claim, for the purpose of giving occasion to an action in order to try the right, was not liable to a penalty under stat. 5 Geo. 3. c. 14. A principle which, upon analogy, should seemingly be applied to stat. 7 & 8 Geo. 4. c. 29. *Kinnersley v. Orpe*, Doug. 517. Respecting oysters, *vide Maldon (Mayor of) v. Woolvet*, 4 P. & D. 26.

Liberum tenementum is a good plea to trespass in a several or free fishery, the owner of the soil being *prima facie* owner of the fishery (1), and though the subject-matter of it may be given in evidence under the general issue, yet the plea is sometimes useful to compel the plaintiff to set forth in his replication his supposed right by prescription or grant.

An excuse for trespass, founded upon a common of fishery, must be pleaded specially. (2)

When an action is brought for fishing in a certain river being the plaintiff's fishery, and the trespass intended by the declaration is for fishing to the extent of two miles and upwards, if the defendant plead, that he is seised in fee of ten acres adjoining the river, and prescribes for a free fishery in the river along the side of the ten acres, the plaintiff ought not merely to traverse the prescription, and go to issue upon it (because at the trial he would not be permitted to give evidence of any act of fishing by the defendant, either above or below the ten acres, for the question would be confined to the prescription only); but he should also new assign, and state, that the trespass complained of was not only for fishing in the river adjoining the ten acres, but also above and below the same, and then the defendant will be under the necessity of giving some answer to the whole trespass. (3)

"Acts of ownership are not admitted in evidence on the ground of *acquiescence* — that goes only to the *value* of the evidence — but as shewing possession, and so proving title." (4)

Where James I. by patent granted to R. B. the soil and bottom and several fishery in a navigable river, and enjoyment under that patent was shewn: — It was held, that this was evidence, that the crown was seised in fee of the soil and bottom and the several fishery, at the time of making the patent. (5)

Where a patent granted the soil and bottom of a river, &c.: — It was held, that evidence of possession (under the patents) of particular parts of the soil and bottom of the river was sufficient to enable the plaintiff (claiming under the patent) to maintain an action of trespass against the defendant who had erected a weir in another part of the soil, although no actual possession was shewn of that particular part, either in the patentee or those deriving under him. (6)

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward I., and such a grant may be inferred from evidence of its having existed before that time. (7)

Trespass for breaking down a weir appurtenant to a fishery. Justification, that a weir was wrongfully erected across part of a public and navigable river, the Severn, where the king's subjects had a right to navigate, and that the rest of the river was choked up, so that defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood, was distinct from the channel, where the right of navigation existed, and was not a public navigable river. Rejoinder, that

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PLEADINGS.

Liberum tenementum.

Excuse for trespass must be specially pleaded.

Prescriptive right.

EVIDENCE.

Crown seised in fee.

When user will support the presumption of a grant.

(1) 1 Chitt. Pl. 503. cit. 18 Edw. 4. 4. Co. Litt. 127. (a.)

(2) Com. Dig. Piscary (A.).

(3) 1 Saund. 300. (c.) 1 Chitt. Pl. 631.

(4) Per Parke B. in *Jones v. Williams*, 2 M. & W. 327.

(5) *Devonshire (Duke of) v. Hodnett*, 1 Hudson & Brooke (Irish), 322.

(6) Ibid.

(7) *Williams v. Wilcox*, 8 A. & E. 314.

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the part was a part of the Severn, and the king's subjects had a right to navigate there, when the rest was choked up, and that the rest was choked up. Surrejoinder, traversing the right:—It was held, that in support of this traverse, the plaintiff might shew user to raise the presumption of such a grant as above, and was not bound for the purpose of introducing such proof to set out his right more specifically on the record.

Admissibility
of old licenses
and leases.

In an action of trespass upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licenses on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, were held to be receivable evidence (1), Mr. Justice Heath observing, "that he could not distinguish these licenses from old leases, which were always received in evidence in favour of those claiming under the lessors." (2) Rent rolls, where payments have been made, are good evidence; but rentals without money received, and money paid upon them are nothing, and an ancient counterpart of feoffment produced from corporation muniments was rejected, because no rent had been received in respect of the property. (3)

Misdirection as
to the exercise
of rights in
relation to
ancient weirs.

In an action of trespass, *quare clausum fregit*, the plaintiffs derived under a patent, granting the soil, &c. of the river B.; the defendant gave in evidence certain deeds, whereby the manor of B. with the weirs, fishing, and fishing places appertaining in the river B. was granted by the plaintiff's ancestors to persons, under whom the defendant derived; and shewed also various acts of ownership over different parts of the river adjoining to the manor of B. The learned judge having told the jury, that if the defendant transgressed the limits of certain ancient weirs, which were in existence at the time of the grants to those under whom he derived, he was a trespasser:—It was held to be a misdirection. (4)

In an action on the case brought by the owner of a several fishery at L. against the owner of a several fishery lower down on the same river at B., for erecting weirs of a new construction, whereby a greater quantity of fish was caught at the defendant's fishery than formerly, to the injury of the plaintiff's fishery; Mr. Justice Moore having charged the jury, that if the defendant's weirs, in their present condition, caught a greater quantity of fish than formerly, to the injury of the plaintiff's fishery at L., they should find for the plaintiff (5):—It was held to be a misdirection.

When objection
must be
made to the
production of a
copy.

A party objecting to the production of a copy on account of due search not having been made for the original, must make the objection at the time of the trial distinctly on that ground; if he do not, the court will not afterwards entertain it:—"Justice requires this, not so much to the judge, as to the opposite party, who may be willing rather to wave the benefit of the evidence, than put his verdict in peril on the issue of the objection." (6)

Costs.

Under stat. 3 & 4 Vict. c. 24. the plaintiff in an action of trespass or of trespass on the case, must recover 40s. to be entitled to costs. (7)

(1) Phillipps' Ev. 286.

(2) Rogers v. Allen, 1 Camp. 309. Bid-
dolph v. Ather, 2 Wils. 23.

(3) Lancum v. Lovell, 6 C. & P. 441.,
vide etiam Woodnoth v. Cobham (Lord), Bunb.
180.

(4) Devonshire (Duke of) v. Smith, 2
Hudson & Brooke (Irish), 512.

(5) Ibid.

(6) Per Lord Denman in Williams v
Wilcox, 8 A. & E. 314.

(7) Antè, 228.

FRAUDS, STATUTE OF.

1. GENERALLY, pp. 1953, 1954.

2. LEASES, pp. 1954—1960.

STAT. 29 CAR. 2. C. 3. ss. 1 & 2. — *Construction of, by Lord Ellenborough in Crosby v. Wadsworth — Yearly tenancy is not determined by a parol license — Judgment of Lord Ellenborough in Mollett v. Brayne — Effect of Statute of Frauds, as applicable to parol leases not exceeding three years — Judgment of Mr. Baron Bayley in Edge v. Strafford — Parol lease can contain special stipulations or agreements — Judgment of Lord Denman in Bolton (Lord) v. Tomlin — Where a party enters into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the Statute of Frauds, yet by an indorsement referring to the case on the draft by the party, admits the agreement, it being in writing, is sufficient within the statute — Judgment of Lord Denman in Shippey v. Derrison — A mere license not within the statute — WOOD v. LAKE — Commentaries of Sir Edward Sugden on Wood v. Lake — Tenant agreeing to pay an additional sum per annum in consideration of improvements by the landlord — Judgment of Mr. Justice Littledale in Donellan v. Read — SHALL HAVE THE FORCE AND EFFECT OF LEASES AT WILL ONLY — Judgment of Lord Kenyon in Clayton v. Blakey — Judgment of Lord Kenyon in Doe d. Rigge v. Bell — Commentaries of Mr. Smith on Clayton v. Blakey; and Doe d. Rigge v. Bell.*

3. ASSIGNMENT OR SURRENDER OF TITLE, pp. 1960, 1961.

STAT. 29 CAR. 2. C. 3. s. 3. — *No leases or estates of freehold shall be granted or surrendered by word — Mere cancellation of a lease not a sufficient surrender — Surrender of lease may be effected by writing without deed — “OR BY ACT AND OPERATION OF LAW” — Taking a new lease is a surrender of an old lease — Insufficient notice to quit does not amount to a surrender — Party entering under an agreement for a future lease.*

4. STAT. 29 CAR. 2. C. 3. s. 4., pp. 1961—1987.

I. GENERALLY, pp. 1961, 1962.

II. “NO ACTION SHALL BE BROUGHT WHEREBY TO CHARGE ANY EXECUTOR OR ADMINISTRATOR, UPON ANY SPECIAL PROMISE, TO ANSWER DAMAGES OUT OF HIS OWN ESTATE,” pp. 1962, 1963.

III. “OR WHEREBY TO CHARGE THE DEFENDANT UPON ANY SPECIAL PROMISE TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGES OF ANOTHER PERSON,” pp. 1963—1967.

Improper use of the word “collateral” — Distinction between a promise before the delivery of the goods and after denied — To whom credit was given, is a question for the jury — “Miscarriage and default” applies to tortious acts — An agreement under the 4th sect. which cannot be enforced, is void — Parol promise to pay the debt of another, and also to perform some other act — Where there is no debt or default in another — Where creditor originally responsible, another not liable without a note in writing — When promiser is under a legal obligation to pay for a benefit received by another — If the statute be once satisfied, it is not requisite, that a subsequent promise should be in writing — Judgment of Mr. Justice Bayley in Gibbons v. M’Casland — NEW CONSIDERATION.

IV. “OR TO CHARGE ANY PERSON UPON ANY AGREEMENT MADE UPON CONSIDERATION OF MARRIAGE,” p. 1968.

Mutual promises to marry, not within the statute.

V. “OR UPON ANY CONTRACT OR SALE OF LANDS, TENEMENTS, OR HEREDITAMENTS, OR ANY INTEREST IN OR CONCERNING THEM,” pp. 1968—1976.

CASES WITHIN THE FOREGOING CLAUSE — Statute does not expressly vacate parol contracts — Judgment of Lord Ellenborough in Crosby v. Wadsworth — INTEREST IN LAND DEFINED — Shares in mining companies — Judgment of Chief Justice Bushe in Boyce v. Green — Agreement to occupy lodgings — Payment of money

by tenant for repairs — "Keep," an interest in land — Parol agreement that an arbitrator shall determine whether a lease shall be granted — An entire agreement made for the sale of real and personal estate, if void for the realty, is equally void for the personalty — CASES NOT WITHIN THE FOREGOING CLAUSE — Judgment of Chief Baron Joy in Dunne v. Ferguson — Sale of growing crops distinct from any selling or assignment of the land — Judgments of Mr. Justice Holroyd and Mr. Justice Littledale in Evans v. Roberts — Sale of crops when ripe — Judgment of Lord Denman in Jones v. Flint — FIXTURES — Sale of timber — Railway share — Judgment of Lord Abinger in Bradley v. Holdsworth — Damage sustained to land in consequence of a road made through it — EASEMENTS — EQUITABLE MORTGAGE — Collateral agreement by tenant to pay a per centage upon landlord's repairs.

VI. "OR UPON ANY AGREEMENT THAT IS NOT TO BE PERFORMED WITHIN THE SPACE OF ONE YEAR FROM THE MAKING THEREOF," pp. 1976—1978.

Contingencies not within the statute — Landlord agreeing to lay out money in repair on his tenant's premises — Judgment of Mr. Justice Littledale in Donellan v. Read — An inchoate performance within a year, not sufficient to take the case out of the statute — Except where by the express appointment of the parties, the thing is not to be performed within a year — Contract for a year's service — Hire of a carriage — Literary work to be published in eighteen numbers, at intervals of two months.

VII. "UNLESS THE AGREEMENT UPON WHICH SUCH ACTION SHALL BE BROUGHT, OR SOME MEMORANDUM OR NOTE THEREOF, SHALL BE IN WRITING," pp. 1978—1984.

Construction of the word "agreement" — Judgment of Lord Ellenborough in Wain v. Warlters — Judgment of Chief Justice Tindal in Laythorpe v. Bryant — FORM OF AGREEMENT — Signature in pencil — CONSIDERATION — When consideration sufficiently appears — Must appear from the instrument itself — Judgment of Chief Baron Joy in Bewley v. Whiteford — Agreement void for want of mutuality — Not requisite that the agreement should state the precise amount of the sum to be paid — Judgment of Lord Ellenborough in Bateman v. Phillips — Plaintiff becoming bail for a stranger in consideration of a third party promising indemnification — Continuing guarantee — Agreement not expressly disclosing by whom the consideration money was paid — What is not an undertaking to pay the debt of another — "OR SOME MEMORANDUM OR NOTE THEREOF" — Contract may be collected from several distinct papers — Sufficient guarantee to answer for the debt of another — Proposal by letter acceded to by parol — General instructions for an agreement to be afterwards executed — When agreement not in writing, such fact can be indorsed on the postea.

VIII. "AND SIGNED BY THE PARTY TO BE CHARGED THEREWITH," pp. 1984—1986.

IX. "OR SOME OTHER PERSON THEREUNTO BY HIM LAWFULLY AUTHORIZED," pp. 1986, 1987.

5. STAT. 29 CAR. 2. C. 3. s. 17., pp. 1987—1995.

I. GENERALLY, p. 1987.

II. "NO CONTRACT FOR THE SALE OF ANY GOODS, WARES, AND MERCHANDISE, FOR THE PRICE OF TEN POUNDS STERLING, OR UPWARDS, SHALL BE ALLOWED TO BE GOOD," pp. 1987—1989.

Execution of contract without specification of price — Judgment of Chief Justice Tindal in Hoadly v. McLaine — Ordering articles successively under the price of 10l., but collectively above that sum — Judgment of Mr. Justice Bayley in Baldey v. Parker — Sale of stock — CONTRACTS NOT WITHIN THE STATUTE.

III. "EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME," pp. 1989—1992.

There must be a delivery with an intention of vesting the right of possession — Judgment of Mr. Justice Parke in Smith v. Surman — When delivery takes the agreement out of the statute — Judgment of Mr. Justice Patteson in Williams v. Burges — Purchaser writing his name upon the goods at the time of the purchase — When joint order is given for several classes of goods, the acceptance of one class operates as an acceptance for the whole — If goods be not refused within a reasonable time, the retention will amount to an acceptance — WHAT IS NOT AN ACCEPTANCE.

IV. "OR GIVE SOMETHING IN EARNEST TO BIND THE BARGAIN, OR IN PART OF PAYMENT," p. 1992.

To constitute a payment as earnest, there must be an actual transfer or delivery of the thing or money agreed to be given, as earnest or part payment.

V. "OR THAT SOME NOTE OR MEMORANDUM IN WRITING," pp. 1992, 1993.

Distinctions between the 4th and 17th sections — Terms of agreement can be inferred from distinct writings — Quantity of goods specified, but not the price to be paid — Letters must be taken in their entirety — WHAT IS NOT A SUFFICIENT MEMORANDUM — When the specific goods contracted for do not appear — Agent of vendor writing the name of the vendee — Vendee signing by initials in vendor's book, but whose name did not appear therein.

VI. "OF THE SAID BARGAIN BE MADE AND SIGNED BY THE PARTIES TO BE CHARGED BY SUCH CONTRACT," pp. 1993, 1994.

Construction of the word "bargain" — Name printed — Place of signature immaterial — Judgment of Lord Abinger in Johnson v. Dodgson.

VII. "OR THEIR AGENTS THEREUNTO LAWFULLY AUTHORISED." pp. 1994, 1995.

6. EFFECT OF PAROL EVIDENCE UPON WRITTEN CONTRACTS UNDER THE STATUTE OF FRAUDS, pp. 1996—2001.

Object of Statute of Frauds is to exclude oral evidence — Judgment of Lord Hardwicke in Partridge v. Powlet — Judgment of Lord Denman in Goss v. Nugent (Lord) — Statute of Frauds does not require that all contracts concerning lands shall be in writing — Written contracts concerning lands may be abandoned by an agreement not in writing — Judgment of Lord Denman in Harvey v. Graham — Day for the completion of the purchase of an interest in land, cannot be waived by oral agreement — Judgment of Chief Justice Tindal in Stowell v. Robinson — Where giving of time is parcel of the contract — Judgment of Lord Denman in Stead v. Dawber, — Written agreement for the delivery of goods at a specified time, cannot be altered by a parol agreement — Judgment of Mr. Baron Parke in Marshall v. Lynn — Judgment of Lord Denman in Trueman v. Loder.

1. GENERALLY.

The Statute of Frauds is entitled "An act for the prevention of frauds and perjuries;" and it recites, that the object of its provisions were "for the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury:" but it dispenses with no evidence of consideration, which was requisite previous to the statute, and gives no efficacy to written contracts, which they did not possess previously; but it requires, in certain cases, more cogent evidence than oral testimony. (1)

This statute embraces a variety of subjects, that have no connection with each other, and many of which, are in no degree affected by the common object referred to in the title and preamble. The two leading provisions, which require that the disposition of lands and certain personal contracts shall be evidenced by writing, signed by the party conveying or contracting, and that wills of land shall be attested by witnesses, are very useful and expedient, but are not distinguished by any great novelty of principle. The language and composition of the act, have certainly no claim to particular commendation; and it was truly observed by Lord Mansfield, with respect to the clause concerning the attestation of wills, "that the whole clause, which introduces a positive solemnity to be observed, not by the learned only, but by the unlearned, at a time when they are supposed to be without legal advice; in a matter which greatly interests every proprietor of land; where

(1) *Rann v. Hughes*, 7 T. R. 350. n. *Case v. Barber*, Sir T. Raym. 450. 2 Stark. *Barrell v. Trussell*, 4 Taunt. 121., *et vide* Ev. 3d ed. 472. *etiam* Com. Dig. Action on the Case (F. 3.).

GENERALLY.

the direction should be plain to the meanest capacity, is so loose, that there is not a single branch of the solemnity defined or described with sufficient certainty to convey the same idea to the greatest capacities." (1) It is certainly an act which, next to those relating to the settlement of the poor, has been productive of greater litigation in settling its construction, than any in the whole range of the statutes, although the Annuity Acts may be placed in competition with it in that respect, when considered with reference to the very limited nature of the subject to which it applies. It was stated by Mr. Barrington forty years ago, to be a common notion in Westminster Hall, that it had not been explained at a less expense than 100,000*l.* But the laxity which has sometimes prevailed in the construction of it may share, with any imperfection of its own, a considerable proportion of the imputation of that expense—a laxity, which the opinions recently expressed concerning its operation have very generally condemned; and there can be no doubt, that the permitting the exposition of an act to be influenced by any opinions respecting its policy or utility, is not less repugnant to general convenience, than to the maintenance of a due subordination of judicial interpretation to legislative authority. (2)

This statute has however received unqualified praise from the judicial bench: thus, Lord Nottingham said, "that every line of it was worth a subsidy" (3); and Lord Kenyon in *Chaplin v. Rogers* (4) observed, "It is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our statute book."

LEASES.

2. LEASES.

Stat. 29 Car. 2.
c. 3. ss. 1 & 2.
Creation of
estates, &c.
Sect. 1.

By stat. 29 Car. 2. c. 3. ss. 1 & 2. "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding."

Exceptions as
to leases.
Sect. 2.

"Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least, of the full improved value of the thing demised."

Judgment of
Lord Ellen-
borough
in *Crosby v.*
Wadsworth.

In *Crosby v. Wadsworth* (5) Lord Ellenborough, in reference to the foregoing sections, observed, "I think, collecting the meaning of the first [section] by aid derived from the language and terms of the second section, and the exception therein contained, that the leases, &c. meant to be vacated by the first section must be understood as leases of the like kind

(1) *Windham v. Chetwynd*, 1 Burr. 418.

(4) 1 East, 194.

(2) 10 Petersdorff's Abr. 90.

(5) 6 *ibid.* 610.

(3) Lord Keeper Guildford's Life by Roger North, 109.

with those in the second section, but which conveyed a larger interest to the party than for a term of three years, and such also as were made under a rent reserved thereupon."

The construction in the foregoing case was in *Botting v. Martin* (1) attempted to be extended to the third section. It was argued, that the leases mentioned in the third section, as requiring to be assigned by writing, must be intended such leases as were required by the first and second sections of the statute to be created by deed or writing, viz. leases conveying a larger interest to the party than for a term of three years; but Chief Baron M'Donald held, that the assignment was void for not being by deed or note in writing.

A tenancy from year to year created by parol, is not determined by a parol license from the landlord to the tenant to quit in the middle of a quarter, and the tenants quitting the premises accordingly: thus, in *Mollett v. Brayne* (2) it appeared, that the defendant took the premises in question of the plaintiff at Lady-day, 1808, at the yearly rent of 42*l*. In the November following, disputes arose between the parties respecting repairs. The defendant then threatening to quit the premises, the plaintiff said, "You may quit when you please." The defendant accordingly left the premises a few days after, and tendered the plaintiff rent for a day beyond the time he had occupied them. This sum was paid into court upon the tender pleaded; and the question now was, Whether the plaintiff was entitled to rent after the defendant had quitted? Upon these facts Lord Ellenborough was of opinion, "that the tenancy was not determined merely by the landlord giving the tenant a parol license to quit, and the tenant quitting accordingly. At that time, there was a subsisting term in the premises, and the Statute of Frauds (3) provides, that no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered unless by deed or note in writing, or by act and operation of law. Here there was no deed or note in writing, and nothing is proved, which can be considered a surrender by operation of law." (4)

Yearly tenancy is not determined by a parol license.

Judgment of Lord Ellenborough in *Mollett v. Brayne*.

In *Edge v. Strafford* (5) Mr. Baron Bayley said, "The Statute of Frauds, as far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession." "In *Ryley v. Hicks* (6) the point decided is, that a lease, though it were to commence *in futuro*, would be within the exception in the Statute of Frauds, if it did not exceed three years from the making; but how that bears upon the decision in *Inman v. Stamp* I do not see." "The fourth section enacts, that no action shall be brought, whereby to charge the defendant upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some

Effect of Statute of Frauds as applicable to parol leases not exceeding three years.

Judgment of Mr. Baron Bayley in *Edge v. Strafford*.

(1) 1 Camp. 318.

(2) 2 *ibid.* 103.

(3) Stat. 29 Car. 2. c. 3. s. 3.

(4) Vide etiam *Stone v. Whiting*, 2 Stark.

235. *Thomson v. Wilson*, *ibid.* 379. *Phipps*

v. Sculthorpe, 1 B. & A. 50. *Thomas v.*

Cooke, 2 Stark. 408. 2 B. & A. 119.

(5) 1 C. & J. 397.

(6) Str. 651.

LEASES.

Parol lease can contain special stipulations or agreements.

Judgment of Lord Denman in *Bolton (Lord) v. Tomlin*.

Where a party enters into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the Statute of Frauds, yet, an indorsement, on the draft by the party, admits the agreement.

Judgment of Lord Ellenborough in *Shippey v. Derrison*.

A mere license

memorandum thereof, be in writing. Is then the agreement [in which the plaintiff proved that the defendant on the 12th of April agreed, by parol, to take the lodgings from the 25th for two or three years, at the weekly rent of 2*l.*, which was more than two-thirds of the annual value of the lodgings] on which this action is brought a contract of an interest in lands? *Inman v. Stamp* says distinctly that it is; and, unless that case can be successfully impeached, it must govern the present."

A parol lease can contain special stipulations or agreements: thus, in *Bolton (Lord) v. Tomlin* (1) Lord Denman said, "Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth; and it seems absurd to say, that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No authority is or can be cited to shew, that it may not; on the contrary, it has always been assumed, that a parol lease, warranted by the second section, may be as special in its terms as a written one, and we are of opinion that the law is so."

The case of *Shippey v. Derrison* (2) was a special action on the case to recover damages for breach of an agreement, by which the defendant agreed to take certain premises for a term of fifteen years. It was admitted, that there was no note in writing of the agreement, as to the term which was to be granted. To prove the case, the plaintiff called a Mr. Thackray, an attorney: he stated, that he was employed to prepare a lease from the plaintiff to the defendant for a term of fifteen years; he said, he considered himself as employed by both parties, as he was to be paid by both. That he prepared a draft of a lease, but which he sent to an attorney for perusal on the part of the defendant, who made some alterations in it, and returned it. That soon after, the defendant finding himself unable to perform the agreement, applied to the plaintiff to cancel it: who replied he had no objection, upon being indemnified against the expense and inconvenience he had been put to; but before he would try to let it again, he required the defendant to relinquish the agreement by writing: the defendant accordingly wrote on the draft of the lease, "I hereby request Mr. Shippey (the plaintiff) to endeavour to let the premises to some other person, as it will be inconvenient to me to perform my agreement for them, and for so doing this shall be a sufficient authority. J. DERRISON." Upon which Lord Ellenborough observed, "It is not necessary that the note in writing, to be binding under the statute, should be cotemporary with the agreement. It is sufficient, if it has been made at any time, and adopted by the party afterwards, and then any thing under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute, which was only intended to protect persons from having parol agreements imposed on them. In this case the indorsement says, that he was unable to perform the agreement for the premises, and it is written on the draft of the lease of those premises, which had been perused and altered by his own attorney. It is sufficient with respect to the case from Peere Williams, to observe, that was an agreement purely executory, and nothing more than the bare draft of the lease, which was not signed by the party."

In *Wood v. Lake* (3), which was a case reserved, it was stated, that the

(1) 5 A. & E. 864.

(2) 5 Esp. N. P. C. 190.

(3) Sayer, 3.

defendant had agreed by a parol agreement, that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant for the term of seven years, and that, during this term, he should have the sole use of that part of the close upon which he was to have the liberty of stacking coals; and that, after the plaintiff had, pursuant to this agreement, enjoyed the liberty of stacking coals three years, the defendant locked up the gate of the close. The question was, Whether this agreement was good for seven years? Chief Justice Lee and Mr. Justice Dennison were of opinion that it was; because, "in the case of *Web v. Paternoster* (1) it is laid down, that the grant of a license to stack hay upon land does not amount to a lease of the land; and, although it be in that case said, that such a license, provided the grant be for a time certain, is irrevocable, it by no means follows, that an interest in the land does thereby pass. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was, notwithstanding the Statute of Frauds and Perjuries, good for seven years."

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is not within
the statute.
WOOD v. LAKE.

Mr. Justice Foster concurred in opinion, "that the agreement did not amount to a lease; but he inclined to be of opinion, that the words in the Statute of Frauds and Perjuries, *any uncertain interest in land*, do extend to this agreement, and consequently, that it was not good, for more than three years."

Chief Justice Lee and Mr. Justice Dennison inclined to be of opinion, that the words in that statute, *any uncertain interest in land*, do relate only to interests, which are uncertain as to the time of their duration; and after taking time to consider, it was holden, that the agreement was good for seven years.

Upon this case Sir Edward Sugden (2) thus remarks:—"The case referred to in *Palmer* does not seem to bear out in judgment in the above case; the decision turned upon another point: but *Montague and Haughton* both thought that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the Statute of Frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the legislature intended to guard. In *Wood v. Lake* the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all leases, *estates*, or *interests*. The statute expresses an anxious intention to embrace interests of every description. How can it be argued, that a license not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute? Upon what principle is it, that the person entitled to such an easement may maintain trespass? This relaxation of the statute holds out a strong temptation to a man in possession of land, under a parol agreement, to commit perjury, in order to insure to himself a more permanent interest in the land than the statute would permit him to claim, were the

Commentaries
of Sir Edward
Sugden on
Wood v. Lake.

(1) *Palm.* 71.

(2) 1 *V. & P.* 139.

LEASES.

Tenant agreeing to pay an additional sum *per annum* in consideration of improvements by the landlord.

Judgment of Mr. Justice Littledale in *Donellan v. Read*.

"SHALL HAVE THE FORCE AND EFFECT OF LEASES AT WILL ONLY."

Judgment of Lord Kenyon in *Clayton v. Blakey*.

real transaction disclosed." The case of *Wood v. Lake* has, however, been followed in several recent cases. (1)

Where a landlord who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work:—It was holden, that* the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the Statute of Frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord; Mr. Justice Littledale observing, "We think, that though the word rent has been used, it is too much to treat it as rent, in the technical strict meaning of the term, and that all that the parties meant was a personal contract to pay an additional 5*l.* a year; and we think this case is to be governed by *Hoby v. Roebuck* (2); for though the agreement there was to pay ten *per cent.* upon the money laid out, and it was not called rent, yet that was in truth the same thing, and it only amounted to a collateral contract." (3)

Though by the Statute of Frauds it is enacted, that all leases by parol for more than three years shall have the effect of estates at will only, such a lease may be made to enure as a tenancy from year to year. (4)

In *Clayton v. Blakey* (5), which was an action against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit, the first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence, that the defendant had held the premises for two or three years under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and in consequence of the Statute of Frauds directing, that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at *Nisi Prius*, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to such a tenancy, that the plaintiff ought to be nonsuited. Mr. Justice Rooke however, considering, that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

It was moved to set aside the verdict on the ground of a misdirection, reliance being placed upon the positive words of the statute:—But Lord Kenyon observed, "The direction was right, for such a holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered

(1) *Sayer*, 3., et vide *Winter v. Brockwell*, 8 East, 308. *Rex v. Standon (Inhab. of)*, 2 M. & S. 461. *Taylor v. Waters*, 2 Marsh. 551. 7 Taunt. 374. *Rex v. Horndon-on-the-Hill (Inhab. of)*, 4 M. & S. 562. *Cocker v. Cowper*, 1 C. M. & R. 418.

(2) 7 Taunt. 157.

(3) *Donellan v. Read*, 3 B. & Ad. 899.

(4) Vide *Fisher v. Maguire*, 1 Armstrong & Macartney (Irish), 51.

(5) 8 T. R. 3.

as a tenancy at will, has since been properly construed to enure as a tenancy from year to year." (1)

If a landlord lease for seven years by parol, and agree, that the tenant shall enter at Lady Day and quit at Candlemas, though the lease be void by the Statute of Frauds, as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas.

Thus, in *Doe d. Rigge v. Bell* (2) Lord Kenyon said, "Though the agreement be void by the Statute of Frauds, as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now in this case it was agreed, that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas."

Judgment of
Lord Kenyon
in *Doe d.
Rigge v. Bell.*

Mr. Smith in his *Leading Cases* (3) thus comments upon *Clayton v. Blakey* and *Doe d. Rigge v. Bell*:—"These two cases, although loudly impugned by Mr. Watkins in his able little treatise on conveyancing, have never since been invalidated by judicial decision. Nor does either of them seem inconsistent with the Statute of Frauds."

Commentaries
of Mr. Smith
on *Clayton v.
Blakey* and
*Doe d. Rigge v.
Bell.*

"Now it is clear, that the words of these sections [ss. 1 & 2] are satisfied by holding, that a parol demise for more than three years, creates, in the first instance, an estate at will strictly so called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year, by payments of rent, or other circumstances indicative of an intention to create such yearly tenancy; and this perhaps is all which was decided by the two cases in the text; for in *Doe v. Bell* we are expressly told, that the defendant had paid rent. And though in *Clayton v. Blakey* there is no express mention of rent having been paid, yet, as the tenant had been in possession for three years, and that under a rent (for the action was for double rent), it is more than probable, that some payment of rent had taken place during that period. Indeed, to deny to such a payment the effect of creating a tenancy from year to year, in cases where the letting was by parol for more than three years, would be to contravene, rather than obey the enactment of the Statute of Frauds, since that act evidently means, that such a parol lease shall enure in every respect as a lease at will. Now one of the incidents of a lease at will, is its convertibility, by payment of rent, into a tenancy from year to year. (4) 'If a party enters and pays, or promises to pay a rent certain, or settles it in account (5), a new agreement may be presumed, under which the landlord may have a right to distrain.' But the decisions (it is believed) have not gone so far as to

(1) It is not requisite to prove part performance to have occurred within a year of the promise of a lease, to sustain an equitable defence to an ejectment on title. *Gawley v. Grier*, 1 Irish Circuit Cases, 100.

(2) 5 T. R. 471.

(3) Vol. ii. p. 75.

(4) *Vide Doe d. Collins v. Weller*, 7 T. R. 478. *Roe d. Bree v. Lees*, 2 W. Black. 1171., et vide *Wright v. Wright*, 7 Bing. 458.

(5) *Vide Cox v. Bent*, 5 Bing. 185.

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establish, that a parol lease for more than three years at a fixed rent will, without any other circumstance, create an interest from year to year, so as to give the tenant a right to enter, indefeasible except by six months' notice, ending with the expiration of the year. Such a construction would, perhaps, be incompatible with the strict letter of the Statute of Frauds; nor (it is believed) has it ever been held, that a parol demise for more than three years, at a fixed rent, even when coupled with the lessee's entry under it, will, before payment or acknowledgment in account of any part of the rent reserved, have the effect of rendering him tenant from year to year. Indeed, the contrary appears involved in the late case of *Doidge v. Bowers* (1), where persons entered under a lease for seven years, not signed by the lessor, and, therefore, inoperative under the Statute of Frauds; payments of rent were made, but not being shewn to have been made with the assent of one of the three, it was held, that, as against her, there was no evidence of a tenancy from year to year, she not having resided a year on the premises; Parke B. saying, 'Under the original contract no demise could be created, but a mere tenancy at will.' Then, in order to constitute a new tenancy, it must be shewn, that all the three parties agreed to vary it, by a new contract for a tenancy from year to year." (2)

ASSIGNMENT OR SURRENDER OF TITLE.

No leases or estates of freehold shall be granted or surrendered by word.

3. ASSIGNMENT OR SURRENDER OF TITLE.

By stat. 29 Car. 2. c. 3. s. 3. "no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law."

A parol assignment of a lease from year to year (3), or a mere parol agreement between a landlord and tenant to determine the tenancy in the middle of the quarter are not binding. (4)

Mere cancellation of a lease not a sufficient surrender.

The mere cancelling of a lease is not a sufficient surrender under this statute. Thus, where a lease had been duly executed, and once in the lessee's possession, and the lease began to operate, but was afterwards found in the lessor's possession in a cancelled state:—It was held, that as there was no surrender by operation of law, nor any ground for presuming, that there had been any note in writing within the Statute of Frauds, the lease was to be considered as in operation. (5)

Surrender of lease may be effected by

But a surrender of a lease for years, may be effected by writing without deed; as where a mortgagee wrote upon the mortgage deed a receipt for

(1) 2 M. & W. 365.

(2) Vide *Denn d. Warren v. Fearnside*, 1 Wils. 176. *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680.

(3) *Botting v. Martin*, 1 Camp. 318. *Mollett v. Brayne*, 2 ibid. 103. *Thomson v. Wilson*, 2 Stark. 379., et vide *Magennis v. McCullough*, Gilb. Eq. Ca. 236.

(4) *Thomson v. Wilson*, 2 Stark. 379. *Mollett v. Brayne*, 2 Camp. 103. *Johnston v. Hudlestone (Clerk)*, 4 B. & C. 922. *Mathews v. Sawell*, 8 Taunt. 270.

(5) *Doe d. Courtail v. Thomas*, 9 B. & C. 299. *Roe d. Berkeley (Earl) v. York (Archbishop of)*, 6 East, 86.

principal and interest, adding, "I do release the said A. B., and discharge the within mortgaged premises from the term of 500 years." (1)

Taking a new lease, is by operation of law, a surrender of the old one (because without it, the intention of the parties would not be effectuated) (2), although it be by deed (3), provided it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it, is no implied surrender of the old one. (4)

Where A. by parol let a house to B., who underlet it to C., and then A. with B.'s assent accepted C. as his tenant, and received rent from him, it was held, that the substitution involved a surrender, for it was made with the assent of B., which could not be, without the surrender of the former lease. (5)

So where it was agreed between the landlord and the tenant, that another tenant should be substituted for him, which was done, it was held, that the first tenancy was thereby determined. (6)

Where the landlord, having had a dispute with his tenant, told him, that he might quit when he pleased, and the tenant accordingly quitted in the middle of the quarter, it was held, that the landlord was entitled to recover in an action for use and occupation for the whole quarter. (7)

But an insufficient notice to quit, accepted by the landlord, does not amount to a surrender by operation of law, and there cannot be a surrender to operate *in futuro*. (8)

But where the landlord accepted from his tenant the key of the demised house in the middle of the quarter, it was held, that the former could not recover in respect of any subsequent rent. (9)

Where a party enters under a mere agreement for a future lease, he is tenant at will only; if he pay a yearly rent, he becomes a tenant from year to year, such tenancy being determinable on the execution of the lease, according to the agreement; and though no rent be paid, the relation of landlord and tenant subsists, the party having entered with a view to a lease, and not with a view to a purchase. (10)

ASSIGNMENT OR SURRENDER OF TITLE.

writing without deed.

"OR BY ACT AND OPERATION OF LAW."

Taking a new lease, is a surrender of an old lease.

Insufficient notice to quit, does not amount to a surrender.

Party entering under an agreement for a future lease.

4. STAT. 29 CAR. 2. C. 3. S. 4.

I. Generally.

STAT. 29 CAR. 2. C. 3. S. 4. GENERALLY.

By stat. 29 Car. 2. c. 3. s. 4. "no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate (11); or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages

Promises and agreements by parol.

(1) *Farmer d. Earl v. Rogers*, 2 Wils. 26. B. & A. 119. *Walls v. Atcheson*, 3 Bing. 462.
(2) 1 Saund. 236. (b.) Touchst. by Atherley, tit. SURRENDER, 301. *Hamerton v. Stead*, 3 B. & C. 478., et vide *Mellow v. May*, Sir F. Moore, 636.
(3) Ibid., et vide *Thomas v. Cooke*, 2 Stark. 410.
(4) *Wilson v. Sewell (Knt.)*, 4 Burr. 1980. *Davison v. Stanley*, ibid. 2210. 1 Saund. 236. (b.)
(5) *Thomas v. Cooke*, 2 Stark. 408. 2
(6) *Stone v. Whiting*, 2 Stark. 235. et vide *Whitehead v. Clifford*, 5 Taunt. 518. *Harding v. Crethorn*, 1 Esp. N. P. C. 57.
(7) *Mollett v. Brayne*, 2 Camp. 103.
(8) *Johnstone v. Hudlestone (Clerk)*, 4 B. & C. 922.
(9) *Whitehead v. Clifford*, 5 Taunt. 518.
(10) 2 Stark. Ev. 3d ed. 474.
(11) *Rez v. Johnson*, Show. 16.

STAT. 29 CAR. 2.
C. 3. s. 4.

Distinction between the 4th and 17th sections of the Statute of Frauds.

Judgment of Mr. Baron Alderson in *Marshall v. Lynn*.

of another person (1); or to charge any person upon any agreement made upon consideration of marriage (2); or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them (3); or upon any agreement, that is not to be performed within the space of one year from the making thereof (4); unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

In *Marshall v. Lynn* (5) Mr. Baron Alderson observed, "By the 4th section of the Statute of Frauds, it is provided, that the contracts therein mentioned shall be in writing, otherwise no action shall be maintained on them. The 17th section requires, that some note or memorandum in writing of the bargain before made, shall be signed by the party to be charged by such contract, or his agent lawfully authorised. There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section, it is sufficient, if all the terms by which the defendant is to be bound are stated in writing, so as to bind him."

"NO ACTION SHALL BE BROUGHT WHEREBY TO CHARGE ANY EXECUTOR OR ADMINISTRATOR, UPON ANY SPECIAL PROMISE, TO ANSWER DAMAGES OUT OF HIS OWN ESTATE;"

II. "No Action shall be brought whereby to charge any Executor or Administrator, upon any special Promise, to answer Damages out of his own Estate;" (6)

Rann v. Hughes (7) affords an illustration of the construction of the foregoing clause. The declaration stated, that on the 11th of June, 1764, divers disputes had arisen between the plaintiff's testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded, that the defendant's intestate should pay to the plaintiff's testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of 983*l.* was unpaid, "by reason of which premises, the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable, she in consideration thereof, undertook and promised to pay," &c. The defendant pleaded *non assumpsit, plene administravit*, except as to certain goods, &c. which were not sufficient to pay an outstanding bond debt of the intestate therein set forth, &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the last two; and on the first a general judgment was entered in *Banco Regis* against the defendant *de bonis propriis*. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where after argument the following question was proposed to the

(1) *Anon.* Skin. 142, 143.

(2) *Gillmore v. Shooter*, 2 Mod. 310.

(3) *Anon.* 1 Vent. 361, 362.

(4) *Philpott v. Wallet*, 3 Lev. 65, 66.
Anon. 1 Salk. 280.

(5) 6 M. & W. 118.

(6) *Vide antè*, 1279. tit. DECERT.

(7) 7 T. R. 350. n. in error.

judges by the Lord Chancellor, "Whether sufficient matter appeared upon the declaration to warrant, after verdict, the judgment against the defendant in error in her personal capacity?" Upon which the Lord Chief Baron Skynner in delivering the opinion of the judges stated, "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said, that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable; that the words in the Statute of Frauds, in relation to the question then under consideration, were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove, that the agreement was still not liable to be tried and judged of, as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing, the party must be at all events liable. [His Lordship then observed upon the case of *Pillans v. Van Mierop* (1) and the case of *Losh v. Williamson* (2), and seemed to intimate, that so far as these cases went on the doctrine of *nudum pactum*, they were erroneous.] In this case there is not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is, that the question put to us, must be answered in the negative."

STAT. 29 CAR. 2.
C. 3. s. 4.

Judgment of
Chief Baron
Skynner in
Rann v. Hughes.

III. "Or whereby to charge the Defendant upon any special Promise to answer for the Debt, Default, or Miscarriages of another Person;"

In reference to this clause Mr. Justice Buller states (3), "Many of the doubts upon the statute have arisen by making use of the word 'collateral,' which is not a word used in the act of parliament. The proper consideration is, whether it be or be not a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore, strictly speaking, not a collateral undertaking, yet it is within the statute, and the adding to the promise of the payment of the debt a promise to pay the costs of the action would make no difference." (4)

The law, however, respecting collateral promises is now settled. Thus, in *Matson v. Wharam* (5) it was held, that "The authorities are not now to be shaken; and the general line now taken is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds;" therefore, where a defendant applied to M. (one of

"OR WHEREBY
TO CHARGE THE
DEFENDANT
UPON ANY
SPECIAL
PROMISE TO
ANSWER FOR
THE DEBT, DE-
FAULT, OR MIS-
CARRIAGES OF
ANOTHER PER-
SON;"

Improper use
of the word
"collateral."

(1) 3 Burr. 1663.

(2) M. T. 16 Geo. 3. in B. R.

(3) N. P. 281. (a.)

(4) Vide *Fish v. Hutchinson*, 2 Wils. 94.
Watkins v. Perkins, 1 Ld. Raym. 182.

(5) Per Buller J. 2 T. R. 81.

STAT. 29 CAR. 2.
C. 3. s. 4.

Distinction between a promise before the delivery of the goods and after denied.

To whom credit was given, is a question for the jury.

the plaintiffs), and asked, "If he was willing to serve one C. of P. with groceries:" and the plaintiff M. answered, "They dealt with nobody in that part of the country, and did not know C.:" to which defendant answered, "If you do not know him you know me, and I will see you paid." M. then said he would serve him. W. answered, "He is a good chap, but I will see you paid." The court held this promise void, not being in writing, and denied the distinction between a promise before delivery of the goods and after. (1)

It is a question for the jury, whether the credit, before the debt was incurred, was given to the defendant, or to another as the principal, taking into their consideration, the amount of the debt, the situation of the parties, and all the other circumstances of the case. (2) If upon notice given by the defendant to the plaintiff to produce his books, it appear, that the credit was not originally given to the defendant, but to another, it is strong but not conclusive (3) evidence against the plaintiff (4), that the defendant was not a surety. But if a vendor refuse to deliver goods on the credit of A. B., and C. D. undertake absolutely to pay the amount, the promise need not be in writing, for this is in effect a sale to C. D. as a principal, not to A. B., to whom no credit was given. (5)

A promise to see the plaintiff paid, amounts to a promise to pay (6); as where the defendant said, "You must supply my mother-in-law with bread, and I will see you paid" (7); in which case, the very form of the promise seems to imply, the intention of the defendant to render himself liable as surety only, and points out the principal: so an undertaking by the defendant, that if the plaintiff would lend his gelding to J. S. the latter would re-deliver it, is within the Statute (8); and so it was held, where the defendant said, "I will pay you, if J. S. will not," and the goods were afterwards delivered (9); and where A. promises B. in a letter of guarantee, that if the latter will supply C. with shoes, and accept bills of exchange for present payment, and "that should they not be honoured when due, he (A.) would see them paid," it was held to be within the fourth section. (10)

An undertaking to guarantee the payment of a note is also within the statute. (11)

A tenant, in August, being about to sell his stock by auction, upon the landlord (the plaintiff) putting in a distress for the amount of rent then due, the defendant (the auctioneer) verbally promised, that if the plaintiff would not distrain, but permit the sale to go on, he would pay, as well the rent due, as also the rent then accruing and due at Michaelmas: — It was held, that as to the latter amount, in which there was then no vested right in the landlord, nor power to distrain, it was beyond the consideration, and a bare promise to pay the debt of another, and void by the statute; and that the promise being entire and void as to part, was void altogether. (12)

(1) *Matson v. Wharam*, 2 T. R. 81.

(2) *Keate v. Temple*, 1 B. & P. 158. *Darnell v. Tratt*, 2 C. & P. 82.

(3) *Keate v. Temple*, 1 B. & P. 158.

(4) *Croft v. Smallwood*, 1 Esp. N. P. C. 121.

(5) 2 Stark. Ev. 3d ed. 477.

(6) *Robinson v. Pulford*, 1 Vent. 43. 2 Keb. 563.

(7) *Jones v. Cooper*, Cowp. 227.

(8) *Buckmyr v. Darnall*, 2 Ld. Raym. 1085. 1 Salk. 27. 6 Mod. 248.

(9) *Jones v. Cooper*, Cowp. 227., *sed vide Mawbrey v. Cunningham*, cit. *ibid.* 228.

(10) *Morris v. Stacey*, Holt's N. P. C. 153.

(11) *Exp. Adney*, Cowp. 460.

(12) *Thomas v. Williams*, 10 B. & C. 664., et vide *Chater v. Beckett*, 7 T. R. 201.

In *Tomlinson v. Gell* (1) the declaration stated, that B. had sued the defendant in equity, and had retained the plaintiff as his attorney; and that costs, viz. 30*l.*, had become due to the plaintiff as such attorney for his costs in the suit; and that the plaintiff and the defendant had agreed, with the consent of B., that the suit should be discontinued, and that the defendant should pay the plaintiff the costs which were due. It then stated that, in consideration of the premises, and that B. had consented to discontinue, and the plaintiff to accept his costs from the defendant, the latter promised the plaintiff to pay him such costs, but did not;—to which it was pleaded, that the promise was an undertaking to pay the debt of another, and was not in writing. On demurrer it was holden, that such promise, was a promise to pay the debt of another within the Statute of Frauds.

STAT. 29 CAR. 2.
c. 3. s. 4.

Promise to pay
debt of another.

Where A. had wrongfully occasioned the death of B.'s horse, and C. promised to pay the damages, in consideration that B. would not sue A.:—It was held, that the case was within the intention of the statute, which was to prevent the commission of fraudulent practices by the means of perjury, and also within the words of the statute, inasmuch, as the terms *miscarriage* and *default* applied to tortious acts, from which duties resulted, independent of any contract (2); and the case was distinguished from that of *Read v. Nash* (3), because, it did not appear, that the defendant in the former action, had ever been guilty of an assault, or been liable in damages.

“Miscarriage
and default”
applies to tor-
tious acts.

An agreement under the fourth section, which cannot be enforced on either side, is a contract void altogether, and yet may have as an agreement, some operation in communicating a license, so as to excuse what would otherwise be a trespass, but such license, would be countermandable. (4)

An agreement
under the fourth
section, which
cannot be en-
forced, is void.

A parol promise to pay the debt of another, and also to do some other thing, is void altogether, since the plaintiff cannot separate the two parts of the contract. (5)

Parol promise
to pay the debt
of another, and
also to perform
some other act.

Where there is no debt or default of another, the case is not within the statute: thus, in *Eastwood v. Kenyon* (6) it was held, that the fourth section of the Statute of Frauds, as to promises to pay the debt of another, contemplates only promises made to the person to whom another is liable; therefore, a promise by a defendant to a plaintiff to pay A. B. a debt due from plaintiff to A. B., is not within the statute. (7)

Where there is
no debt or de-
fault in an-
other.

When an action is brought for an assault, and the defendant, in consideration that the plaintiff will withdraw the record, undertakes to pay a sum of money and costs, he is liable (8); for this is an *original* promise, it not appearing, that there had been any default or miscarriage from another person.

So where the plaintiff, at the request of the defendant, advanced a sum of money to pay workmen in the garden of the defendant's infant grandson,

(1) 6 A. & E. 564.

(2) *Kirkham v. Marter*, 2 B. & A. 613.

(3) 1 Wils. 305.

(4) *Carrington v. Roots*, 2 M. & W. 257.,
vide *Winter v. Brockwell*, 8 East, 308. *Cros-*
by v. Wadsworth, 6 ibid. 602.

(5) *Chater v. Beckett*, 7 T. R. 201., vide
etiam *Mechelen v. Wallace*, 7 A. & E. 49.

(6) 11 ibid. 438.

(7) Defendant may show under *non as-*
sumpsit, that the promise was within stat.
29 Car. 2. c. 3. s. 4. and was not in writing.
Ibid.

(8) *Read v. Nash*, 1 Wils. 305.

STAT. 29 CAR. 2.
C. 3. s. 4.

the case was held to be without the statute, the money having been advanced on the defendant's credit, for the infant was not liable. (1)

An action having been brought against the defendant, an attorney, and two others, for appearing for the plaintiff without a warrant, the record was carried down to be tried at the assizes, when the defendant promised, in consideration that the plaintiff would not further prosecute the action, he, the defendant, would pay 10*l.* and costs of suit. In an action on this promise the question was, whether this was a promise within the statute? and it was holden, that it was not, as not being a promise to pay the debt of another, but to pay the party's own debt. (2)

Where creditor originally responsible, another not liable without a note in writing.

Where the person to whom the goods are furnished is liable, credit having been originally given to him (3), another is not liable without a note in writing, as where the promise is to see another paid for goods, or for labour supplied to a third person, as to see a surgeon paid, if he would cure J.S. of a wound. (4)

Where A. falsely pretending, that he was authorised by B. to order goods on his credit to be delivered to C., promised to see the vendor paid, it was held, that he was not liable, either on his promise or for goods sold, but that he would be liable in an action on the case for the deceit. (5)

When promiser is under a legal obligation to pay for a benefit received by another.

Where the defendant is under a legal obligation to pay for a benefit received by another, the promise need not be in writing, as where an overseer promises to pay an apothecary for the cure of a pauper (6); but when it appears, that another, independent of the defendant, is liable as the principal, the case is within the statute, unless the defendant bind himself upon an express promise, founded upon a new consideration, to pay the debt.

If the statute be once satisfied, it is not requisite, that a subsequent promise should be in writing.

In *Gibbons v. M'Casland* it appeared, that the defendant had entered into a guarantee in writing, and became liable upon it at a period of more than six years, before the commencement of the suit, but had verbally promised within six years, that the matter should be arranged; and afterwards, on an action being brought, pleaded *actio non accrevit*, &c.: — It was held, that the Statute of Frauds, having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the Statute of Limitations, that the latter promise should also be in writing (7), Mr. Justice Bayley observing, "To satisfy the Statute of Frauds, there must be a promise in writing, and to take the case out of the Statute of Limitations, there must be a promise within six years. Both these requisites concur in the present case. It is said, that the acknowledgment must be in writing; but that is not necessary, for the defendant's liability is fixed by the original promise in writing, and the acknowledgment within six years is only to shew, that that liability has not been discharged. The object of the Statute of Limitations was to protect parties who might have paid their debts, and have lost the vouchers by which such payments might have been established. In this case, if, at the time the testator said

Judgment of Mr. Justice Bayley in *Gibbons v. M'Casland*.

(1) *Harris v. Huntbach*, 1 Burr. 373.

(2) *Stephens v. Squire*, 5 Mod. 205.

(3) *Matson v. Wharam*, 2 T. R. 80. *Anderson v. Hayman*, 1 Hen. Black. 120. *Lexington (Lord) v. Clarke*, 2 Vent. 223., vide etiam *Mechelen v. Wallace*, 7 A. & E. 49.

(4) *Watkins v. Perkins*, 1 Ld. Raym. 224.

Robinson v. Pulford, 1 Vent. 43. 2 Keb. 563.

(5) *Thompson v. Bond*, 1 Camp. 4.

(6) Bull. N. P. 280. (d.) et vide *Went v. Adney*, 3 B. & P. 250. *Lamb v. Bancroft*, 4 M. & S. 275.

(7) 1 B. & A. 690.

it should be arranged, the amount of the debt had been mentioned, it would have been sufficient to fix the defendant on the account stated." STAT. 29 CAR. 2.
C. 3. S. 4.

Any person may bind himself by an express parol promise, founded upon a new consideration, to pay the amount of another person's debt, as where A. having a lien upon policies of insurance in his hands, delivers them up to an agent of the owner, on an agreement that the defendant, the agent, will pay the amount of a bill drawn by his principal, and accepted by A. for the accommodation of the principal. (1) NEW CON-
SIDERATION.

An express
parol promise
founded upon
a new consider-
ation.

Mr. Starkie observes (2), "The principle of this and similar cases seems to be very clear; A. had a right to retain the policies, and if the defendant had personally undertaken to pay him a sum of money in consideration of his giving up the policies, the doing so, being a relinquishment of an advantage by the plaintiff, would have been a good consideration to enforce the payment of the money; but if the relinquishment would have been a good consideration to support a promise to pay money, why should it not be equally sufficient to support any other promise? If a promise by the defendant to pay 20*l*. (the amount of the bill) would have been binding, why should not the promise to pay the amount of the bill, specifically, be also binding?"

So where the plaintiff had a *lien* on goods for a debt due from A. B., and the defendant, in consideration, that the plaintiff would relinquish his lien, promised to pay the debt:—It was held, that the case was not within the statute (3): where the plaintiff *distrainted* for rent, and the defendant, an auctioneer, being in possession of the goods, and about to sell them for the benefit of the creditors, by virtue of a bill of sale made by the tenant, promised to pay the debt (4), it was also holden, not to be within the statute. Where a lien
exists.

Goods dis-
trained for rent.

Bill of sale.

A promise to execute a bail bond is not within the statute (5):—or if A. being indebted to B., assign to him a debt due from C., which C. promises to pay to B., the statute does not apply to such a promise. (6)

If an accommodation acceptor defend an action at the request of the drawer, the case is not within the statute, and he may recover the costs as money paid to the use of the defendant. (7) But it has been held, that a promise by the indorser of a dishonoured note to indemnify the holder, if he will sue the drawer, is within the statute. (8) So if J. S. agree, in consideration of the assignment of a debt due to the plaintiff, to pay him 10*s*. in the pound, the case is not within the statute (9), it being an original contract to purchase the debt. Parties to bills
of exchange.

But a promise to pay the debt of another, in consideration of *forbearance* to sue that other, has been held to be within the statute. (10) Promise to pay
in consideration
of forbearance.

(1) *Castling v. Aubert*, 2 East, 325., et vide *Houlditch v. Milne*, 3 Esp. N. P. C. 87. *Barrell v. Trussell*, 4 Taunt. 117.

(2) 2 Ev. 3d ed. 478.

(3) *Houlditch v. Milne*, 3 Esp. N. P. C. 86. *Williams v. Leaper*, 2 Wils. 308., vide *Keate v. Temple*, 1 B. & P. 158.

(4) *William v. Leaper*, 3 Burr. 1886. 2 Wils. 308. *Castling v. Aubert*, 2 East, 325. 380. *Bampton v. Paulin*, 4 Bing. 264.

(5) *Jarmain v. Algar*, 1 R. & M. 348.

(6) *Lacy v. McNeile*, 4 D. & R. 7.

(7) *Howes v. Martin*, 1 Esp. N. P. C. 162.

(8) *Winckworth v. Mills*, 2 ibid. 484., et vide *Read v. Nash*, 1 Wils. 305.

(9) *Anstey v. Marden*, 1 N. R. 124.

(10) *Rothery v. Curry*, cit. Bull. N. P. 280. (d.) *Fish v. Hutchinson*, 2 Wils. 94. *Buckmyr v. Darnall*, 2 Ld. Raym. 1087.

STAT. 29 CAR. 2.
C. 3. s. 4.

' OR TO
CHARGE ANY
PERSON UPON
ANY AGREEMENT MADE
UPON CONSIDERATION OF MARRIAGE ;'

Mutual promises to marry, not within the statute.

IV. " *Or to charge any Person upon any Agreement made upon Consideration of Marriage ;* "

The Statute of Frauds extends to agreements to pay money, or to do some collateral act in consideration of marriage ; but mutual promises to marry are not within the statute (1) ; and a subsequent marriage is not sufficient to take a previous parol agreement out of the statute, as a part performance. (2)

Where a father promised his daughter 3000*l.*, and died before her marriage, leaving her 2000*l.* only, and afterwards the husband hearing of the letter filed his bill to obtain the other 1000*l.*, it was dismissed, because the marriage was not contracted in expectation of 3000*l.* (3) And a parol agreement to pay money, or make a settlement in consideration of marriage, is void ; and a recognition after marriage of a parol promise before marriage, will not take the case out of the statute. (4)

" OR UPON ANY
CONTRACT OR
SALE OF LANDS,
TENEMENTS, OR
HEREDITA-
MENTS, OR ANY
INTEREST IN OR
CONCERNING
THEM ;'

CASES WITHIN
THE FOREGOING
CLAUSE.

Statute does
not expressly
vacate parol
contracts.

Judgment of
Lord Ellen-
borough in
Crosby v. Wadsworth.

INTEREST IN
LAND DEFINED.

V. " *Or upon any Contract or Sale of Lands, Tenements, or Hereditaments, or any Interest in or concerning them ;* " (5)

In *Crosby v. Wadsworth* Lord Ellenborough said, " The statute does not expressly and immediately vacate such contracts if made by parol ; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives on the ground of such contract and of some supposed breach thereof : " — but if the parol agreement be executed, the parties cannot treat it as a nullity.

Thus, if a man having agreed verbally to buy an estate, agree by writing to sell the benefit of his contract to another, who actually obtains a conveyance from the original seller, the transfer will be a sufficient consideration for the promise, and the first purchaser, may recover the sum agreed to be paid for the transfer. (6)

" An actual interest agreed to be granted in land, of course falls within the fourth section, and requires a written agreement. And if an agreement profess to give an exclusive right to the vesture of land during a given period, that is an interest concerning lands within the fourth section ; and therefore, an agreement to sell a growing crop of mowing grass, to be mowed and made into hay by the purchaser, requires a written agreement." (7)

And even where such an exclusive right is not given as amounts to an interest in or concerning lands, yet an agreement to sell a crop, which would not go as emblements to an executor (*e. g.* a crop of grass) cannot be

(1) Bull. N. P. 279. (a.) *Harrison v. Cage*, 1 Ld. Raym. 386. 1 Salk. 24. *Cork v. Baker*, Str. 34. *contra*. *Philpot v. Walcot*, Skin. 24. 3 Lev. 65.

(2) *Maxwell (Sir George) v. Mountacute (Lady)*, Prec. Ch. Ca. 526. 1 P. Wms. 618. *Taylor v. Beech*, 1 Ves. sen. 297., et vide *Shaw v. Jakeman*, 4 East, 201.

(3) *Ayliffe v. Tracy (Mr. Justice)*, 2 P. Wms. 45.

(4) *Randall v. Morgan*, 12 Ves. 73.

(5) *Vide ante*, 493. tit. AUCTION.

(6) *Seaman v. Price*, 1 R. & M. 195.

(7) 1 Sug. V. & P. 142. *Crosby v. Wadsworth*, 6 East, 602. *Carrington v. Roots*, 2 M. & W. 248. *Per Bayley J. in Parker v. Staniland*, 11 East, 366.

deemed a chattel, and therefore can only be bound by a written contract. (1) STAT. 29 CAR. 2.
c. 3. s. 4.

Contracts for the sale of growing turnips, their maturity not being stated (2); for growing trees for hop poles (3); for growing underwood (4); for the abatement of a tenant's rent (5); for the grant of a rent-charge, or for a right of common; — are within the statute.

In *Falmouth (Earl of) v. Thomas* (6), which was in *indebitatus assumpsit* upon an account stated, the defendant pleaded, that, before the taking of the account, there was a verbal agreement for the sale of certain crops growing upon the plaintiff's land, and for work, labour, and materials done and used in preparing the land for tillage; that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; that the money to be paid for the crops, and the work, labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing or any note thereof. To this plea the plaintiff replied, that, before the account was stated, the defendant had mown the crops and taken them to his own use, and had and received the amount of the work and labour and materials. The defendant rejoined, traversing, that he had cut down the crops, and received the amount of the work and labour, &c. before the stating of the account. Upon general demurrer, it was held, that the contract, as appearing on the pleadings, was within the Statute of Frauds, and that the plaintiff could not recover (7); because, at the time when the contract was made, the crops were growing upon the land, the tenant was to have had the land as well as the crops, and the work, labour, and materials were so incorporated with the land, as to be inseparable from it. He would not have the benefit of the work, labour, and materials, unless he had the land; and the court were of opinion, that the right to the crops and the benefit of the work, labour, and materials, were both of them an interest in land.

In *Boyce v. Green* (8) it was holden, that shares in mining companies were within stat. 7 Will. 3. c. 12. s. 2. (Irish), Chief Justice Bushe observing, "This case comes before the court upon shewing cause against a conditional rule for setting aside the verdict. This is an action of *assumpsit*, and the breach is for not transferring shares in a company founded under an act of the 5 Geo. 4., entitled 'An act to enable the Mining Company of Ireland to sue and be sued in the name of their secretary, or of one of their members.' Plea, *non assumpsit*. The only written evidence in support of the plaintiff's case is a paper containing these words, 'Sold 100 Mining *Purdy's*, at 17s. 6d. J. Greene.' That was explained by parol evidence to have such a meaning, as the declaration annexed to the contract. That parol evidence was objected to by the defendant, who insisted on the second section (corresponding with the fourth section of the English act) of the Statute of

Growing turnips; hop-poles underwood; tenant's rent; rent-charge; right of common.

Where the crops, work, labour, and materials are so incorporated with the land, as to be inseparable from it.

Shares in mining companies. Judgment of Chief Justice Bushe in *Boyce v. Green*.

(1) *Evans v. Roberts*, 5 B. & C. 829. *Smith v. Surman*, 9 ibid. 566.

(2) *Emmerson v. Heelis*, 2 Taunt. 38., see vide *Warwick v. Bruce*, 2 M. & S. 205. *Waddington v. Bristow*, 2 B. & P. 452.

(3) *Teul v. Auty*, 2 B. & B. 99.

(4) *Scorell v. Boxall*, 1 Y. & J. 396.

(5) *O'Connor v. Spaight*, 1 Sch. & Lef. (Irish), 306.

(6) 1 C. & M. 89.

(7) *Falmouth (Earl) v. Thomas*, ibid. 3 Tyrw. 26.

(8) 1 Batty (Irish), 616.

STAT. 29 CAR. 2.
c. 3. s. 4.

Judgment of
Chief Justice
Bushe in *Boyce*
v. *Green*.

Frauds (1), which is in these words, 'No action shall be brought, &c. upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, &c. unless the agreement upon such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' The defendant's objection rests on two allegations, both which, he has in our opinion sustained: 1. that the contract declared on is of the class of those described by the statute; 2. that the writing given in evidence is not such as the statute requires. As to the first, it is only necessary to read the first three sections of the private act of parliament, to shew that the Mining Company of Ireland are engaged in a partnership in interests in or concerning lands, tenements, or hereditaments. The nature of mining implies, at least, a right to open the ground and keep it open, and such right to the land for a limited time and purpose, as induced the court, in *Crosby v. Wadsworth* (2), to hold a contract for the sale of a growing crop to be within the statute. But the evidence given upon the trial, by the secretary of the company, puts this part of the case out of doubt. He stated that the company had many mines at work in different parts of Ireland; that they had purchased some and rented others, and that they had erected steam-engines and smelting houses and built workmen's houses. Now the private act recognises the shares of this company as transferable; and what does a purchaser of one of them acquire, and what would he be entitled to on the dissolution of the company? Why, a share in those houses and interests in land, which the act contemplated the company would acquire 'by grant, conveyance, or demise.' Upon that point, therefore, we think the defendant right. The second question is, on the sufficiency of the writing given in evidence. Many imperfections are objected to it, but it is sufficient to consider one, viz. that the names of both buyer and seller are not mentioned in it. I do not say *signed*, but they are not even *named*. When an agreement is reduced to writing, an integral part of it, is the name of each party; and the language of Chief Justice Mansfield in *Champion v. Plummer* (3) is quite applicable to this case. The plaintiff, however, insisted that this objection was removed by its having appeared, that the defendant had himself admitted the agreement by having sent to the plaintiff a certain other paper containing these words:— 'I hereby undertake to have transferred to Messrs. John and J. Boyce, one hundred shares in the Mining Company of Ireland, *as soon as the books are opened for that purpose*. Value received. 7th January, 1825. James Greene.' This document cannot answer the objection made to the other; for first, it does not refer to it, and cannot be connected with it, or called in aid of it. (4) Secondly, this document varies from the other in two respects: 1. in the names of the parties; for it is an undertaking to transfer to Messrs. John and J. Boyce; 2. a certain condition is introduced into it, which is not in the other instrument. We therefore think that the verdict cannot stand under the statute."

Agreement to
occupy lodg-
ings.

An agreement to occupy lodgings at a yearly rent, payable in quarterly

(1) 7 Will. 3. c. 12. s. 2. (Irish).

(2) 6 East, 602.

(3) 1 N. R. 254.

(4) *Clinan v. Cook*, 1 Sch. & Lef. (Irish) 22. 33.

proportions (the occupation to commence on a future day), is an agreement relating to an interest in land within the meaning of the fourth section. (1)

STAT. 29 CAR. 2.
C. 3. s. 4.

Where A. being possessed of a messuage and premises for the residue of a certain term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises. :—It was held, that this was an agreement relating to the sale of an interest in land within stat. 29 Car. 2. c. 3. s. 4. It was also adjudged, that in an action brought by A. on this contract, B. was entitled to avail himself under *non assumpsit* of the objection, that there was no memorandum or note in writing, &c. of such contract. (2)

Payment of money by tenant for repairs.

Keep, viz. growing grass of fields, is an interest in land. (3)

“Keep” is an interest in land.

A parol agreement that an arbitrator shall determine between the parties whether a lease shall be granted, is within the statute. (4)

Parol agreement, that an arbitrator shall determine whether a lease shall be granted.

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property, which was sold with it. (5)

An entire agreement made for the sale of real and personal estate, if void for the realty, is equally void for the personalty.

Respecting cases which are not within the statute Sir Edward Sugden states (6), “Any crop which would be emblements, and might be taken in execution, for example, wheat, may be considered goods and chattels, and therefore not within the fourth section.”

CASES NOT WITHIN THE FOREGOING CLAUSE.

The judgment of Chief Baron Joy in *Dunne v. Ferguson* (7) affords one of the best illustrations of the present question :—“The facts of the case were, that in October, 1830, the defendant sold to the plaintiff, a crop of turnips, which he had sown a short time previously, for a sum less than 10*l*. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain.”

Judgment of Chief Baron Joy in *Dunne v. Ferguson*.

It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the Statute of Frauds. Upon the foregoing facts Chief Baron Joy observed (Barons Smith, Pennefather, and Foster concurring), “The general question for our decision is, Whether there has been a contract for an interest concerning lands, within the second section of the Statute of Frauds? or, Whether it merely concerned goods and chattels? and that question resolves itself into another, Whether or not a growing crop is goods and chattels? The decisions have been very contradictory—a result which is always to be expected

(1) *Edge v. Strafford*, 1 C. & J. 391. *Inman v. Stamp*, 1 Stark. 12.

(2) *Buttmore v. Hayes*, 5 M. & W. 456.

(3) *Shelton v. Livius*, 2 Tyrw. 420. 2 C. & J. 411.

(4) *Walters v. Morgan*, 2 Cox, 369.

(5) *Cooke v. Tombs*, 2 Anst. 420. *Lea v. Barber*, *ibid.* 425., vide *Chater v. Beckett*, 7 T. R. 201., et vide *Neal v. Viney*, 1 Camp. 471. *Corder v. Drakeford*, 3 Taunt. 382. *Mayfield v. Wadsley*, 3 B. & C. 357. 5 D. & R. 224. *Falmouth (Lord) v. Thomas*,

1 C. & M. 89. *Mechelen v. Wallace*, 7 A. & E. 49. 1 Sug. V. & P. 159. It may be requisite to observe, that an agreement for a sale of growing crops, carrying the right of possession for a limited time at a gross sum not exceeding 50*l*., requires a 1*l*. stamp, viz. a conveyance within the description in the Stamp Act. *Cuttle v. Gamble*, 5 Bing. N. C. 46.

(6) 1 V. & P. 142.

(7) *Hayes (Irish)*, 542.

STAT. 29 CAR. 2.
C. 3. & 4.

Judgment of
Chief Baron
Joy in *Dunne*
v. *Ferguson*.

when the judges give themselves up to fine distinctions. In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case, the distinction turned upon the hand that was to dig them; so that, if dug by A. B. they were potatoes; and if by C. D., they were an interest in lands. Such a course always involves the judge in perplexity, and the cases in obscurity. Another criterion must therefore be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be *goods*; and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The Statute of Frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands it would come within the second section of the act; but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of *Evans v. Roberts* (1), *Smith v. Surman* (2), and *Scorell v. Boxall* (3), have all been decided. And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must rule the points saved for the plaintiff."

Sale of growing crops distinct from any selling or assignment of the land.

Judgment of
Mr. Justice
Holroyd in
Evans v. Roberts.

In *Evans v. Roberts* (4) it appeared, that on the 25th of September a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid 1*s.* earnest: but it was held, not to be a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the fourth section of the Statute of Frauds, but a sale of goods, wares, and merchandise, within the seventeenth section; Mr. Justice Holroyd observing, "This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land, while the potatoes were arriving at maturity, yet I think he had not an interest, in the land within the meaning of this statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited; for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away. In *Parker v. Staniland* (5) Lord Ellenborough says, 'The lessee *primæ vesturæ* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right; but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement—a right to come upon the land for the purpose of taking up and carrying away the

Parker v. Staniland.

(1) 5 B. & C. 829.

(2) 9 *ibid.* 561.

(3) *Vide antè*, 1969. *Falmouth (Earl of)*

v. Thomas, 1 C. & M. 89. et *Graves v. Wells*, 5 B. & Ad. 105.

(4) 5 B. & C. 829.

(5) 11 East, 366.

potatoes; but that gave him no interest in the soil.' In this case the potatoes are not to be dug up by the buyer; but even if that had been part of the contract, I think he would not have had an interest in the land, but a mere easement. In *Emmerson v. Heelis* (1) it did not appear, that the subject-matter of the contract was fit to be taken at the time of the contract. The purchaser was not to pay till January, and it may have continued to grow till that period. In *Poulter v. Killingbeck* (2) *indebitatus assumpsit* was brought for moieties of crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his (the defendant's) own use. It appeared that the plaintiff, by a parol agreement, had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The action was brought to recover a moiety of the value. It was objected, that the agreement was within the statute, because it related to land; but the court overruled the objection, Chief Justice Eyre observing, 'That as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement, but that special agreement was executed by the appraisement. The circumstance of the appraisement afforded clear proof, that the plaintiff sold what the defendant had agreed was his; and the price having been ascertained, brought this to the case of an action for goods sold and delivered.' Lord Ellenborough, in observing upon that case in *Crosby v. Wadsworth* (3), says, 'The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so; it was originally an agreement to render what should have become a chattel, i.e. part of a severed crop in that shape, in lieu of rent; and by a subsequent agreement it was changed to money, instead of remaining a specific render of produce.' So in this case, the contract being for the sale of the produce of a given quantity of land, was a contract to render what afterwards would become a chattel; and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land within the meaning of the fourth section of the Statute of Frauds."

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C. 3. S. 4.

*Emmerson v.
Heelis.*

*Poulter v. Kil-
lingbeck.*

*Crosby v. Wads-
worth.*

Mr. Justice Littledale also stated, "I am of opinion, that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the Statute of Frauds. The words, 'lands, tenements, and hereditaments' in that section, appear to me to have been used by the legislature to denote a fee simple; and the words 'any interest in or concerning them' were used to denote a chattel interest, or some interest less than the fee simple." (4)

Judgment of
Mr. Justice
Littledale in
*Evans v. Ro-
berts.*

(1) 2 Taunt. 38.

(2) 1 B. & P. 397.

(3) 6 East, 602.

(4) In the foregoing case of *Evans v. Roberts*, Mr. Justice Bayley for the first time referred to the rule as to emblements, and

gave an extra-judicial opinion, that the contract was for the sale of goods, wares, and merchandises within the meaning of s. 17.: but as the price was under 10*l.*, a written note or memorandum of the agreement was not necessary. *Vide* 1 Sug. V. & P. 152.

STAT. 29 CAR. 2.
C. 3. s. 4.

Mayfield v.
Wadsley.

Sale of crops
when ripe; the
purchaser to
find diggers.

Sale of growing
corn with the
profits of the
stubble after-
wards.

Judgment of
Lord Denman
in *Jones v.*
Flint.

"*Mayfield v. Wadsley* (1) shews, that where there is a sale of growing crops distinct from any assignment or letting of the land, the crops do not constitute part of the inheritance, or any interest in land, but are mere chattels, and may be recovered under a count for goods bargained and sold." (2)

In *Sainsbury v. Matthews* (3) it appeared, that the plaintiff and defendant being together at an inn at Erlstoke in June, 1836, the defendant said he had got 100 bags of potatoes, and he would sell them at 2s. per sack. The plaintiff said he would have them; and it was agreed, that the plaintiff was to have them at that price at digging-up time, and that he should find diggers. When the potatoes were ripe, the plaintiff accordingly sent diggers to take them up; but the defendant refused to permit them to do so: upon such facts it was holden, that this was not a contract for the sale of an interest in lands within the fourth section.

In *Jones v. Flint* (4) it was proved, that in August, 1835, the plaintiff and defendant agreed orally, that the defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that the plaintiff was to have the liberty for his cattle to run with the defendant's: that the defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields. The defendant was to harvest the corn, and dig up the potatoes; and the plaintiff was to pay the tithe. It did not distinctly appear, whether the sale was by the acre or not. The crops, &c. were taken by the defendant in conformity with the agreement; the payment and tender were proved as pleaded; and the defendant's counsel contended, that the plaintiff was not entitled to recover on the first issue, because the contract proved, was for an interest in land within sect. 4. of the Statute of Frauds. Upon these facts Lord Denman observed, "Three things were the subject-matter of the contract: crops of corn, potatoes, and the after-crop of stubble and lay grass. Of these, all but the lay grass are *fructus industriales*; as such, they are seizable by the sheriff under a *fieri facias*, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled, that the contract would have been held to be a contract merely for the sale of goods and chattels. And although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from their original character, not to be on that account a contract for the sale of any interest in land. *Evans v. Roberts* (5) proceeds on this principle.

"The present case differs from *Evans v. Roberts* (6) in this, that there the potatoes were to be dug up by the seller: the judgments, however, do not proceed on this distinction, although it was not unnoticed. Holroyd J. expressly says (7) that, even if they were to be dug up by the buyer, 'I think he would not have had an interest in the land.' And we agree, that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by these tests, we think that, if the lay grass be excluded, the

(1) 3 B. & C. 357.

(2) *Per* Bayley J. in *Evans v. Roberts*, 5
ibid. 836.

(3) 4 M. & W. 343.

(4) 10 A. & E. 754.

(5) 5 B. & C. 829.

(6) *Ibid.*

(7) *Ibid.* 838.

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C. 3. s. 4.

parties must be taken to have been dealing about goods and chattels; and that an easement of the right to enter the land, for the purpose of harvesting and carrying them away, is all that was intended to be granted to the purchaser."

"Upon this principle, however, we are to examine, whether the introduction of the lay grass into the contract ought to vary the decision."

"If, therefore, this be a case in which the parties intended a sale and purchase of the grass to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail.

"Looking, however, at the facts, we think this was not such a bargain. It may well be doubted, upon all the evidence, whether any thing that could be called a crop of grass was in the ground, or in the contemplation of the parties at all; for it does not appear that any clover or other grass had been sown with the corn; and the word 'grass' seems merely to have been adopted by the witness in cross-examination from the defendant's counsel. But not relying upon this, we find that the plaintiff was to pay the tithe; and that, after the harvesting, he reserved to himself the right of turning his own cattle into the fields; and we think that, however expressed, the more reasonable construction of the contract is, that the possession of the field still remained with the owner after harvesting, as before; it was not necessary to the vendee before, on account of the grass, because that, whatever it was, could not then be got at; nor did it need preservation; and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by him, whose interest, at the best, was of so very limited a nature." (1)

Respecting fixtures, *Hallen v. Runder* (2) will afford an illustration, in which it appeared, that a short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired; and the tenant, having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.*, and signed the valuation:—It was held, that the plaintiff having, at the defendant's request, waved his right to remove the fixtures, the matter bargained for, was not an interest in land within stat. 24 Car. 2. c. 3. s. 4., and that the amount ascertained by the broker might be recovered in *indebitatus assumpsit* for fixtures and effects bargained and sold, without proving a note, &c. in writing. (3)

The sale of timber was in *Smith v. Surman* (4) held not to be an interest in land. Under the following circumstances A., being the owner of trees

(1) If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold, or leasehold, whether taken in the name of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase-money, unless such a resulting trust would break in upon the policy of an act of parliament. A custom that the nominee shall take beneficially, cannot stand against the right in equity of

the purchaser to the resulting trust. And although the person in whose name the conveyance is taken, executes no declaration of trust, yet a trust will result for the person who paid the money by operation of law, this species of trust being expressly excepted out of the Statute of Frauds. 3 Sug. V. & P. 255.

(2) 3 Tyrw. 259.

(3) *Seemle*, that such note, &c. in writing was not required under s. 17. respecting the "sale of goods" of 10*l.* value or upwards. Ibid.

(4) 4 M. & R. 551. 9 B. & C. 561.

STAT. 29 CAR. 2.
C. 3. s. 4.

growing on his land, verbally agreed with B., while they were standing, to sell him the timber at so much per foot. B. afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. A. afterwards by letter required B. to pay for the timber which he, B., had bought of him. B. wrote a letter in answer stating, that he had bought the timber, but that he bought it to be sound and good, and that it was not so:—It was held, that the contract was not a contract for the sale of lands, tenements, hereditaments, or any interest in or concerning the same within the meaning of the fourth section of the Statute of Frauds, but that it was a contract for the sale of goods, wares, and merchandises within the seventeenth section.

Railway shares not an interest in land, and can be sold by a verbal contract.

Judgment of Lord Abinger in *Bradley v. Holdsworth*.

By a railway act it was declared, that the shares in the undertaking, or the joint stock and fund of the company, should to all intents and purposes be deemed personal estate, and be transmissible as such, and should not be of the nature of real property:—It was holden, that the shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract (1), Lord Abinger observing, "I think there is nothing which can authorise us to say, that these shares are an interest in land. The act of parliament declares them to be personal property to all intents and purposes; your argument is, that for one purpose they are real property." And Mr. Baron Alderson added, "I conceive that all the shareholders would take, even without such a clause." (2)

Damage sustained to land in consequence of a road made through it.

The damage sustained by the plaintiff, in consequence of a road having been made through his land, is not such an interest in land within the meaning of the Statute of Frauds as to require, that a submission to arbitrators to ascertain how much the defendant should pay as an indemnification, should be an agreement in writing. (3)

EASEMENTS.

A parol contract for an easement, such as a liability to nail the framework of a skylight against a wall (4), is not within the statute.

EQUITABLE MORTGAGE.

Collateral agreement by tenant, to pay a per centage upon landlord's repairs.

It seems to be now settled, that an equitable mortgage by the deposit of title deeds is not within the statute. (5) Neither is a collateral agreement by a lessee to pay a per centage on money laid out by the landlord on the premises. (6)

"OR UPON ANY AGREEMENT, THAT IS NOT TO BE PERFORMED WITHIN THE SPACE OF ONE YEAR FROM THE MAKING THEREOF."

Contingencies not within the statute.

VI. "*Or upon any Agreement, that is not to be performed within the Space of one Year from the making thereof.*"

"The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon

(1) *Bradley v. Holdsworth*, 3 M. & W. 422.

(2) In an action for not excepting railway shares, the court refused to allow the defendant to plead, that the contract was for goods, and that there was no note in writing; together with a plea, that it was a contract for an interest in land, and no such note. *Sykes v. Reeres*, 6 Dowl. P. C. 384.

(3) *Gillanders v. Rossmore* (Lord), 1 Jones (Irish), 504.

(4) *Winter v. Brockwell*, 8 East, 310. *n. Parker v. Staniland*, 11 *ibid.* 366.

(5) *Russel v. Russel*, 1 Bro. Ch. Ca. 269. 11 Ves. 403, 404. *n.* 12 *ibid.* 197. 1 *Evans' St.* 235.

(6) *Hoby v. Roebuck*, 7 Taunt. 157. *Taylor v. Waters*, 7 Taunt. 374. 2 Marsh. 551.

contingency. It does not extend to cases, where the thing may be performed within the year." (1) And where a parol promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years' time after the promise was made, it was held, not to be within the statute, for that by possibility the ship might have returned within the year. (2) So, also, where a debtor to the plaintiff, stated to the plaintiff's solicitor, on being applied to for payment, that he, the debtor, could not pay then or during his lifetime, but, that he had provided for payment by his will, and directed his executors to pay:—such statement was held to be binding on the executors, although there was no promise in writing by the testator to pay. (3)

In *Donellan v. Read* (4) it appeared, that a landlord, who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work:—It was held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the Statute of Frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord;—Mr. Justice Littledale observing, "As to the contract not being to be performed within a year, we think that, as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens, that they are not to be paid for in full, till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part."

Landlord agreeing to lay out money in repairs on his tenant's premises.

Judgment of Mr. Justice Littledale in *Donellan v. Read*.

An inchoate performance within a year, is not sufficient to take the case out of the statute, because "the word used in the clause of the statute is 'performed,' which *ex vi termini* must mean the complete performance or consummation of the work; and that is confirmed by another part of the statute, requiring only part performance of an agreement to supersede the necessity of reducing it to writing; which shows, that when the legislature used the word 'performed,' they meant a complete and not a partial performance." (5)

An inchoate performance within a year, not sufficient to take the case out of the statute.

The principle, that the statute always extends to those cases where, by the express appointment of the parties, the thing is not to be performed within a year, will receive illustration from the following cases:—

Except where by the express appointment of the parties, the thing is not to be performed within a year.

A., on the 20th of July, made proposals in writing (unsigned) to B., to

(1) *Per* Denison J. in *Fenton v. Emblers*, 3 Burr. 1281. *Per* Wilmut J. *ibid.* *Peter v. Compton*, Skin. 353. *Smith v. Westall*, 1 Ld. Raym. 317. *Wells v. Horton*, 4 Bing. 40.
(2) *Anon.* 1 Salk. 280. *Peter v. Compton*, Skin. 353.

(3) *Wells v. Horton*, 12 Moore, 176. 4 Bing. 40.

(4) 3 B. & Ad. 899.

(5) *Per* Lord Ellenborough in *Boydell v. Drummond*, 11 East, 142.

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C. 3. & 4.

Contract for a
year's service to
commence at a
subsequent day.

Hire of a car-
riage.

Literary work
in eighteen
numbers to be
published at
intervals of two
months.

enter his service as bailiff for a year, B. took the proposals and went away, and entered into A.'s service on the 24th of July:—It was held, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the fourth section of the Statute of Frauds. (1)

A contract for a year's service to commence at a subsequent day, is a contract not to be performed within the year, and by the statute must be in writing; therefore, no action can be maintained for the breach of a verbal contract made on the 27th May for a year's service, to commence on the 30th June following. (2)

An agreement to hire a carriage for more than one year, determinable by the custom of the trade, at any time, upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith. (3)

Mavor v. Pyne (4) is seemingly at variance with the foregoing cases, in which a party agreed to take a work, which was to be published in eighteen numbers, at intervals of two months, and after receiving several numbers refused to take any more, though he had notice from the publisher that the others were ready for him if he would send for them;—the plaintiff, the assignee of the publisher, who had become bankrupt, sued him for the value of the whole; and the jury having found a verdict for the plaintiff, for the price of the numbers received by the defendant;—the court refused to disturb it, although it was contended, that the contract was entire and void, under the fourth section of the Statute of Frauds, it not having been reduced into writing, nor to be performed within a year.

" UNLESS THE
AGREEMENT
UPON WHICH
SUCH ACTION
SHALL BE
BROUGHT, &C.
SHALL BE IN
WRITING."

Construction
of the word
" agreement."
Judgment of
Lord Ellen-
borough in
Wain v. Warl-
ters.

VII. " *Unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing.*"

Respecting the foregoing clause, Lord Ellenborough in *Wain v. Warlters* (5) observed, "The Statute of Frauds has the word 'agreement;' and the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise*, or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so, when it is considered by whom the statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express, as he was able to conceive, the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise*; but without a legal consideration

(1) *Snelling v. Huntingfield* (Lord), 1 C. M. & R. 20. 4 Tyrw. 606.

(2) *Bracegirdle v. Heald*, 1 B. & A. 722.

(3) *Birch v. Liverpool* (Earl), 4 M. & R. 380. 9 B. & C. 392.

(4) 3 Bing. 285. 2 C. & P. 91. 11 Moore, 2.

(5) 5 East, 16. recog. in *Saunders v. Wakefield*, 4 B. & A. 595. *Jenkins v. Reynolds*, 3 B. & B. 14. *Cannel v. Buckle*, 2 P. Wms. 242. *Hawes v. Armstrong*, 1 Bing. N. C. 71.

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C. 3. s. 4.

to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any *promise* which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause; but still, in order to charge the party making it, the statute proceeds to require, that the *agreement*, by which must be understood, the agreement in respect of which the promise was made, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing, as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise, which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the agreement should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by Comyns (1), to which may be added Dyer (2), all show that the word *agreement* is not satisfied unless there be a consideration, which consideration, forming part of the agreement, ought therefore to have been shewn; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on."

In *Laythoarp v. Bryant* (3) Chief Justice Tindal said, "The word agreement is satisfied, if the writing states the subject-matter of the contract, the consideration, and is signed by the party to be charged." "But I find no case, nor any reason for saying that the signature of both parties is that, which makes the agreement. The agreement, in truth, is made before any signature."

Judgment of
Chief Justice
Tindal in *Lay-
thoarp v. Bry-
ant*.

The statute does not require a formal agreement (4) with technical precision; any thing under the hand of the party expressing, that he had entered into the agreement, and shewing the terms thereof, suffices, although it be merely a recognition or adoption of a prior parol contract. (5) Thus, a letter in answer and referring to a letter of the plaintiffs, which stated the terms of the contract, and by which answer the defendant recognises the contract, though he excuses the performance, is a sufficient compliance with the act. (6) A contract for the purchase of land by letters is sufficient within the Statute of Frauds; but it will not be specifically executed, unless upon a fair interpretation it imports a concluded agreement, and not doubtful, whether only a treaty. (7)

FORM OF
AGREEMENT.

(1) Plowd. 5. (a.) 6. (a.) 9.

(2) 336. (b.)

(3) 2 Bing. N. C. 744.

(4) As to form of agreement, vide *Chapman v. Bluck*, 4 Bing. N. C. 187. *Gosbell v. Archer*, 2 A. & E. 500. *Thomas v. Derring*, 1 Jur. 211.

(5) *Shippey v. Derrison*, 5 Esp. N. P. C. 190.

(6) *Jackson v. Lowe*, 1 Bing. 9. *Saunders v. Jackson*, 2 B. & P. 238.

(7) *Stratford v. Bosworth*, 2 Ves. & B 341.

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C. 3. s. 4.

An agreement for the sale of an estate, the result of a correspondence by letters, is good within the Statute of Frauds. (1) But one letter or document must contain a distinct reference to the other, without requiring the aid of parol evidence (2); and a mere offer to contract, without evidence of an acceptance by the party to whom the proposal is made, is of no avail. (3)

Signature in pencil.

It seems, that even when writing is necessary, it may be made in pencil, and that ink is not essential. (4)

The consideration.

To constitute a valid agreement to answer for the debt or default of a third person within the fourth section of the Statute of Frauds, it is not necessary, that the consideration should appear in express terms; it is enough if the memorandum be so framed, that a person of ordinary capacity must infer from its perusal, that such and no other, was the consideration upon which the undertaking was given. (5)

When consideration sufficiently appears.

In *Joint v. Mostyn* (6) it was held, that the consideration sufficiently appeared on the face of the following instrument: — "Dublin, 20th January, 1819. 41*l.* 1*s.* 4*d.* I promise to pay A. J., or order, the sum of 41*l.* 1*s.* 4*d.* in three years and five months, in case Mr. H. B. C. does not, within said period, pay it, by instalments of 1*l.* per month, or such instalments as he shall make, or as that said sum shall be paid within that period, the time to be computed from this day." Signed Ffolliott, T. Mostyn; and indorsed A. Joint.

Consideration must appear from the instrument itself.

The consideration of a guarantee must appear from the instrument itself, either expressly, or by necessary inference, and must be executory. The following guarantee, therefore, written at the foot of an invoice, "I guarantee you the payment of the above — A. B.," was in *Bewley v. Whiteford* (7) held insufficient, Chief Baron Joy observing, "The result of all is, that the consideration must clearly appear from the guarantee itself, either by express statement, or necessary implication. The consideration, also, must be executory, unless a previous request appear. If there be a doubt whether the consideration is executed or executory, and that that must be explained by parol evidence; the guarantee is insufficient.

Judgment of Chief Baron Joy in *Bewley v. Whiteford*.

"Let us apply these principles to the present case — 'I guarantee to you the payment of the above.' That implies that Higgins and Co. had already bought the goods. What, then, remains to be done in future? Nothing. Is it conditional? No. The plaintiff, if entitled to recover upon this guarantee, would not be bound to shew, that they had done any thing in consequence of it.

"It has been said, that the transaction of the sale of goods is divisible into two parts, the contract, and the delivery; and that, though the contract may have been complete before the making of the guarantee; yet *non constat* that the delivery had taken place. But I say *non constat* that it had *not* taken place. It may be urged, too, that the guarantee has no date, but is written at the foot of the invoice, which is dated; and that therefore the

(1) *Huddleston v. Briscoe*, 11 Ves. 583.

(2) *Boydell v. Drummond*, 11 East, 142.
Hinde v. Whitehouse, 7 ibid. 558. *Sandilands v. Marsh*, 2 B. & A. 680.

(3) *Gaunt v. Hill*, 1 Stark. 10.

(4) *Geary v. Physic*, 5 B. & C. 234.

Jeffery v. Walton, 1 Stark. 267. *Chitty on Contracts*, 73.

(5) *Hawes v. Armstrong*, 1 Scott, 661. 1 Bing. N. C. 761.

(6) 2 Fox & Smith (Irish), 4.

(7) 1 Hayes (Irish), 356.

date of the guarantee ought to refer to the date of the invoice. But then the question arises—Was this invoice written on the day of the sale? There is nothing to warrant us in the making that presumption. And the danger of such presumptions is sufficiently manifest by the parol evidence that has been received; and which shews that the guarantee was written, not at the place of sale, but at the defendant's own house. Is it not allowable, therefore, to shew by parol evidence, the true time of making the guarantee? I say not. That was contended for in *Wain v. Warlters*, and was refused.

STAT. 29 CAR. 2.
C. 3. s. 4.

“Considering, then, that it does not appear in this case, whether or not the goods had been delivered when the guarantee was executed; whether the guarantee was prospective, or any thing remained to be done by the plaintiffs, in consequence of it:—we are of opinion, that the plaintiffs are not entitled to recover, and that the exceptions must be allowed.”

Where B. contracted in writing to work for plaintiff in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until B. should give notice of quitting, it was held, that such agreement was invalid under stat. 29 Car. 2. c. 3. s. 4. for want of mutuality; and that this objection might be taken by the defendant in an action by plaintiff for harbouring B., who, as plaintiff alleged, had quitted him without proper notice. (1)

Agreement void for want of mutuality.

In *Stapp v. Lill* (2) an agreement in writing, by which the defendant undertook to guarantee the payment of any goods, which the plaintiff should deliver to a third person, sufficiently expresses the consideration for the defendant's undertaking, to render the agreement binding, under the fourth section of the Statute of Frauds, although it contains no promise on the part of the plaintiff to deliver goods, and no action would have lain upon it against him:—Lord Ellenborough observing, “that though by the agreement the plaintiff was not obliged to deliver goods, there appeared a sufficient consideration for the defendant's promise to be answerable, if any should be delivered. He should therefore admit evidence of the delivery of the goods;” and the plaintiff had a verdict.

Agreement for goods may be binding, although it contain no promise for delivering the goods.

Judgment of Lord Ellenborough in *Stapp v. Lill*.

In the ensuing term the attorney general moved for a rule to shew cause, why this verdict should not be set aside, and a nonsuit entered. But the court said, that this case differed from *Wain v. Warlters* (3), as the agreement here contained the thing to be done by the plaintiff, which was the foundation of the defendant's promise; and that the delivery of the goods, was a sufficient consideration, although no cross-action upon the agreement could have been brought against the plaintiff, either at the suit of the defendant or of Nichols.

It is not requisite, that the agreement should contain the precise amount of the sum to be paid. Thus, in *Bateman v. Phillips* (4) it appeared, that the defendant addressed the following letter to the attorney of the plaintiff:—“Sir, the bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid.” (Signed by the defendant.) Upon which Lord Ellenborough observed, “The parol evi-

Not requisite that the agreement should state the precise amount of the sum to be paid.

Judgment of

(1) *Sykes v. Dixon*, 9 A. & E. 693.

(3) 5 East, 16.

(2) 1 Camp. 242. S. C. nom. *Stadt v.*

(4) 15 *ibid.* 274.

Lill, 9 East, 348.

STAT. 29 CAR. 2.
C. 3. s. 4.

Lord Ellen-
borough in
Bateman v.
Phillips.

Plaintiff be-
coming bail for
a stranger in
consideration
of a third party
promising in-
demnification.

Continuing
guarantee.

Agreement not
expressly dis-
closing by
whom the con-
sideration
money was
paid.

What is not
an undertaking
to pay the debt
of another.

"OR SOME
MEMORANDUM
OR NOTE
THEREOF."

Contract may
be collected
from several
distinct papers.

dence received, did not go to extend the terms of the agreement in writing; it only went to shew, that the letter was addressed to him as the attorney for the plaintiff, and not as the principal and creditor of Williams. Would it be contended to be necessary to state the very sum to be paid, where it appeared, that the defendant meant to say to the plaintiff, 'Whatever sum Williams owes you, I engage to pay it, if you will not sue him?' If the defendant did not know the exact amount of the debt, might he not contract to pay it in those terms? The parol evidence does not enlarge any term of the letter; and I think it would be holding the statute too strictly to say, that this was not sufficient evidence of the contract."

If plaintiff become bail for a stranger, in consideration of defendant's request, and of defendant promising to indemnify plaintiff against the consequences, no action lies upon such promise, unless it be in writing under stat. 29 Car. 2. c. 3. s. 4. (1)

In *Mayer v. Isaac* (2) the following guarantee was given:—"In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200*l.*," which was held to be a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than 200*l.* had been supplied to and paid for by V.

"I hereby guarantee you the payment of the proceeds of the goods you have consigned to my brother, and also any future shipments you may make in consideration of 2*s.* 6*d.* paid me," was held to be a sufficient memorandum within the Statute of Frauds to make the subscriber liable to the vendor, notwithstanding it did not expressly disclose by whom the 2*s.* 6*d.* was to be paid. (3)

Where a plaintiff had issued execution against L. for debt, and L., with the assent of the plaintiff, conveyed all his property to the defendant, who thereupon undertook to pay the plaintiff the debt due from L., upon the plaintiff withdrawing the execution:—It was held, that the defendant's undertaking was not an undertaking to pay the debt of a third person within the meaning of the Statute of Frauds. (4)

Under this section as well as the 17th, the terms of the contract may be collected from several distinct papers, provided they be connected by reference from one another; but it is not sufficient to connect them by mere extrinsic oral testimony (5): thus, an agreement for a lease, which does not specify any definite term, and which has no reference to an advertisement which does express the term, cannot be connected with it by oral evidence (6): and a letter, referring to some agreement generally, but without specifying

(1) *Green v. Cresswell*, 10 A. & E. 453.

(2) 6 M. & W. 605.

(3) *Dutchman v. Tooth*, 5 Bing. N. C. 577.

(4) *Bird v. Gammon*, 3 *ibid.* 883. One count of the declaration stated the consideration for the defendant's promise to be, "the opening an account, and accepting and negotiating bills;" and another count stated it to be, "the continuing to keep an account, and accepting and negotiating bills." The pleas to these counts stated, that there was no memorandum containing a consideration according to the statute; and the replications to those pleas set out the

letter of 1830, for the purpose of shewing that there was a memorandum containing such consideration:—It was held, that their replications were departures from the respective counts to which they applied. *Wilmore v. Johnson*, 1 Jebb & Symes (Irish), 8

(5) *Tawney (Kat.) v. Crowther*, 3 Br. Ch. Ca. 161. 318.

(6) *Clinan v. Cook*, 1 Sch. & Lef. (Irish), 22. 1 Evans' St. 237. *Seagood v. Monk*. Prec. Ch. Ca. 560. *Clerk v. Wright*, 1 Atk. 12. *Whaley v. Baganal*, 1 Bro. P. C. 345. cit. 2 Stark. Ev. 3d ed. 483.

the terms of it, is not sufficient. (1) Thus, a reference to an agreement to such parts of another paper as have been read to the party is insufficient. (2)

STAT. 29 CAR. 2.
C. 3. S. 4.

In *Whitmore v. Johnson* (3) the defendant by a letter dated the 29th of May, 1830, "in consideration that defendant would open an account with R. S. on receiving a guarantee from any loss which might occur to them in consequence of bad bills or otherwise by opening such account, promised J. and J. P. to guarantee them from any such loss not exceeding 500*l.*; the guarantee to be in force for one year." After the expiration of this guarantee, the defendant wrote another letter to J. and J. P. in these words:—"Messrs. J. and J. P., London. Cork, June 13. 1833. Gentlemen, Mr. R. S. informs me, that you wish to have the guarantee revived against any loss which may occur in consequence of bad bills or otherwise; now I am willing, and hereby undertake to guarantee you from any such loss, not exceeding 500*l.*, and this guarantee to be in force for one year, I am," &c:—It was held in an action by the assignees of J. and J. P. (who became bankrupt) against the defendant upon his guarantee, that the two letters, taken together, amounted to a sufficient memorandum or note in writing, containing a consideration for the promise within the meaning of the Statute of Frauds; but that the letter of 1833, taken by itself, did not amount to such a memorandum.

Sufficient
guarantee to
answer for debt
of another.

It is not essential that a note or memorandum of the agreement should have been delivered to the other party. A letter written by a man to his own agent, setting forth the terms of the agreement, has been held to be sufficient (4);—and a similar decision was made, where the father wrote a letter to a friend of the plaintiff's, agreeing to give 500*l.* to his daughter on her marriage, to be charged upon his land. (5) But, where the father wrote a letter to the daughter, after an agreement with the intended husband, in which he stated his agreement to leave her 3000*l.*, and that the matter was to be fully concluded the next day, was held to be a mere communication, and not binding, the husband having married the daughter in ignorance of the letter (6)

Not essential
that a note or
memorandum
of the agree-
ment should
have been deli-
vered.

A proposal by letter when acceded to by parol is sufficient (7), although it be afterwards retracted and again agreed to by parol. (8)

Proposal by
letter, acceded
to by parol.

Where defendant had written letters to different people, in which he stated, that he had agreed to sell an estate to the plaintiff at twenty-one years' purchase, upon a bill filed for a specific performance, the plea of the statute was allowed (9); and in general, a mere written statement of the party to be bound of the terms of an agreement, will not be sufficient, unless it be either regularly signed as an agreement, or unless it appear, that the party considered the agreement as complete. Thus, the written instructions for a deed, unless the party subscribe or insert his name, so as to give

(1) *Brodie v. St. Paul*, 1 Ves. jun. 326.

(2) *Ibid.* 1 Evans' St. 237. *Kain v. Old*, 2 B. & C. 627.

(3) 1 Jebb & Symes (Irish), 8.

(4) *Welford v. Beezely*, 3 Atk. 503. *Moore v. Hart*, 1 Vern. 110.

(5) *Moore v. Hart*, 2 Ch. Rep. 284. 1 Vern. 110.

(6) *Ayliffe v. Tracy*, 2 P. Wms. 65.

(7) *Coleman v. Upcot*, cit. 5 Vin. Abr. Contract and Agreement, 527. [I.]

(8) *Bird v. Blosse*, 2 Vent. 361. It has been said, that a proposal by letter, at first refused, but afterwards assented to, is binding. *Hodgson v. Hutchenson*, 5 Vin. Abr. Contract and Agreement, 522. [H.], *sed vide* 1 Evans' St. 236. n. 13.

(9) *Whaley v. Baganal*, 6 Bro. Ch. Ca. 45. cit. 2 Stark. Ev. 3d ed. 484.

STAT. 29 CAR. 2.
c. 3. s. 4.

authenticity to the document, is not binding. (1) Where the counsel for a lady took down in writing a minute of the father's and intended husband's proposals for a settlement, and gave them to his clerk to prepare the deed, and before they were drawn the father died, a bill for specific performance was dismissed, since there was no act of the party to indicate, that he considered the agreement to be complete, and the neglect to sign it formally was evidence to show that it was left open to further consideration. (2)

General instructions for an agreement to be afterwards executed.

General instructions for an agreement to be afterwards executed, are not binding. (3)

When agreement not in writing, such fact can be indorsed on the *postea*.

That part of the statute which directs certain agreements to be in writing, will be taken notice of by the court, in the trial of an issue out of the court of Chancery; however, if the jury should think that there was an agreement made, which was not in writing, the judge will indorse that finding on the *postea* as special matter. (4)

VIII. "And signed by the Party to be charged therewith."

"AND SIGNED BY THE PARTY TO BE CHARGED THEREWITH."

"It is not necessary that the note in writing, to be binding under the statute, should be cotemporary with the agreement. It is sufficient, if it has been made at any time, and adopted by the party afterwards; and then any thing under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute, which was only intended to protect persons from having parol agreements imposed on them." (5)

Agreement signed by a third person.

A paper written by a party is admissible in evidence against such party, although it be signed by a third person (6), and the party is bound by a letter containing the terms, which by the contents can be connected and identified with the agreement. (7) Where an agreement purported by the words attached to the signature of a particular person to have been signed by that person on the behalf of another, having an interest but not being a party, such person may be examined to prove, that he signed in reality for a different person named as a party, and whose signature was not to the agreement, and that the statement of his having signed for the first mentioned person was written by mistake. (8)

Party making his mark, instead of signing his name.

The statute will be complied with, if the party make his mark, instead of signing his name. (9) A signature by the party as a witness to a deed which contains the agreement, or which refers to it, is a sufficient signature within the statute (10); but it is essential to prove, that the witness knew, that the instrument contained the agreement or referred to it. (11)

An agreement for the sale of a house, beginning "I, A. B." &c. in the handwriting of the vendor, but signed by the vendee only, is sufficient to

(1) *Stokes v. Moore*, 1 Cox, 222. 1 P. Wms. 770. n.

(2) *Bawdes v. Amhurst*, Pr. Ch. 402., sed vide *Welford v. Beezely*, 3 Atk. 503.

(3) *Whitchurch v. Bevis*, 2 Bro. Ch. Ca. 569.

(4) *Burnand v. Nerot*, 1 C. & P. 578.

(5) *Per* Lord Ellenborough in *Shippey v. Derrison*, 5 Esp. N. P. C. 190. *Hawkins v. Holmes*, 1 P. Wms. 770.

(6) *Alexander v. Brown*, 1 C. & P. 288.

(7) *Coles v. Trecothick*, 9 Ves. 250.

(8) *Rumball v. Wright*, 1 C. & P. 589.

(9) *Hubert v. Moreau*, 12 Moore, 218. *Taylor v. Denning*, 8 N. & P. 223. *Baker v. Dening*, 8 A. & E. 94. *Hyde v. Johnson*, 2 Bing. N. C. 780.

(10) *Welford v. Beezely*, 1 Wils. 118. 3 Atk. 502.

(11) *Ibid. et vide* 1 Evans' St. 236.

bind the vendor (1), whether at the beginning or end. The perusing and altering the draft of an intended lease is not a sufficient signature. (2)

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C. 3. S. 4.

"The place of the signature is immaterial. If a person draw up an agreement in his own handwriting, beginning, 'I, A. B. agree,' &c. and leave a place for his signature at the bottom, the agreement will be considered as sufficiently signed." (3)

Place of signature immaterial.

It is not essential, that the signature should be upon the agreement itself; it is sufficient if it be indorsed on the draft of a lease, as a notification of the party to its terms. (4)

If the name be inserted in an instrument in such a manner, as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with, and it does not matter in what part of the instrument the name is found. (5)

But, there must be a signing, either by an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman, &c. (6)

Essentially requisite, that there should be a signing.

A letter from a mother to her son, beginning "My dear Robert," and concluding "Your affectionate mother," is not signed, so as to constitute a binding agreement on the part of the mother, within the intent of the Statute of Frauds. (7)

It is sufficient, if the agreement be signed by the party charged by it in the particular action, although it has not been signed by the other contracting party (8), for the writing is not the contract, but merely the evidence of it (9):—and the decisions on the corresponding clause in the 17th section, are applicable to this clause. (10)

The writing is not the contract, but merely the evidence of it.

It has been questioned, whether a note written in the third person, "Mr. T. proposes," &c., making an offer to purchase, and being accepted, amounts to a contract in writing, signed within the Statute of Frauds? (11)

Note written in the third person.

If A. B. write the agreement for the purchase of a leasehold house, and state his own name in the third person, as "Mr. A. B. has agreed," this is a good contract within the Statute of Frauds, though the agreement be not otherwise signed. (12)

But unless the memorandum state both the contracting parties, the purchaser as well as the seller, it will not of itself be sufficient to bind the one named, who has signed it (13): as where a person makes a minute of a contract in the common memorandum-book of another stating himself to be

(1) *Knight v. Crockford*, 1 Esp. N. P. C. 190. *Lemayne v. Stanley*, 3 Lev. 1. *Allen v. Bennet*, 3 Taunt. 169. *Welford v. Beezley*, 1 Wils. 118. *Ogilvie v. Foljambe*, 3 Meriv. 62. *Selby v. Selby*, *ibid.* 6. *Right d. Cater v. Price*, Doug. 241., *sed quare*, Whether the mere mention of the name of the defendant in the body of the instrument, though drawn by himself, be sufficient? Vide *Stokes v. Moore*, 1 P. Wms. 790. n. 1 Cox, 222.

(2) *Hawkins v. Holmes*, 1 P. Wms. 770.

(3) Per Lord Ellenborough in *Knight v. Crockford*, 1 Esp. N. P. C. 109.

(4) *Shippey v. Derrison*, 5 *ibid.* 191. *Blayden v. Bradbear*, 12 Ves. 466.

(5) *Ogilvie v. Foljambe*, 3 Meriv. 53.

(6) *Selby v. Selby*, *ibid.* 2.

(7) *Ibid.* *Quare*, Whether bonds of ar-

bitration are sufficient to take the case of an agreement out of the statute? *Cooth v. Jackson*, 6 Ves. 17.

(8) *Turney (Kat.) v. Crowther*, 3 Bro. Ch. Ca. 161. 318. *Mountague (Countess of) v. Maxwell*, Str. 236. 1 P. Wms. 618. *Seton v. Slade*, 7 Ves. 265., vide etiam *Martin v. Mitchell*, 2 J. & W. 426. *Gasharth v. Lowther (Lord)*, 12 Ves. 107. *Western v. Russell*, 3 Ves. & B. 192. *Seimble*, contra, *Lawrenceson v. Butler*, 1 Sch. & Lef. (Irish), 20.

(9) 1 Evans' St. 236.

(10) 2 Stark. Ev. 3d ed. 485.

(11) *Morison v. Turnour*, 18 Ves. 175.

(12) *Propert v. Parker*, 1 Russ. & M. 625.

(13) *Champion v. Plummer*, 1 N. R. 252.

Klinitz v. Surry, 5 Esp. N. P. C. 257.

STAT. 29 CAR 2
C. 3. s. 4.

the seller, and signs it, but does not name the other person, this will not be sufficient to bind him in an action brought by the other as buyer. (1); but the omission of the signature of the other party may, in many cases, be supplied by his letter, or other papers referring to the same transaction. (2)

"OR SOME
OTHER PERSON
THEREUNTO BY
HIM LAWFULLY
AUTHORISED."

Auctioneer.

Clerks.

Where a person
is not an agent.

Signature of
agent without
authority.

Clerk of an
agent.

Trustees.

IX. "Or some other Person thereunto by him lawfully authorised."

Under sects. 14. and 17. the agent may derive his authority from his principal by parol. (3) An auctioneer is the agent of the vendor under this section, as he is under the 17th, and his receipt for the deposit, will be a sufficient memorandum of the contract, provided that it sufficiently express the terms, or virtually include them, by reference to other documents (4); but a memorandum written by a clerk of the plaintiff, in the presence of the defendant, that the defendant had called to say, that he would be responsible for goods supplied to a third person, is not a sufficient undertaking within the statute. (5)

It has been held, that he is not an agent, whose signature will bind the vendee (6); but this opinion seems to have been completely overruled in the subsequent cases of *Emmerson v. Heelis* (7) and *White v. Proctor* (8), which are consistent with the decisions upon the corresponding clause in the 17th section.

Specific performance of a contract concerning land, will not be decreed on the signature of an agent without an authority. (9)

Parol evidence cannot be admitted to shew, that a party having agreed for the purchase of an estate in his own name, had in fact purchased it on behalf of another person (10); and an allegation in a plea, that "A., by his writing, sold the aftermath of land to B.," is not proved by evidence, that at an auction held for the purpose of selling it, B. was the purchaser, that B. gave a promissory note for the sum, and that B.'s name was written (by A.'s agent) in the printed catalogue as the buyer. (11)

Where upon an agreement to sell a house for an annuity, both parties instructed one attorney, who made minutes of his instructions as follows:—"Mr. B. agrees to convey the house (describing it) in consideration of a rent of 40*l. per annum*; Mr. W. to take the stock at a fair appraisement:"—a bill filed by W. for a specific performance, was dismissed. (12)

The clerk of an agent has not, in general, an authority to sign for the principal, although it may be sufficient in particular cases, where the principal has assented. (13) Where trustees were authorised to sell at the re-

(1) *Allen v. Bennet*, 3 Taunt. 169.
(2) *Western v. Russell*, 3 Ves. & B. 187.
(3) *Coles v. Trecothick*, 9 Ves. 234. 250.
Clinan v. Cooke, 1 Sch. & Lef. (Irish), 22.,
aliter, under the first and third sections.
(4) *Hinde v. Whitehouse*, 7 East, 569.
Blagden v. Bradhear, 12 Ves. 471.
(5) *Dixon v. Broomfield*, 2 Chitt. 205.
(6) *Farebrother v. Simmons*, 5 B. & A.
339. *Wright v. Dannah*, 2 Camp. 203.
Stansfield v. Johnson, 1 Esp. N. P. C. 102.
Per Lord Eldon in *Coles v. Trecothick*, 9
Ves. 234. Per Sir W. Grant in *Buckmaster*

v. Harrop, 7 ibid. 341. *Higginson v. Cloves*,
15 ibid. 516. Per Lord Erskine in 13 ibid.
456. 2 Stark. Ev. 3d ed. 486.
(7) 2 Taunt. 38.
(8) 4 ibid. 209.
(9) *Howard v. Braithwaite*, 1 Ves. & B.
202.
(10) *Bartlett v. Pickersgill*, 1 Cox, 15. 4
East, 577. n.
(11) *Symonds v. Ball*, 8 T. R. 151.
(12) *Whitchurch v. Bevis*, 2 Bro. Ch. Ca.
559.
(13) *Coles v. Trecothick*, 9 Ves. 234—250.

quest of A. B., it was held, that their general consent did not constitute A. B. their agent, so as to enable him to make a contract. (1)

STAT. 29 CAR. 2.
C. 3. s. 4.

An agreement in writing for the sale of an estate is binding, though signed only by the vendor, and followed by a direction to his attorney to prepare a proper agreement for both parties to sign. (2)

Instructions to
an attorney.

A letter to a solicitor, with directions for preparing the conveyance of a purchase, described generally as the land bought of A., not specifying the terms, is not sufficient evidence of a contract within the Statute of Frauds. (3)

Where both parties gave instructions to an attorney to prepare the conveyance, and the defendant delivered to him the particulars, signed by himself, as instructions for the deed, which was accordingly prepared:—It was held not to be sufficient to take it out of the statute; and, being void as to the lands, it was void *in toto*. (4)

An agent's authority may be countermanded at any time before it has been exercised and actually executed. (5)

Countermand
of authority.

5. STAT. 29 CAR. 2. C. 3. s. 17.

I. Generally.

By stat. 29 Car. 2. c. 3. s. 17. "no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

STAT. 29 CAR. 2.
C. 3. s. 17.

II. "No Contract for the Sale of any Goods, Wares, and Merchandises, for the Price of 10*l.* sterling or upwards, shall be allowed to be good,"

"NO CONTRACT
FOR THE SALE
OF ANY GOODS,
WARES, AND
MERCHAN-
DISES, FOR THE
PRICE OF 10*l.*
STERLING OR
UPWARDS,
SHALL BE AL-
LOWED TO BE
GOOD,"

The foregoing section is confined to contracts for the sale of goods. (6)

In *Towers v. Osborne* (Sir John) (7) Chief Justice Pratt said, that the Statute of Frauds related "only to contracts for the actual sale of goods, where the buyer is immediately answerable, without time given him by special agreement, and the seller is to deliver the goods *immediately*." (8)

Thus, a contract for a chariot to be made (9), or for the purchase of a quantity of oak pins, to be cut out of slabs and delivered to the buyer (10), or for a quantity of corn to be thrashed out (11), were respectively held, not to be within the statute.

(1) *Mortlock v. Buller*, 10 Ves. 292.

(7) Str. 506.

(2) *Fowle v. Freeman*, 9 *ibid.* 351.

(8) Vide etiam *Watts v. Friend*, 10 B. & C. 446.

(3) *Rose v. Cunynghame*, 11 *ibid.* 550.

(4) *Cooke v. Tombs*, 2 Anst. 420., et vide *Lea v. Barber*, *ibid.* 425. n.

(9) *Ibid.* *Towers v. Osborne* (Sir John), Str. 506.

(5) *Farmer v. Robinson*, 2 Camp. 339. n.

(10) *Groves v. Buck*, 3 M. & S. 178.

(6) Vide *antè*, 493. tit. AUCTION.

(11) *Clayton v. Andrews*, 4 Burr. 2101.

STAT. 29 CAR. 2.
c. 3. s. 17.

Stat. 9 Geo. 4.
c. 14. s. 7.

Under stat.
9 Geo. 4. c. 14.
s. 7. execution
of contract suf-
ficient, without
specification of
price.

Judgment of
Chief Justice
Tindal in
Hoadly v.
M'Laine.

Ordering suc-
cessively ar-
ticles under the
price of 10*l.*,
but collectively
above that sum.

Judgment of
Mr. Justice
Bayley in *Bal-
dey v. Parker*.

Sale of stock.

Contracts not
within the
statute.

But now, by stat. 9 Geo. 4 c. 14. s. 7., the former enactments are to take effect, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." (1)

The seventeenth section of the Statute of Frauds, has been held to extend to the sale of things which exist *in solido* at the time of the sale, although such contracts were but executory (2); and the goods were to be subsequently delivered at a different place. (3)

In *Hoadly v. M'Laine* (4) it was holden, that where an executory contract is entered into for the fabrication of goods, without any agreement as to price, the memorandum of the contract required by the Statute of Frauds is sufficient, without specification of price, Chief Justice Tindal observing, "The same construction must be put on stat. 9 Geo. 4 c. 14. s. 7. as upon stat. 29 Car. 2. c. 3. s. 17.; but the extreme accuracy of mind of the framer of the latter act, is shewn in this, that while the Statute of Frauds, in its enactments touching contracts for the sale of goods, employs the word *price*, the framer of the latter act has substituted the word *value*; so that, where the parties have omitted to fix a price, it may be open to a jury to ascertain the value in dispute."

If a party at one time order and purchase successively several articles under the price of 10*l.*, but collectively of a larger amount, it is considered as one entire contract, and therefore within the statute, although a separate price for each article was agreed upon. (5) With respect to the interval of time which might elapse between the purchase of different articles, in order to make the contract separate, it was said by Mr. Justice Bayley (6), "The case has been put, of a purchaser leaving a shop after making one purchase and returning, after an interval of five or ten minutes, and making another. If the return to the shop were soon enough to warrant a supposition, that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute."

It seems, that a sale of stock is within the statute, although this has been doubted, since there can be no actual delivery or acceptance of the goods; and in one instance, all the judges were divided in opinion upon this point (7); but in two subsequent cases in equity, the court expressed an opinion, that such a sale was within the statute, and said, that it had been so determined in other cases. (8)

A contract to procure goods and carry them, is not within the statute, for it is not a contract of sale. (9)

Shares in a joint stock banking company (10), a contract for the sale of

(1) *Antè*, 1303. Judgment of Mr. Baron Alderson in *Lyde v. Barnard*.

(2) *Alexander v. Comber*, 1 Hen. Black. 20. *Rondeau v. Wyatt*, 2 *ibid.* 63. *Cooper v. Elston*, 7 T. R. 14. *Garbutt v. Watson*, 5 B. & A. 613. *Smith v. Surman*, 9 B. & C. 568.

(3) *Cooper v. Elston*, 7 T. R. 14.

(4) 10 Bing. 482.

(5) *Baldey v. Parker*, 2 B. & C. 37.

(6) *Ibid.*

(7) *Pickering v. Appleby*, 2 P. Wms. 307. n.

(8) *Mussell v. Cooke*, Prec. Ch. Ca. 533. n. vide 2 Stark. Ev. 3d ed. 487. cit. C. T. King 41. n.

(9) *Cobbold v. Caston*, 1 Bing. 399.

(10) *Humble v. Mitchell*, 3 P. & D. 141. vide *antè*, 1969. *Boyce v. Green*, respecting the shares of a mining company.

shares in a canal navigation, or other public undertaking, need not be in writing, not being within the Statute of Frauds. (1)

STAT. 29 CAR. 2
C. 3. s. 17.

III. "Except the Buyer shall accept part of the Goods so sold, and actually receive the same,"

"EXCEPT THE
BUYER SHALL
ACCEPT PART
OF THE GOODS
SO SOLD, AND
ACTUALLY RE-
CEIVE THE
SAME,"

When the law can pronounce on the facts of the case, whether they constitute an acceptance within the statute, the question is of course a question of law (2); but in other cases, the question of law may depend upon the conclusion of the jury, whether there has, or has not, been a delivery and acceptance in point of fact. (3)

In *Phillips v. Bistolli* (4) it was stated *per cur.*, "that in order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner." (5)

There must be
a delivery with
an intention of
vesting the
right of pos-
session.

So, likewise, in *Smith v. Surman* (6) Mr. Justice Parke stated, the question is, "Whether there has been a part acceptance of the goods sold and actual receipt of the same. In the older cases, the court did not advert to the words of the statute. But the later cases (7) have established, that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance. Here there was nothing to shew, that the vendor had lost his lien for the price, or that the purchaser had lost his right to object to the quality;" in fact, the legislature by requiring an acceptance of the goods as well as an actual receipt of them, contemplated an *actual* assent, and *not* merely a *constructive* assent. (8)

Judgment of
Mr. Justice
Parke in *Smith
v. Surman*.

In *Williams v. Burgess* (9) it appeared, that the plaintiff entered into a parol agreement to sell to the defendant a mare for 20*l.*, subject to the condition, that if it should prove to be in foal, the defendant should, on receiving 12*l.* from the plaintiff, return it on request. The plaintiff delivered the mare, and received 20*l.*; on its proving to be in foal, he tendered to the defendant 12*l.*, and requested him to return the mare, which the defendant refused to do. Upon these facts, it was held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to the defendant; and that the delivery of the mare to the defendant took the agreement out of the Statute of Frauds, so as to enable the plaintiff to sue the defendant for the refusal to return it; Mr. Justice

When delivery
takes the agree-
ment out of
the statute.

(1) *Latham v. Barber*, 6 T. R. 67. 2 Stark. Ev. 3d. ed. 488.

(2) 2 Stark. Ev. 3d ed. 490.

(3) *Blenkinsop v. Clayton*, 7 Taunt. 597. Under a plea of *nunquam indebitatus* in debt for goods bargained and sold, it is open to the defendant to take the objection, that the contract is void by the 17th section of the Statute of Frauds. But it seems, that the objection is answered by shewing an acceptance and actual receipt of part of the goods after action brought. *Fricker v. Thomlinson*, 1 M. & G. 772.

(4) 2 B. & C. 513.

(5) Vide etiam *Kent v. Huskinson*, 3 B. & P. 235.

(6) 9 B. & C. 577.

(7) *Howe v. Palmer*, 3 B. & A. 321. *Hanson v. Armitage*, 5 ibid. 559. *Carter v. Tous-saint*, ibid. 855. *Tempest v. Fitzgerald*, 3 ibid. 680.

(8) *Hart v. Sattley*, 3 Camp. 528. *Dutton v. Solomonson*, 3 B. & P. 583. *Dawes v. Peck*, 8 T. R. 330.

(9) 10 A. & E. 499.

STAT. 29 CAR. 2.
C. 3. s. 17.

Judgment of
Mr. Justice
Patteson in
Williams v.
Burgess.

There need not
be an actual
delivery.

Patteson observing, "It is one entire contract, and not two distinct contracts. It is a sale on the terms, that the mare and part of the price should be returned on a certain event. If, indeed, the defendant had agreed to sell to the plaintiff the foal, the case might have been different. In *Wath v. Friend* (1) the bargain was to sell to the plaintiff an entirely different thing, and not merely to return to him the same article. *Wood v. Benson* (2) shews only, that there may be two contracts on one piece of paper, of which one may be bad, the other good."

When goods are sold by sample, and the specimen is accepted as part of the purchase, this may constitute a part acceptance within the statute (3); but the effect will be otherwise, when the sample is delivered merely as a specimen, and not taken as part of the goods contracted to be delivered. (4)

"Where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property." (5) Thus the delivery of the muniments of a ship, is equivalent to the delivery of the ship itself. (6) And the jury may infer a delivery to, and an acceptance by the vendee, when he sells part of the commodity to another person, and in other respects deals with the property, as if it were in his actual possession. (7) In *Simon v. Motivos* (8) Mr. Justice Wilmet observed, "I remember a case of the sale of some balsam, which was weighed and put into a pot of the seller's instead of a pitcher which the buyer had brought, and left at the seller's shop; this was held a sufficient delivery to bind the contract."

Purchaser
writing his
name upon the
goods, at the
time of the
purchase.

If a purchaser were to write his name upon goods at the time of the purchase, thereby to denote, that he had purchased them, and had appropriated them to his own use, it would be a sufficient delivery (9); or if he requested the vendor to keep them for him, and the latter changed the place of deposit, and made a profit by so keeping them, it is a sufficient delivery (10); but the acquiring a profit by the keep and change of place of deposit seems essential. (11)

Where joint
order is given
for several
classes of
goods, the ac-
ceptance of one
class operates
as an accept-
ance for the
whole.

Where a joint order is given for several classes of goods, the acceptance of one class is part acceptance of the whole, within sect. 17. of the Statute of Frauds. (12)

But if goods be ordered verbally, the delivery of them to a carrier is sufficient to bind the contract, if the purchaser have been in the habit of receiving goods from the vendor by the same mode of conveyance. (13)

(1) 10 B. & C. 446.

(2) 2 C. & J. 94. 2 Tyrw. 93.

(3) *Hinde v. Whitehouse*, 7 East, 555.
3 Smith, 628. *Klinitz v. Surry*, 5 Esp.
N. P. C. 267.

(4) *Cooper v. Elston*, 7 T. R. 14.

(5) *Per* Lord Kenyon in *Chaplin v. Rogers*, 1 East, 194., vide etiam *Searle v. Keeves*,
2 Esp. N. P. C. 598. *Pickering v. Appleby*,
Com. 354. *Colt v. Nettervill*, 2 P. Wms. 308.

(6) *Per* Lord Hardwicke, 1 Atk. 171.

(7) *Chaplin v. Rogers*, 1 East, 192.

(8) 1 W. Black. 601., et vide per Heath
J. in *Elmore v. Stone*, 1 Taunt. 459.

(9) *Hodgson v. Le Bret*, 1 Camp. 233.

(10) *Elmore v. Stone*, 1 Taunt. 458.

(11) *Carter v. Toussaint*, 5 B. & A. 855.

(12) *Seemle*, that if the purchaser of goods
has used (in the opinion of the jury) more
of them than was necessary for experiments,
that does not amount to an acceptance with-
in the statute. *Elliott v. Thomas*, 3 M. &
W. 170.

The defence, that there was no sufficient
contract to satisfy the Statute of Frauds,
may be taken under the general issue. *Ibid.*

(13) *Hart v. Sattley*, 3 Camp. 528.

A party to whom goods to the amount of 10*l.* and upwards are delivered, subject to approval under a parol order, must refuse to accept them within a reasonable time; if he do not, he is to be treated as having accepted them, unless the goods be unfit for use, in which case, there would be no compliance with the order. Respecting what is a reasonable time, that is a question for the consideration of the jury. (1)

STAT. 29 CAR. 2.
c. 3. s. 17.

If goods be not refused within a reasonable time, the retention will amount to an acceptance.

"The Statute of Frauds does not attach, where there has been earnest, or a delivery of part of the things sold." (2)

And where it is agreed that ready money shall be paid for a chattel, and the buyer requests the vendor to keep it till the money be paid, no property passes to the vendee till payment, because the payment of the price was to be an act concurrent with the delivery of the chattel, and no property could pass till such price was paid, and till then, the vendee could not exercise any act of ownership, so as to change the property, which consequently remains in the vendor. (3) The removal of goods in the vendor's own boat to another warehouse of his own, or his agent's, on a stage towards the defendant's residence, by the direction of the latter, will not amount to a sufficient delivery. (4)

What is not a delivery.

Where a party purchased several articles in a ship at separate prices, and some were severed from the bulk and marked by him, it was held, that the whole purchase was an entire contract, and being above 10*l.* was within the statute and no sufficient transfer and acceptance to bring it within the exception in the 17th clause; and that, to satisfy the exception, there must be an actual transfer and acceptance of the goods, or part thereof. (5)

WHAT IS NOT AN ACCEPTANCE.

Where a verbal order was given to the agent of the vendor for goods, which were to remain in the possession of the vendor till called for, and the agent measured the goods, and set them apart, it was held, that there was no acceptance within the statute. (6) So, also, where a merchant in London who had been in the habit of sending goods to B. resident in the country, and of delivering them to a wharfinger in London to be forwarded to B. by the first ship, delivered goods in the same manner to the wharfinger to be forwarded in the usual manner, and they were lost, this was holden not to be an acceptance by the buyer within the act, because the acceptance not being by the party himself, was not sufficient, as the buyer continued to have a right to object to the quantity and quality (7); but it seems, the decision would have been otherwise, if the carrier had been of the defendant's nomination, or that there had been no other. (8)

In *Mabberley v. Sheppard* (9), where the defendant employed the plaintiff to construct a waggon, and while the vehicle was in the plaintiff's yard unfinished, procured a third person to fix on the iron work and a tilt:—It was held, that this did not constitute an acceptance, because the plaintiff retained

(1) *Coleman v. Gibson*, 1 M. & Rob. 168. *Bret*, 1 Camp. 233. *Anderson v. Scott*, *ibid.*

(2) *Per Eyre C. J.* in *Searle v. Keeses*, 2 Esp. N. P. C. 598. 235. n.

(3) *Tempest v. Fitzgerald*, 3 B. & A. 680.

(4) *Astey v. Emery*, 4 M. & S. 262.

(5) *Baldey v. Parker*, 2 B. & C. 37. 3 D. & R. 220. *Thompson v. Maccaroni*, 3 B.

& C. 1. 4 D. & R. 619. *Price v. Lea*, 1 B. & C. 156., *sed vide etiam Hodgson v. Le*

(6) *Howe v. Palmer*, 3 B. & A. 321., *et vide Astey v. Emery*, 4 M. & S. 262. *Anderson v. Hodgson*, 5 Price, 630.

(7) *Hanson v. Armitage*, 5 B. & A. 557.

(8) *Anderson v. Hodgson*, 5 Price, 630

(9) 10 Bing. 99.

STAT. 29 CAR. 2
C. 3. s. 17.

his lien upon the waggon, and there was nothing in the facts, that denoted any intention either to deliver or to accept.

"OR GIVE
SOMETHING IN
EARNEST TO
BIND THE BAR-
GAIN, OR IN
PART PAY-
MENT,"

To constitute a payment as earnest, there must be an actual transfer or delivery of the thing or money agreed to be given, as earnest or part payment.

IV. "*Or give something in earnest to bind the Bargain, or in part Payment,*"

To constitute a payment as earnest, there must be an actual transfer or delivery of the thing or money agreed to be given as earnest or part payment; and where it was the custom in Yorkshire to complete bargains by striking them off with a shilling, although no money was actually paid, it was held not to be a valid payment under the Statute of Frauds, though it was sufficient according to the local usage to bind the purchase (1); but the delivery of a bill of exchange, or promissory note, in part payment, would take a case out of the statute.

"After earnest given, the vendor cannot sell the goods to another without a default in the vendee; and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." (2)

"OR THAT
SOME NOTE OR
MEMORANDUM
IN WRITING,"

Distinction
between the 4th
and 17th sec-
tions.

Terms of agree-
ment can be
inferred from
distinct writ-
ings.

Quantity of
goods specified,
but not the
price to be
paid.

Letters must
be taken in
their entirety.

V. "*Or that some Note or Memorandum in Writing,*"

The only difference between this and the fourth section is, that by the fourth the memorandum of the agreement is to be in writing, and signed by the party to be charged, or by some person authorised by him; here the memorandum of the bargain is to be in writing, signed by the parties to be charged, or their authorised agents. (3)

It is sufficient, if the terms of the agreement can be collected or fairly inferred from several distinct writings having reference to the same agreement, and from subsequent letters, whereby the transaction is admitted. (4)

A bill of parcels, in which the vendor's name is printed, may be connected with a subsequent letter written and signed by the vendor to the vendee (5); so an order for goods, written and signed by the vendor in a book of the vendee's, but not naming the latter, may be connected with a letter written by the vendor to his agent, mentioning the name of the vendee. (6)

If the memorandum specify the quantity of goods purchased, and the rate of payment, that will suffice, — a positive specification of the price to be paid, need not be inserted. (7)

"The plaintiff cannot avail himself of a letter as evidence of the contract for one purpose to bind the defendant within the statute, and renounce it for another purpose, but he must take it altogether." (8)

(1) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(2) *Per Holt C. J. in Langfort v. Tiler (Administratrix of)*, 1 Salk. 113. *Knight v. Hopper*, Skin. 647. Bull. N. P. 50. (a.)

(3) *Antè*, 1962.

(4) *Jackson v. Lowe*, 1 Bing. 9. 7 Moore, 219.

(5) *Saunderson v. Jackson*, 2 B. & P. 286.

(6) *Allen v. Bennet*, 3 Taunt. 169.

(7) *Egerton v. Mathews*, 6 East, 307.

(8) *Per Lord Ellenborough in Cooper v. Smith*, 15 ibid. 103.

If a broker, employed both by seller and buyer, negotiate a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises; because "a contract must be perfect in order to be binding, that is, there must be a contract on the one side to sell, and on the other side to accept, one and the same thing." (1)

STAT. 29 CAR. 2
C. 3. § 17.

A letter, from the terms of which, the exact quantity of goods said to be contracted for, can be ascertained by subsequent measurement, but from which it cannot be ascertained, that the goods to be measured are the specific goods contracted for, is not a sufficient note or memorandum in writing within the Statute of Frauds. (2)

WHAT IS NOT A
SUFFICIENT
MEMORANDUM.
When the specific goods
contracted for
do not appear.
Agent of ven-
dor writing the
name of the
vendee.

A buyer of goods requested D. the agent of the seller, to write a note of the contract in the buyer's book; D. did so, and signed the note with his own name:—It was held, that such note was not a sufficient note under the Statute of Frauds, to bind the buyer. (3)

A memorandum of sale of goods in the vendor's book, signed by the vendee in initials, the vendor's name not appearing in a book, is not a sufficient note in writing to satisfy the Statute of Frauds; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum. (4)

Vendee signing
by initials in
vendor's books,
but whose
name did not
appear therein.

VI. "Of the said Bargain be made and signed by the Parties to be charged by such Contract,"

It has been held that the word "bargain," as used in this clause, does not render so strict a statement of the constituent and essential members of the contract necessary, as the word "agreement" does under the fourth section: a memorandum is sufficient to bind the defendant as the vendee, although it does not express the *consideration* for the promise (5) except by implication from the promise itself; but the note must express the names of both the contracting parties and the price (6); and therefore a note, signed by the vendor of goods, but not mentioning the buyer's name, is insufficient. (7)

"OF THE SAID
BARGAIN BE
MADE AND
SIGNED BY THE
PARTIES TO BE
CHARGED BY
SUCH CON-
TRACT,"

Construction of
the word
"bargain."

It has been urged, that "contracts might subsist, which, by reason of the Statute of Frauds, could be enforced by one party, although they could not be enforced by the other party; but the Statute of Frauds, in that respect, threw a difficulty in the way of the evidence; the objection did not interfere with the substance of the contract, and it was the negligence of the other party, that he did not take care to obtain and preserve admissible evidence, to enable himself also to enforce it." (8)

With respect to the signature, the same construction has been put upon this section as the fourth.

A bill of parcels, in which the vendor's name is printed, is, it seems, a

Name printed.

(1) Per cur. in *Thornton v. Kempster*, 5 Taunt. 786.

(2) *Carroll v. Cowell*, 1 Jebb & Symes (Irish), 43.

(3) *Graham v. Musson*, 5 Bing. N. C. 603.

(4) *Jacob v. Kirk*, 2 M. & Rob. 221.

(5) *Egerton v. Mathews*, 6 East, 307.

(6) *Elmore v. Kingscote*, 5 B. & C. 583.
Kain v. Old, 2 ibid. 627. *Jackson v. Lowe*, 1 Bing. 9.

(7) *Champion v. Plummer*, 1 N. R. 252.

(8) Per cur. 5 Taunt. 788.

STAT. 29 CAR. 2.
C. 3. s. 17.

Place of signature immaterial.

Judgment of Lord Abinger in *Johnson v. Dodgson*.

sufficient making or signing to bind the vendor (1), as a signing by him. But, at all events, a letter subsequently written to the vendee, admitting a contract, may be connected with the bill of parcels, to take the case out of the statute. (2) So in *Schneider v. Norris* (3), where the name of the vendor (the defendant) in the bill of parcels was printed, but the defendant had written the vendee's name upon it, it was held to be a sufficient signature.

An agreement, beginning "I, A. B., agree to sell," although not otherwise signed, is sufficient to bind the vendor. (4) So likewise in *Johnson v. Dodgson* (5) Lord Abinger observed, "The Statute of Frauds requires, that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And the cases have decided, that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, the question being always open to the jury, whether the party not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned, because he refused to complete it. But when it is ascertained, that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing shewing the terms of the contract, and recognised by him."

It is sufficient if the memorandum be signed by the defendant, the vendor, though it was not signed by the plaintiff, the vendee, and although it could not have been enforced against the latter. (6)

VII. "Or their Agents thereunto lawfully authorised."

"OR THEIR AGENTS THERE-UNTO LAWFULLY AUTHORISED."

A broker is an agent for both parties, and need not be constituted by writing, and they are bound by the entry of the contract, which he makes in his book, and of which the bought and sold notes are copies. (7)

In the case of sales by auction (8), it seems to be now settled, that the auctioneer is an agent lawfully authorised by the buyer to sign a contract for him (9), though it is otherwise, where the auctioneer himself brings the action. (10)

Where both the parties had agreed that A. B., a broker, should manage a sale between them, for which they were in treaty, and the vendee some days after informed A. B., that he had made the bargain, and desired him to put down the terms, which A. B. accordingly did, and then sent a sale note to the vendor, and the vendee did not return the note, but in a conversation with A. B. some days afterwards, regretted that she had sold the goods:—It was held, to be evidence to the jury of authority from the

(1) *Saunderson v. Jackson*, 2 B. & P. 238. In *Geary v. Physic* (5 B. & C. 234.) it was held, that an indorsement upon a bill of exchange in pencil was sufficient; and there seems no reason, why it should not be a valid signature under the statute.

(2) *Saunderson v. Jackson*, 2 B. & P. 238. recog. in *Dobell v. Hutchinson*, 3 A. & E. 372. *Schneider v. Norris*, 2 M. & S. 286.

(3) 2 M. & S. 286.

(4) *Knight v. Crookford*, 1 Esp. N. P. C. 190.

(5) 2 M. & W. 659.

(6) *Allen v. Bennet*, 3 Taunt. 169.

(7) *Heyman v. Neale*, 2 Camp. 387. *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105. *Goom v. Aflalo*, 6 B. & C. 117.

(8) *Vide ante*, 493. tit. AUCTION.

(9) *Emmerson v. Heelis*, 2 Taunt. 38. *Hinde v. Whitehouse*, 7 East, 558. *Simon v. Motivos*, 1 Hen. Black. 599.

(10) *Farebrother v. Simmons*, 5 B. & A. 333.

vendor to A. B. (1) But although the owner has authorised a broker to sell, and the latter has made a verbal contract with the vendee, the owner may revoke his authority to the broker, at any time before the sale note is made out. (2)

STAT. 29 CAR. 2.
c. 3. s. 17.

Where the defendant purchased certain leasehold premises at an auction, and signed a memorandum of the purchase on the back of a paper containing the particular of the premises, the name of the owner, and the conditions of sale:—It was held, that the defendant was bound by his contract, notwithstanding it was not signed by the vendor. (3)

Where A. and B. being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstances, refused to be bound by it, but afterwards assented by parol, and samples were delivered to the vendee:—It was holden, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding. (4)

Where the agent of the vendor wrote the note in the vendor's order-book, in the presence of the vendee, although he afterwards, at the desire of the vendee, the defendant, read it over to him:—It was held, that the signature was not sufficient (5); and it has been held, that one of the contracting parties could not be considered as the agent for the other, although the other overlooked him, and gave him directions as to the terms. (6)

Where a buyer of goods requested D., the agent of the seller, to write a note of the contract in the buyer's book; D. did so, and signed the note with his own name:—It was holden in *Graham v. Musson* (7), that such note was not a sufficient note under the Statute of Frauds, to bind the buyers, Mr. Justice Coltman observing, "It is not desirable to relax the provisions of the Statute of Frauds. I am not prepared to say, that if Dyson had been the clerk of Musson, his signing his own name would have been a sufficient memorandum of the bargain to satisfy the statute; but Dyson is not the agent of Musson in any respect; and though if he had signed the name of Musson, at Musson's request, the case might have fallen within the authority of *Bird v. Boulter* (8), yet here, when he signs his own name, he thereby only binds his employer North:"—and Mr. Justice Erskine likewise stated—"It is contended on behalf of the plaintiffs, that Dyson would be himself liable on this contract, and would not be permitted to discharge himself by parol testimony; but that he might charge his principal by shewing, that he signed as agent, and that the cases shew it is enough if the agent's name appear on the contract. That brings us to the question, whether Dyson was the agent of Musson; but there is no evidence of his having ever been appointed such agent; and therefore we give judgment for the defendant."

Judgments of
Mr. Justice
Coltman and
Mr. Justice
Erskine in *Graham v. Musson*.

If a written contract for sale of goods purport to be made between A. the seller and B. the buyer, and it be on B.'s part made by him only as agent for C., parol evidence respecting such sale will not be excluded by the Statute of Frauds. (9)

(1) *Chapman v. Partridge*, 5 Esp. N. P. C. 256.

(2) *Farmer v. Robinson*, 2 Camp. 339. n.

(3) *Laythoarp v. Bryant*, 2 Bing. N. C. 735.

(4) *Soames v. Spencer*, 1 D. & R. 32.

(5) *Cooper v. Smith*, 15 East, 103.

(6) *Wright v. Dannah*, 2 Camp. 203.

(7) 5 Bing. N. C. 608.

(8) 4 B. & Ad. 443.

(9) *Wilson v. Hurt*, 7 Taunt. 295.

EFFECT OF
PAROL EVIDENCE UPON
WRITTEN CONTRACTS UNDER
THE STATUTE
OF FRAUDS.

Judgment of
Lord Hard-
wicke in *Par-
teriche v. Powlet*.

Judgment of
Lord Denman
in *Goss v. Nu-
gent (Lord)*.

Statute of
Frauds does
not require
that all con-
tracts concern-
ing lands shall
be in writing.
Written con-
tract concern-
ing lands may
be abandoned
by an agree-
ment not in
writing.

6. EFFECT OF PAROL EVIDENCE UPON WRITTEN CONTRACTS UNDER
THE STATUTE OF FRAUDS. (1)

In *Goss v. Nugent (Lord)* (2) Lord Denman stated, "We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only."

In *Parteriche v. Powlet* (3) Lord Hardwicke said, "To add any thing to an agreement in writing, by admitting parol evidence, which would affect land, is not only contrary to the Statute of Frauds and Perjuries, but to the rule of common law before that statute was in being."

In *Goss v. Nugent (Lord)* (4) Lord Denman observed, "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to wave, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." "It is to be observed, that the statute does not say in distinct terms, that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem, that a written contract concerning the sale of lands may still be waved and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waver and abandonment of the whole written agreement, but only a part of it; and the question is, What is the effect of that?" (5)

(1) *Vide antè*, 1498. tit. EVIDENCE.

(2) 5 B. & Ad. 66.

(3) 2 Atk. 384.

(4) 5 B. & Ad. 64.

(5) Plausible arguments, and some strong authorities, may certainly be urged to show that such agreement in writing cannot be so waved by parol. In the first place, the original agreement is valid only by being in writing; the Statute of Frauds is to receive a liberal construction on the principle laid down in *Twine's case* (3 Co. 80.); and the maxim, *Nihil tam conveniens est naturali æquitati, quam unum quodque dissolvi eodem ligamine quo ligatum est*, seems to be applicable. The *ligamen* here is the *agreement in writing*,

which, if it had been by parol, would in law have been no binding agreement at all. In conformity with this view, it is laid down by Lord Chancellor Hardwicke in *Bell v. Howard* (9 Mod. 302.), "It is certain that an interest in land cannot be parted with or waved by naked parol without writing; yet articles may be so far waved, that if the party come into this court to have a specific execution of them, such parol waver will rebut the equity which the party before had, and prevent this court from executing them specifically." It is fully settled (*Price v. Dyer*, 17 Ves. 356. 363. *Robinson v. Page*, 3 Russ. 114. 119. *Coles v. Trecothick*, 9 Ves. 234. 249. (a.)) that such parol waver

In *Goss v. Nugent* (1) it appeared, that, by an agreement in writing, the plaintiff contracted to sell the defendant several lots of land for the sum of 450*l.*, and to make a good title to them; and 80*l.* was paid to him as a deposit. It was afterwards discovered, that, as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot; and the plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but ultimately refused to pay the remainder of the purchase money, and relied on the objection to the title. Lord Denman observed, "But in the present case, the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into; and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement. The present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all: but our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds; and that the contract now brought forward by the plaintiff, is not wholly a contract in writing."

EFFECT OF
PAROL EVIDENCE UPON
WRITTEN CONTRACTS UNDER
THE STATUTE
OF FRAUDS.

Judgment of
Lord Denman
in *Goss v. Nugent* (Lord).

"We do not say that verbal evidence may not be given of customs and usages applicable to the subject-matter of the written contract where the contract is silent; that has been done in a great variety of instances."

"Whether the plaintiff may not have relief in a court of equity, we give no opinion; it would be for the court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within the Statute of Frauds where verbal evidence has been allowed. (2) These were cases, where the time for the performance of the contract had been enlarged by a verbal agreement, and they were decided on the ground, that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say, whether these cases were rightly decided; if they were so, still the present is a different case; for here, without doubt, the terms of the original contract were varied."

In *Harvey v. Graham* (3) there was a written agreement, that the plaintiff should grant a lease to the defendants, and the defendants should take certain quantities of straw and other things at a valuation, to be made by persons named respectively by plaintiffs and defendants, or their umpire, in the usual way; and the defendants entered under the agreement, and took possession of the straw, &c. A parol agreement was afterwards entered into, that the valuation should be made by one D. The defence set up to an action to recover the amount of D.'s valuation was, that no valuation

is an answer to a bill for the specific performance of a contract; but even in this case, the defence must be established with the greatest clearness and precision, "and the parties must be placed in the same situation in which they stood before the contract was entered into." Chitty on Contracts, 113.

(1) 5 B. & Ad. 65.

(2) *Warren v. Stagg*, cit. in *Littler v. Holland*, 3 T. R. 591. *Thresh v. Rake*, 1 Esp. N. P. C. 53. *Cuff v. Penn*, 1 M. & S. 21.

(3) 5 A. & E. 61

EFFECT OF
PAROL EVIDENCE UPON
WRITTEN CONTRACTS UNDER
THE STATUTE
OF FRAUDS.

Judgment of
Lord Denman
in *Harvey v.
Graham*

Day for the
completion of
the purchase of
an interest in
land, cannot be
waived by oral
agreement.

Judgment of
Chief Justice
Tindal in *Stowell v. Robinson*.

Where giving
of time is par-
cel of the con-
tract.

had been made pursuant to the original agreement:—It was holden on demurrer, that, although the part of the written agreement which was varied by parol might have been good of itself without writing, by reason of the acceptance of the straw, &c. yet it was not competent to the parties, by agreement not in writing, to separate into two parts the subject-matters of the original agreement and to substitute a new agreement, not in writing, as to the straw, &c.; and judgment was given for the defendants; Lord Denman observing, “The original agreement was in writing, and necessarily so, for it related to an interest in lands, and being an entire agreement, the whole was necessarily in writing.” (1) Now assuming that it was competent to the parties to wave and abandon the whole of the first agreement by a subsequent agreement not in writing, which is however doubted in *Goss v. Nugent (Lord)* (2), yet here, as in that case, the parties have not waved and abandoned the whole; for it appears by the declaration, that the lease is not yet granted, that the original agreement to grant it is still subsisting, and the plaintiff avers his readiness to grant it under that agreement. What has been done is a waver and abandonment of part only; and, if that part had of itself required writing within the Statute of Frauds, the cases of *Goss v. Nugent (Lord)* (3) and *Falmouth (Earl of) v. Thomas* (4), are express authorities to shew that the waver would not be binding.” “We think that the agreement, being entire in the first instance, must so continue, and that it cannot be separated or altered otherwise than by writing.”

In *Stowell v. Robinson* (5) it was held, that the day for the completion of the purchase of an interest in land inserted in a written contract, cannot be waved by oral agreement, and another day substituted in its place, Chief Justice Tindal stating, “This is an agreement for the sale of land, upon which by the Statute of Frauds (sect. 4.) no action can be brought ‘unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorised.’ Now we cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by the Lord Chancellor Hardwicke in *Parteriche v. Powlet* (6), and of Sir W. Grant, Master of the Rolls, in *Price v. Dyer*. (7) And we think the reasoning upon which the judgment of the court of King’s Bench proceeds in *Goss v. Nugent (Lord)* (8) goes directly to the point, that the evidence now under discussion is inadmissible.”

In *Stead v. Dawber* (9), which was an action to recover damages for the non delivery of a cargo of bones, Lord Denman stated, that it appeared “By

(1) *Chater v. Beckett*, 7 T. R. 201.

(2) *Ibid.* 5 B. & Ad. 58.

(3) *Ibid.*

(4) 1 C. & M. 89. 3 Tyrw. 26.

(5) 3 Bing. N. C. 928.

(6) 2 Atk. 383.

(7) 17 Ves. 356.

(8) 5 B. & Ad. 58.

(9) 10 A. & E. 63. overruling *Cuff v. Penn*, 1 M. & S. 21.

the sold note they were to be shipped on the 20th to the 22d of May, and to be paid for by an acceptance at three months from the delivery. The 22d happened on a Sunday; and a conversation taking place between the defendant and the plaintiff's agent respecting this, upon the suggestion of the defendant, the Monday or Tuesday immediately following were substituted as the days of delivery. The agent who proved this, also stated, that the time for giving the acceptance would, in consequence, be also proportionably enlarged. The main question at the trial and before us was, Whether this enlargement of the time was an alteration of the contract, or only a dispensation with its performance as to time? The declaration, after setting out the original contract, stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th of May, and averred a demand on the 24th. The fourth plea alleged, that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest, or part payment; and that there was no note or memorandum in writing of it; and the replication traversed its being parcel of the contract.

EFFECT OF
PAROL EVIDENCE UPON
WRITTEN CONTRACTS UNDER
THE STATUTE
OF FRAUDS.

Judgment of
Lord Denman
in *Stead v. Dawber*.

“The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony; for to allow such a contract to be proved, partly by writing and partly by oral testimony, would let in all the mischiefs, which it was the object of the statute to exclude.

“It was urged by the plaintiff's counsel, that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties; but the statute intervenes; and, in the case of such a contract, takes away the remedy by action.”

In *Marshall v. Lynn* (1) it was holden, that the terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing; Mr. Baron Parke observing, “The decision in *Goss v. Nugent* (*Lord*) (2), the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that if the original written contract be varied, and a new contract, as to any of its terms, substituted in the place of it, that new contract cannot be enforced in law, unless it also be in writing.

A written agreement for the delivery of goods at a specified time, cannot be altered by a parol agreement.

Judgment of Mr. Baron Parke in *Marshall v. Lynn*.

“The question is, Whether the same reasoning does not apply to a contract for the sale of goods under the 17th section? It appears to me that no distinction can be made; and I must also observe, that it seems to me to be unnecessary to inquire, what are the *essential* parts of the contract, and what

(1) 6 M. & W. 109. overruling *Cuff v. Penn*, 1 M. & S. 21.

(2) 5 B. & Ad. 58.

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not ; and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material ; and perhaps, therefore, the latter part of the judgment in *Stead v. Dawber* (1) may be considered as laying down too limited a rule. Every thing for which the parties stipulate as forming part of the contract must be deemed to be material.

“ Now in this case, by the original contract, the defendant was to accept the goods, provided they were sent by the first ship ; the parties afterwards agreed by parol, that the defendant would accept the goods if they were sent by the second ship, on a subsequent voyage ; that appears to me to be a different contract from what is stated before.” (2)

In *Trueman v. Loder* (3) it appeared, that the defendant, a merchant, residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him ; after which H. contracted with the plaintiff to sell him tallow (of more than 10*l.* value) ; and H.'s name was used as before. H. intended to make the contract on his own account, but the plaintiff did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker, W. acting for both parties. He signed, bought, and sold notes ; the former beginning “ Bought for T.” (the plaintiff), and the latter “ Sold for H. to my principals,” no buyer or seller being further named. Upon which facts it was holden, that the defendant was liable for the non delivery of the tallow, the plaintiff having no notice that the name of H. ceased to mean the defendant ; that the bought and sold notes constituted a sufficient note in writing to charge the defendant within stat. 29 Car. 2. c. 3. s. 17. ; and that no objection lay to the admission of parol evidence of the above facts, as varying the written instrument :—but upon evidence being offered by the defendant of a custom in the tallow trade, that, on such contracts as the above, “ a party might reject the undisclosed principal, and look to the broker for the completion of the contract,” it was held to be inadmissible, as varying a written instrument (4) :—Lord Denman observing, “ If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive, is hardly open to a doubt. He would decide at once, that the written contract must speak for itself on all occasions ; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts, to write the whole of their contracts ; while, in mercantile affairs, no mischief can be greater, than the uncertainty produced, by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it, must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a pre-

Judgment of
Lord Denman
in *Trueman v.*
Loder.

(1) 10 A. & E. 63.

(2) Respecting the effect of omitting to mention certain terms, which were either agreed upon, or in respect of which no agreement was made, and what is a sufficient statement of such agreements to satisfy the Statute of Frauds, vide *Elmore v. Kings-*

cote, 5 B. & C. 583. *Acebal v. Levy*, 10 Bing. 376. *Hoadly v. M^r Laine*, *ibid.* 482.

(3) 11 A. & E. 589.

(4) And *semble*, that if such evidence were admissible, the custom would not apply here, the principals being in fact disclosed by the broker, who acted for both parties. *Ibid.*

valence of what is called a custom in trade, as to justify a verdict, that it forms a part of every contract? Debate may also be fairly raised, as to the right of binding strangers by customs probably unknown to them: a conflict may exist, between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful, whether the parties to the individual contract really meant, that it should include the custom.

EFFECT OF
PAROL EVIDENCE UPON
WRITTEN CONTRACTS UNDER
THE STATUTE
OF FRAUDS.

“Considerations of this kind gave birth to the Statute of Frauds, requiring that in certain cases no unwritten contract shall be received. But, with regard to such as the parties themselves have agreed to reduce to writing, common sense has established the plain rule, that the writing must bind, and that no spoken words can be allowed to relax or vary its obligation. Evidence of the prevailing custom is supposed to shew, that both parties had something in their contemplation, more than appears in the writing, but suppose them both to have, not only contemplated, but distinctly expressed, in the plainest words, that they considered their contract to include a provision not to be found in the paper, still the evidence cannot be introduced into the cause.

“Custom of trade has been supposed to form a virtual exception to this well known rule; but the cases go no farther than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract.”

GAME.

1. GENERALLY, pp. 2003, 2004.

Principal statutes relative to game—Game defined by stat. 1 & 2 Will. 4. c. 32. s. 2. — No right exists to enter upon the land of another for the destruction of game — Free warren — Judgment of Lord Lyndhurst in Attorney General v. Parsons.

2. PROPERTY IN GAME, pp. 2004—2007.

Reservation of game—Stat. 1 & 2 Will. 4. c. 32. ss. 7. & 36. — The land itself gives the right of shooting — A grant to hunt, &c. is not such an interest as can pass under the execution of a power — Grant of “hawking and hunting” will not include “shooting” — When a grant will not be presumed — When liberty to hunt, &c. may be exercised by servants of the grantee — Judgment of Mr. Baron Parke in Wickham v. Hawker — Where an exception operates as a grant — Action may be maintained for a disturbance without an actual entry — JUSTIFICATION.

3. QUALIFICATION TO KILL GAME, pp. 2007—2009.

Stat. 1 & 2 Will. 4. c. 32. ss. 6. & 46. — Stat. 2 & 3 Vict. c. 35. s. 3. — Time for expiration of game certificates — Stat. 52 Geo. 3. c. 93. — Recovery of penalties — DUTIES FOR CERTIFICATES — Stat. 48 Geo. 3. c. 55. — To whom duties payable — Persons who can demand the production of certificates — Penalties for non production — Judgment of Lord Tenterden in Scarth v. Gardener — KEEPING DOGS AND GUNS — Not penal under stat. 1 & 2 Will. 4. c. 32.

4. APPOINTMENT AND RIGHTS OF GAMEKEEPERS, pp. 2010, 2011.

Stat. 1 & 2 Will. 4. c. 32. s. 13. — Appointments of gamekeepers must be registered with the clerk of the peace — Lord of a manor cannot seize the gun of a gamekeeper of another lord.

5. POSSESSION OF GAME, pp. 2011, 2012.

6. DESTRUCTION OF GAME AT IMPROPER PERIODS, p. 2012.

7. PROCEEDINGS AGAINST UNAUTHORISED PERSONS KILLING GAME, pp. 2012—2015.

Time within which proceedings must be commenced — Venue — By whom complaint may be made — Stat. 1 & 2 Will. 4. c. 32. s. 23. — Stat. 1 & 2 Will. 4. c. 32. ss. 11 & 12 — Occupier or tenant pursuing or killing game — Stat. 1 & 2 Will. 4. c. 32. s. 30. — “Entering and being” defined — Stat. 1 & 2 Will. 4. c. 32. s. 31. — Trespassers in search of game may be required to quit the land and to tell their names and abodes — Stat. 1 & 2 Will. 4. c. 32. s. 32. — Penalty on persons armed using violence — Stat. 1 & 2 Will. 4. c. 32. s. 33. — Trespassing in daytime in his majesty’s forests — What to be deemed daytime.

8. EVIDENCE, pp. 2015, 2016.

Stat. 1 & 2 Will. 4. c. 32. s. 42. — If defendant justify as a gamekeeper, he must prove his deputation — Title to a manor and its boundaries — With a view to costs it should be shewn that the trespass was malicious — COMPETENCY OF WITNESS.

9. ENFORCEMENT OF PENALTIES — WHEN SESSIONS NO POWER TO QUASH CONVICTIONS — APPLICATION OF PENALTIES, p. 2016.

I. GENERALLY.

GENERALLY.

The principal statutes relative to game in England are 48 Geo. 3. c. 55., 52 Geo. 3. c. 93., 9 Geo. 4. c. 69., 1 & 2 Will. 4. c. 32. (1), and 2 & 3 Vict. c. 35.

Principal statutes relative to game.

Stat. 1 & 2 Will. 4. c. 32. s. 2. defines the word "game" to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Game defined by stat. 1 & 2 Will. 4. c. 32. s. 2.

Grouse are not birds of warren (2); and trespass on a free warren will not lie for shooting them.

Rooks are a species of birds *feræ naturæ* of a destructive nature, not known as an article of food, and not protected by any statute; and, therefore, a person cannot have any property in them, or establish any legal right to cause them to resort to his trees. (3)

No right exists for a person arbitrarily to enter upon the land of another for the destruction of game; and the lord of a manor, has no peculiar right to the game superior to that, of any other duly qualified landowner, within the manor.

No right exists to enter upon the land of another for the destruction of game.

A right of free warren, is an exclusive privilege to the owner of the soil to take beasts and fowls of warren (4) within the privileged place created by the king's grant or prescription. (5) The right may be created, and exist *alieno suo* (6); but will not pass by general words in a grant from the crown, of lands within a forest of the crown. The right of free warren is usually established by evidence of enjoyment and usage. But the non user of the right for twenty years, would afford *prima facie* evidence of an extinguishment of the right, especially where it was claimed in the land of another. (7)

Right of free warren.

Free warren can only appertain to a manor by prescription, and cannot be parcel of a manor, and therefore will not pass by a grant of the manor with the appurtenances, though it be held with the manor. (8)

Free warren in gross, of which a grantor is seised, will not pass by a grant of a manor and the appurtenances. (9) Nor by a grant of a manor and all free warren (or other term comprehending free warren) "belonging to or in anywise appertaining to the manor, or therewith or at any time theretofore usually held, and occupied, and enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." (10)

In *Attorney General v. Parsons* (11) it appeared, that James I. granted

(1) The stat. 1 & 2 Will. 4. c. 32. does not extend to Scotland or Ireland.

For the punishment of persons going armed by night for the destruction of game, vide stat. 9 Geo. 4. c. 69. Stat. 2 & 3 Will. 4. c. 58. applies to Scotland.

(2) *Devonshire (Duke of) v. Lodge*, 7 B. & C. 36. 9 D. & R. 875., et vide *Att. Gen. v. Parsons*, 2 C. & J. 279. 2 Tyrw. 223.

(3) *Hannam v. Mockett*, 4 D. & R. 518. 2 B. & C. 934.

(4) 1 Inst. 293. Manwood, 362.

(5) 1 Inst. 293.

(6) Year Book, 3 Hen. 6. 28., 34 Hen. 6. 34., 5 Hen. 7. 10. *Dacre (Lord) v. Tubb*, 2 W. Black. 1151.

(7) *Smith v. Carr*, cit. 2 Tyrw. 243. n.

(8) *Morris v. Dimes*, 3 N. & M. 671. 1 A. & E. 654.

(9) Ibid.

(10) Ibid.

(11) 2 C. & J. 279.

GENERALLY.

Judgment of
Lord Lynd-
hurst in *Att.*
Gen. v. Parsons.
Construction of
the word "de-
mesne."

to Sir Richard Tichborne and his heirs the king's manor and town of Aulton, and the king's hundred of Aulton, with its rights, and all other things to the said manor and hundred belonging; and also, that they should have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and on all other lands and woods being in the same hundred, &c. although the same demesne and other lands were within the king's forest, &c. Upon this grant Lord Lyndhurst observed, "We think we are fully warranted in saying, that though the word 'demesne' may in some cases be applied to any fee simple lands a man holds, yet it is more correct and usual to apply it to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*."

"The effect of the grant in question will then be perfectly clear. It will have conferred upon Sir Richard Tichborne, his heirs and assigns, a right of free warren and free chase in those lands within the manor of Aulton which Sir Richard Tichborne had, as lord of that manor, under the description of his demesne lands; and it will have conferred upon them a similar right in whatever tenemental lands Sir Richard Tichborne then held in fee, either of the king, or of any lord within the limits mentioned in the grant; but it will have conferred no other right. No other right, then, will have been conferred by implication; and the anomaly, not to say the indecorum, of a subject's right to free warren and free chase in the lands of the crown, whilst in the occupation of the crown, will not have occurred. We have not noticed the case of *Smith v. Carr* (1) referred to in the argument, because we think this case sufficiently clear upon the grounds we have mentioned."

**PROPERTY IN
GAME.**

2. PROPERTY IN GAME.

**Reservation of
game.**

The stat. 1 & 2 Will. 4. c. 32. does not affect any then existing or subsequent agreements respecting game, nor any rights of manor, forest, chase, or warren (s. 8.), nor any of the crown forest rights (s. 9.), nor cattle-gates nor rights of common, and does not preclude lords of manors from having game on the wastes (s. 10.).

**Stat. 1 & 2
Will. 4. c. 32.
s. 7.**

Under existing
leases the land-
lord is to have
the game, ex-
cept in certain
cases.

By stat. 1 & 2 Will. 4. c. 32. s. 7. "where any person shall occupy any land under any lease or agreement made previously to the passing of this act, except in the cases hereinafter next excepted, the lessor or landlord shall have the right of entering upon such land, or of authorising any other person or persons who shall have obtained an annual game certificate to enter upon such land, for the purpose of killing or taking the game thereon; and no person occupying any land under any lease or agreement, either for life or for years, made previously to the passing of this act, shall have the right to kill or take the game on such land, except when the right of killing the game upon such land has been expressly granted or allowed to such person by such lease or agreement, or except where upon the original granting or renewal of such lease or agreement a fine or fines shall have

(1) K. B. M. T. 1812, 2 C. & J. 294. n.

been taken, or except where, in the case of a term for years, such lease or agreement shall have been made for a term exceeding twenty-one years."

And by stat. 1 & 2 Will. 4. c. 32. s. 36. "when any person shall be found by day or by night upon any land, or in any of his majesty's forests, parks, chases, or warrens, in search, or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise, as hereinbefore mentioned, or for the occupier of such land (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any officer as aforesaid of such forest, park, chase, or warren, or for any person acting by the order and in aid of any of the said several persons, to demand from the person so found such game in his possession; and in case such person shall not immediately deliver up such game, to seize and take the same from him, for the use of the person entitled to the game upon such land, forest, park, chase, or warren."

PROPERTY IN
GAME.

Stat. 1 & 2
Will. 4. c. 32.
s. 36.

Game may be
taken from
trespassers not
delivering up
the same when
demanded.

In *Dayrell v. Hoare* (1) Mr. Justice Patteson said, "It is the land itself which gives the right of shooting, and the lessor has no power to separate the land from one of its incidents."

The land itself
gives the right
of shooting.

One who finds game on his own ground, cannot justify pursuing it into the land of another (2); but the right of property in game, is in the owner of the land as long as the game abides there. Thus, if A. start a hare in the land of B., and hunt it and kill it there, the property continues all the while in B.; but if A. start a hare in the ground of B., and hunt it into the ground of C., and kill it there, the property is in A. the hunter; but A. is liable in an action of trespass for hunting in the grounds of B. as well as C. (3)

A grant of full liberty to a person, his executors and administrators, and his and their friends, in his or their company, or with his or their permission, and to and for his or their gamekeeper, to hunt, course, shoot, and fish over lands, is not such an interest, as can pass under the execution of a power to lease lands, or any part or parts thereof. (4)

A grant to
hunt, &c. is
not such an
interest as can
pass under the
execution of a
power.

Where there was a clause in a deed bearing date in 1655 (at which time shooting was not in use), reserving a right of hawking and hunting, it was held, that it did not include the liberty of shooting feathered game with a gun. (5)

Grant of
"hawking and
hunting" will
not include
"shooting."

In *Pickering v. Noyes* (6), which was an action of trespass for breaking and entering a close, parcel of Forton Farm, it was pleaded, that J. W., as whose tenant the defendant justified, was seised in fee of fifty acres of land adjoining the close in which, &c.; and that by deed of 1736, between F. C., who was seised in fee of the close in which, &c. and R. W. who was seised in fee of the fifty acres, F. C. granted to R. W., his heirs and assigns for the time being, owners in fee of the fifty acres, the privilege of hunting for

(1) 4 P. & D. 114.

(4) *Dayrell v. Hoare*, 4 P. & D. 114.

(2) *Deane v. Clayton*, 7 Taunt. 489. 2 Marsh. 577. 1 Moore, 203.

(5) *Moore v. Plymouth (Earl)*, 1 Moore, 346. 7 Taunt. 614. 3 B. & A. 66.

(3) *Sutton v. Moody*, 1 Ld. Raym. 250. 12 Hen. 8. 9.; vide *Churchward v. Studdy*, 14 East, 249.

(6) 7 D. & R. 49. 4 B. & C. 639.

**PROPERTY IN
GAME.**

When a grant
will not be
presumed.

When liberty
to hunt, &c.
may be exer-
cised by ser-
vants of the
grantee.

Judgment of
Mr. Baron
Parke in *Wick-
ham v. Hawker*.

Where an ex-
ception operates
as a grant.

Action may be
maintained for
a disturbance,
without an
actual entry.

JUSTIFICATION.

game in the close in which, &c. Replication, that F. C. did not grant to R. W. the privilege as in the plea mentioned. Issue thereon. There was no proof of the grant pleaded; but it was proved that, by deed of the same date, R. W., who was seised in fee of the manor of Middleton, conveyed Forton Farm to F. C. in fee, retaining all royalties; that from 1753 the gamekeepers of the lords of the manor were accustomed to sport over Forton Farm, with the knowledge of plaintiff and his landlords, the owners of Forton Farm; that, about fourteen years ago, plaintiff, by desire of his landlord, gave notice to the gamekeeper of the lord of the manor not to trespass, but he continued to sport there, by the order of the lord of the manor, without further interruption:—It was held, that, upon such evidence, the jury could not presume a grant.

In *Wickham v. Hawker* (1) Mr. Baron Parke said, "The liberties to hawk, hunt, fish, and fowl, granted to one, his heirs and assigns, are interests, or profits *à prendre*, and may be exercised by servants in the absence of the master; and further, we think that the addition 'with servants or otherwise' does not limit the privilege, and exclude the exercise of it by servants. Words tending to enlarge cannot (unless the intention is very plain) be taken to restrain." (2)

An exception in a grant of free liberty of hawking and hunting upon the premises to the grantor and the heirs of his body, and his and their friends, servants, and followers, though it may not be good as a reservation, yet, being sealed with the seals of the parties, operates as a grant to the party and his heirs. (3)

It is not requisite to maintain an action for the destruction or disturbance of game, that the defendant should have actually entered upon the land of the plaintiff. Thus, an action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away, and the owner damnified. (4)

Firing at wildfowl to kill and make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight, the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence, though he did not fire into the decoy pond, is evidence of a wilful disturbance of and damage to the decoy, for which an action on the case is maintainable by the owner. (5)

Although it be a general rule, that the owner of a dog is not liable for any mischief which the animal commits, unless he be aware of his mischievous propensities, yet if the owner be a trespasser, he is responsible for such mischief independently of the fact of knowledge (6): thus, in *Beckwith v. Shordike* (7) the defendants were trespassing on the plaintiff's field with dogs and guns, when their dogs, contrary to their will, killed a deer of the plaintiff's, yet, they were held responsible.

(1) 7 M. & W. 79.

(2) Vide *Cardigan (Earl of) v. Armitage*, 2 B. & C. 209.

(3) *Moore v. Plymouth (Lord)*, 7 Taunt. 614. S. C. not S. P. 3 B. & A. 66.

(4) *Keeble v. Hickeringill*, 11 East, 574. n.

(5) *Carrington v. Taylor*, *ibid.* 571. 2

Camp. 258. If a man standing in one parish or county shoot at game in another, he uses the gun in the district in which he stands. *Rex v. Alsopp*, Show. 339.

(6) *Beckwith v. Shordike*, 4 Burr. 2092.

(7) *Ibid.*

A defendant cannot justify the killing a dog in pursuit of game on his, the defendant's, premises, unless he can shew, that the hare was put in such peril, as to render the destruction of the dog necessary for the preservation of the hare. (1)

PROPERTY IN
GAME.

Killing dogs.

A man cannot justify the digging in another's land in order to destroy a badger (2); and though it has been held, that a man might justify the riding over another man's land in following a fox, which could not otherwise be killed (3), yet in a later case (4) Lord Ellenborough is said to have ruled, that if the jury thought from the evidence, that the defendant pursued the fox for his own pleasure, and that the good of the public was not his sole and governing motive, they ought to find for the plaintiff.

Destruction of
badgers.

3. QUALIFICATION TO KILL GAME.

QUALIFICATION
TO KILL GAME.

By stat. 1 & 2 Will. 4. c. 32. s. 6. "every person who shall have obtained an annual game certificate shall be authorised to kill and take game, subject to an action or to such other proceedings, as are hereinafter mentioned, for any trespass by him committed in search or pursuit of game: provided always, that no game certificate on which a less duty than 3*l.* 13*s.* 6*d.* is chargeable under the acts relating to game certificates, shall authorise any gamekeeper to kill or take any game, or to use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game except within the limits included in his appointment as gamekeeper;" but that if he do, "he may be proceeded against under this act, or otherwise, in the same manner to all intents and purposes as if he had no game certificate whatever."

Stat. 1 & 2
Will. 4. c. 32.
s. 6.

Every certi-
ficated person
may kill game
subject to the
law of trespass.

Proviso as to
gamekeepers.

By stat. 1 & 2 Will. 4. c. 12. s. 46. "nothing in this act contained, shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except, that where any proceedings shall have been instituted under the provisions of this act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence, under the general issue."

Stat. 1 & 2
Will. 4. c. 12.
s. 46.

Does not pre-
clude actions
for trespass, but
no double pro-
ceedings for
the same tres-
pass.

By stat. 2 & 3 Vict. c. 35. s. 3. all game certificates are to expire on the 5th of July, instead of the 5th of April; and by sect. 4. justices of the peace are authorised to hold special sessions for the purpose of granting licences to deal in game at any time after July in every year, as well as in July, as enacted by stat. 1 & 2 Will. 4. c. 32. s. 18., and under similar regulations as to notice, &c., and the licences are to continue till the 1st of July next following.

Stat. 2 & 3
Vict. c. 35. s. 3.
Time for ex-
piration of
game certi-
ficates.

(1) *Vere v. Cawdor* (Lord), 11 East, 568.
Janson v. Brown, 1 Camp. 41., et vide *Wright*
v. Ramscott, 1 Saund. 84. *Athill v. Corbet*,
Cro. Jac. 463.

(3) *Gundry v. Feltham*, 1 T. R. 334.

(4) *Essex (Earl of) v. Capel*, Hertford
Sum. Ass. 1809. Christian on the Game
Laws, 114.

(2) *Gedge v. Minne*, 2 Bulstr. 60.

**QUALIFICATION
TO KILL GAME.**Stat. 52 Geo. 3.
c. 93.Recovery of
penalties.**DUTIES FOR
CERTIFICATES.**Stat. 48 Geo. 3.
c. 55. Sched.
(L.)To whom
duties payable.Persons who
can demand
the production
of certificates.Penalties for
non produc-
tion.

By stat. 52 Geo. 3. c. 93. Sched. (L.)^{xiii.} the penalties are recoverable before any two or more commissioners for the affairs of taxes, who shall give judgment for the penalty, or for such part thereof as the commissioners shall think proper to mitigate, not being less than one moiety.

By stat. 48 Geo. 3. c. 55. Sched. (L.) "every person using any dog, gun, net, or other engine, for the purpose of taking or killing game, or any woodcock, snipe, quail, or landrail, or any conies in Great Britain, if such person be a servant to any person charged in respect of such servant by such act, and shall use any dog, &c. for any of the before mentioned purposes upon any manor or royalty in England, Wales, Berwick-on-Tweed, or Scotland, by virtue of any deputation or appointment duly registered or entered as gamekeeper thereto, shall be charged the annual sum of 1*l.* 1*s.* (1); and if not a servant for whom the duties on servants shall be charged, the annual sum of 3*l.* 3*s.* (2); and every other person using any dog, &c. for any of the purposes before mentioned, is chargeable with the annual sum of 3*l.* 3*s.* with two exceptions only — first, the taking woodcocks and snipes with nets and springes; and secondly, the taking and destroying conies in warrens, or in any inclosed ground, or by any person in land in his occupation, either by himself or by his direction."

These duties are to be paid to the collector of assessed taxes for the place where the party resides; and the collector is authorised to give a receipt, and to demand 1*s.* of the party for the same over and above the duty as a compensation for his trouble. The receipt being delivered to the clerk of the commissioners of the district, he will exchange it for a certificate gratis. Gamekeepers, on whose behalf a receipt and certificate have been obtained by their masters, are not required to obtain a certificate for themselves; but it is provided, that the certificate shall be void upon the revocation of the deputation; but the same may be renewed for the remainder of the year on behalf of the new gamekeeper. The same statute provides, that unqualified persons shall not be protected by the certificate; and that the protection of gamekeepers' certificates shall not extend beyond the limits of the manor for which they are appointed.

The following persons may demand the production of certificate, and permission to read or take a copy of it, viz. the assessor or collector of the parish where the party is using any dog, &c.; commissioners of assessed taxes for the county, riding, division, or place; lord, lady, or gamekeeper of the manor; inspector of taxes for the district; any person duly assessed to these duties for killing game; and lastly, the owner, landlord, lessee, or occupier of the land.

If certificate be not produced, then the party who has made the demand may require the person using the dog, gun, &c., under a penalty of 20*l.*, to declare his christian name and surname, and place of residence, and parish or place in which he has been assessed; lastly, persons who use dogs, guns, &c. without having obtained certificate, are to pay the duty of 3*l.* 3*s.* by way of surcharge, and a penalty of 20*l.*

(1) Four shillings were added by stat. 52 Geo. 3. c. 93. to this and the following sum by stat. 52 Geo. 3. c. 93.

(2) Ten shillings and sixpence were added

In *Scarth v. Gardener* (1) Lord Tenterden said, "I am not prepared to say, that the demand of the certificate must be made on the land. It might happen, that, seeing the gamekeeper, a person might get into the road before the keeper could come up to him, and thus the statute might be evaded. However, I think that the demand, if not actually made on the land, must be made immediately, and so in some degree to form a part of the same transaction. It is not necessary that a gamekeeper making the demand should produce any certificate; and, if the other party refuse to produce his certificate, he does so at the risk of whether the party demanding it is a gamekeeper, or other person having a right to demand it."

QUALIFICATION
TO KILL GAME.

When demand
of the certifi-
cate should be
made.

Judgment of
Lord Tenter-
den in *Scarth*
v. Gardener.

If a person refuse to produce his game certificate, or to tell his name or residence, the person demanding, need not go on to ask in what place, if any, he is assessed to the game duty.

The penalty under the Game Certificate Act, for not producing a license when lawfully required, is not complete by the refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and the place of his residence. (2)

The mere keeping of a dog or instrument is not, under stat. 1 & 2 Will. 4. c. 32., penal, though kept with intent to use it for the destruction of game.

KEEPING DOGS
AND GUNS.

Not penal
under stat.
1 & 2 Will. 4.
c. 32.

Whether the defendant *used* a dog or instrument for the destruction of game, is a question of fact depending on the acts done, and the intention of the agent, as collected from his declarations and conduct; but an accidental killing of game is not penal (3), although penal to take away the game so killed.

A gun is not necessarily an engine to kill game (4); but it is sufficient to prove, that the defendant was beating about for game and pointed his gun, though he did not fire at any. (5)

Gun not neces-
sarily an engine
to kill game.

To warrant a magistrate in convicting, the evidence ought to be such, as to satisfy his conscience of the intent of the party to pursue game, and there should appear on the face of the conviction such reasonable and *prima facie* evidence of the intent, as would have been sufficient in an action to have been left to a jury. (6)

Evidence to
justify a magis-
trate's convic-
tion.

But in an action on the stat. 5 Anne, c. 14., where the defendant set up a defence that he joined in the sport as the servant of another, it was held, that he must give strict evidence, that the person by whose orders he acted was himself qualified to kill game (7); and though an unqualified person brought his own dogs into the field, the penalty did not attach if he brought them as a loan to the qualified person. (8)

(1) 5 C. & P. 40.

(2) *Molton v. Rogers*, 4 Esp. N. P. C. 215.

(3) *Molton v. Cheeseley*, 1 ibid. 123.

(4) *Wingfield v. Stratford*, 1 Wils. 315.

(5) *Hebden v. Hentey*, 1 Chitt. 607.

(6) *Rex v. Davis*, 6 T. R. 177.

(7) *Clarke v. Broughton*, 3 Camp. 328.

(8) *Lewis v. Taylor*, 16 East, 49. For

decisions under the statute of Anne, vide *Molton v. Rogers*, 4 Esp. N. P. C. 217. *Rex v. Bleasdale*, 4 T. R. 809. *Exp. Sylvester*, 9 B. & C. 61. 4 M. & R. 5. *Turner v. Coningsby (Lord)*, Bull. N. P. 196. (b.) *Rex v. Taylor*, 15 East, 460. *Rex v. Newman*, Lofft, 178. 5 T. R. 376. n. *Walker v. Mills*, 4 Moore, 348. 2 B. & B. 1.

**APPOINTMENT
AND RIGHTS OF
GAMEKEEPERS.**

Stat. 1 & 2
Will. 4. s. 32.
s. 13.

Lords of ma-
nors may ap-
point game-
keepers.

Appointments
of gamekeepers
must be regis-
tered with the
clerk of the
peace.

Lord of a
manor, cannot
seize the gun
of a game-
keeper of an-
other lord.

4. APPOINTMENT AND RIGHTS OF GAMEKEEPERS.

By stat. 1 & 2 Will. 4. c. 32. s. 13. "any lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his majesty, by writing under hand and seal, or in case of a body corporate then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers, to preserve or kill the game within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty, for the use of such lord or steward thereof, and to authorise such gamekeeper or gamekeepers within the said limits, to seize and take for the use of such lord or steward all such dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used within the said limits by any person not authorised to kill game for want of a game certificate." (1)

By sect. 16. all appointments of gamekeepers must be registered with the clerk of the peace.

In *Bush v. Green* (2) Chief Justice Tindal said, "No one is a gamekeeper under stat. 1 & 2 Will. 4. c. 32. unless he be registered with the clerk of the peace under it;" and it was therefore holden, that a gamekeeper acting from a deputation granted under stat. 48 Geo. 3. c. 93. was not entitled to a month's notice of action under stat. 1 & 2 Will. 4. c. 32. s. 47.

Where a gamekeeper kills game within a manor, it will be presumed, that the act was done for the use of his principal. (3)

A seizure is a ministerial act, and need not be done by the gamekeeper himself, but may be done by another under his immediate direction (4), but not under a general authority. (5)

If a dog or engine be seized, it becomes the property of the person having authority to seize it, and may be destroyed. (6)

The former statute, which authorised the seizure of dogs, &c. kept for the destruction of game, did not authorise the seizure of any dog such as was not prohibited from being kept, *e. g.* a hound. (7)

The repealed statute (5 Anne, c. 14.) authorised the lord of a manor to take game from unqualified persons, which he could not do before. (8)

The lord of a manor cannot seize the gun of a gamekeeper of another lord, although he be upon the manor of the first without authority. (9) Where a lord of a manor is also a justice of the peace, he is entitled to a month's notice of an action brought against him for taking away a gun from the house of an unqualified person; for it will be presumed, that he acted as a justice. (10) Under stat. 5 Anne, c. 14., before seizure of

(1) Sect. 16. contains regulations respecting the appointment of gamekeepers in Wales.

(2) 4 Bing. N. C. 49.

(3) *Spurrier v. Vale*, 10 East, 413.

(4) *Bird v. Dale*, 7 Taunt. 560.

(5) *Ibid.*

(6) *Kingsnorth v. Bretton*, 5 *ibid.* 416.

(7) *Grant v. Hulton*, 1 B. & A. 134., et

vide *Hooker v. Wilkes*, cit. 2 Stark. Ev. 506. n. 3d ed. 1126., where it was held that a hound was not within the statute 5 Anne, c. 14., because it was not mentioned there.

(8) *Bird v. Dale*, 7 Taunt. 560. 1 Moore, 290. The present statute does not extend to game, except in cases within sect. 36.

(9) *Rogers v. Carter*, 2 Wils. 387.

(10) *Briggs v. Evelyn*, 2 Hen. Black. 114.

game on the land of an unqualified person, the lord, &c. was bound to exercise his judgment, whether the person possessing the game be qualified or not, afterwards he may seize by the hands of another. (1) Where a magistrate convicts an unqualified person for killing game under the statute, and causes his dog to be brought for the purpose of seizing it, he may order the dog to be killed without any formal adjudication of seizure. (2)

APPOINTMENT
AND RIGHTS OF
GAMEKEEPERS.

5. POSSESSION OF GAME.

POSSESSION OF
GAME.

By stat. 1 & 2 Will. 4. c. 32. s. 4. "if any person licensed to deal in game by virtue of this act as hereinafter mentioned, shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this act as hereinafter mentioned, shall buy or sell any bird of game, after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control, any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year, on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so bought, or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction."

Stat. 1 & 2
Will. 4. c. 32.
s. 4.

Possession of
game illegal
after ten days
in dealers, and
forty days in
other persons,
from the ex-
piration of the
season.

Sect. 17. authorises persons who have obtained an annual game certificate to sell game to any person licensed to deal in game; provided, that no game certificate on which a less duty than 3*l.* 13*s.* 6*d.* is chargeable under the acts relating to game certificates shall authorise any gamekeeper to sell any game except on the account and with the written authority of the master whose gamekeeper he is, and if he do, he may be proceeded against under this act in the same manner as if he had no game certificate.

Sect. 17.

If the possession of game be made out to the satisfaction of the jury, it is incumbent on the defendant to show that it was a justifiable possession.

Incumbent on
defendant to
shew, a justifi-
able possession
of game.

Under stat. 9. Anne, c. 25. s. 2, now repealed, it was held, that a mere possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor in order to carry it to the lord, was not a possession within the penalty of the game laws. (3) "It may as well be said," observed Lord Ellenborough, "that if a qualified man returning home with a bag of game were to fall from his horse, another could not lawfully take up the bag in order to assist the owner; or,

(1) Vide *Bird v. Dale*, 7 Taunt. 566.

(2) *Kingsnorth v. Bretton*, 5 *ibid.* 416.

(3) *Warneford v. Kendall*, 10 East, 19.

**POSSESSION OF
GAME.**

that if a person seised an offender, who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the acts of parliament made for protecting the king's stores."

**DESTRUCTION
OF GAME AT
IMPROPER
PERIODS.**

Days and seasons during which game shall not be killed.

6. DESTRUCTION OF GAME AT IMPROPER PERIODS.

By stat. 1 & 2 Will. 4. c. 32. s. 3. "if any person whatsoever, shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas Day, such person shall, on conviction thereof, before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction; and if any person whatsoever, shall kill or take any partridge between the first day of February and the first day of September in any year, or any pheasant between the first day of February and the first day of October in any year, or any black game (except in the county of Somerset or Devon, or in the New Forest in the county of Southampton), between the tenth day of December in any year and the twentieth day of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the tenth day of December in any year and the first day of September in the succeeding year, or any grouse, commonly called red game, between the tenth day of December in any year, and the twelfth day of August in the succeeding year, or any bustard between the first day of March and the first day of September in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding 1*l.*, as to the said justices shall seem meet, together with the costs of the conviction; and if any person, with intent to destroy or injure any game, shall at any time put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, every such person shall, on conviction thereof, before two justices of the peace, forfeit and pay such sum of money, not exceeding 10*l.*, as to the said justices shall seem meet, together with the costs of the conviction."

Penalty for laying poison to kill game.

A qualified person, who had in his possession, on the 9th of February, partridges and a pheasant killed before the first, was not guilty of any offence against stats. 2 Geo. 3. c. 19. and 39 Geo. 3. c. 34. (1)

**PROCEEDINGS
AGAINST UNAU-
THORISED
PERSONS KILL-
ING GAME.****7. PROCEEDINGS AGAINST UNAUTHORISED PERSONS KILLING GAME.**

By stat. 1 & 2 Will. 4. c. 32. s. 41. the prosecution for every offence punishable upon summary conviction under that act, must be commenced within three months after the commission, of the offence.

Venue, &c. in proceedings

By stat. 1 & 2 Will. 4. c. 32. s. 47. "all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act,

(1) *Simpson v. Unwin*, 3 B. & Ad. 134.

shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant."

PROCEEDINGS
AGAINST UNAUTHORISED PERSONS KILLING GAME.

against persons acting under this act.
Tender of amends.

The plaintiff may rely on any offence committed by the defendant within three months before the commencement of the action, although the fact was not then known to the plaintiff. (1)

A *qui tam* information for penalties under the game laws, is not an information within the meaning of the 48 Geo. 3. c. 58., so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead. (2)

By stat. 1 & 2 Will. 4. c. 32. s. 30., when the occupier of the land, not being entitled to the game, allows any person to kill it, the party entitled to the game, may enforce the penalty.

Stat. 1 & 2 Will. 4. c. 32. s. 30.

In *Midelton v. Gale* (3) Lord Denman said, "The question was, whether it was necessary, that a complaint under stat. 1 & 2 Will. 4. c. 32. s. 30. for a trespass committed in search of game should be made by an owner or occupier of the land, or a person authorised by such owner or occupier. We do not find that any decision has taken place on this point; but we have considered it, and are of opinion, that any person may make such complaint, and that the conviction was therefore good."

By whom complaint may be made.

Judgment of Lord Denman in *Midelton v. Gale*.

By stat. 1 & 2 Will. 4. c. 32. s. 23., if any person without a game certificate kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of searching for or killing or taking game, he will be liable to pay for every such offence, a sum of money not exceeding 5*l.* with the costs of the conviction.

Stat. 1 & 2 Will. 4. c. 32. s. 23.

Killing game without a certificate.

By stat. 1 & 2 Will. 4. c. 32. ss. 11 & 12., when the lessor or landlord has reserved to himself the right of killing game, he may authorise others to kill it; and when the landlord has the right to the game, in exclusion of the occupier, the occupier is liable for pursuing game to a penalty not exceeding 2*l.*, and, for every head of game killed, a sum of money not exceeding 1*l.*

Stat. 1 & 2 Will. 4. c. 32. ss. 11, 12. & 30.

Occupier or tenant pursuing or killing game.

In a conviction for a trespass in the daytime under stat. 1 & 2 Will. 4. c. 32. s. 30., the words "entering and being" constitute only one offence (4); — and in a conviction, the place of committing the trespass may be described as "certain land," without giving it a name, or setting it out with abutments. (5)

"Entering and being" defined.

By stat. 1 & 2 Will. 4. c. 32. s. 31., "where any person shall be found on any land, or upon any of his majesty's forests, parks, chases, or warrens, in the day-

Stat. 1 & 2 Will. 4. c. 32. s. 31.
Trespassers in

(1) *Rushworth v. Craven*, 1 M. & Y. 417.

(2) *Davies, q. t. v. Bint*, 5 D. & R. 359. 3 B. & C. 586. 1 C. & P. 439.

(3) 8 A. & E. 160.

(4) *Rex v. Mellor*, 2 Dowl. P. C. 173.

(5) *Ibid.* Under stat. 1 & 2 Will. 4. c. 32. s. 45. the conviction itself cannot be removed out of the inferior court, but a verified copy may be used, to ascertain whether the conviction is valid. *Ibid.*

**PROCEEDINGS
AGAINST UNAU-
THORISED PER-
SONS KILLING
GAME.**

search of game may be required to quit the land, and to tell their names and abodes, and in case of refusal may be arrested.

Penalty.

Party arrested must be discharged, unless brought before a justice within twelve hours.

Stat. 1 & 2
Will. 4. c. 32.
s. 32.

Penalty on
persons found
armed using
violence, &c.

Stat. 1 & 2
Will. 4. c. 32.
s. 33.

time, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise as herein-before mentioned, or for the occupier of the land (whether there shall or shall not be any such right or reservation or otherwise), or for any gamekeeper, or servant of either of them, or for any person authorised by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode, as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring as aforesaid, and also for any person acting by his order and in his aid, to apprehend such offender, and to convey him or cause him to be conveyed as soon as conveniently may be before a justice of the peace; and such offender (whether so apprehended or not), upon being convicted of any such offence before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the convicting justice shall seem meet, together with the costs of the conviction: provided always, that no person so apprehended shall, on any pretence whatsoever, be detained for a longer period than twelve hours from the time of his apprehension until he shall be brought before some justice of the peace; and that if he cannot, on account of the absence or distance of the residence of any such justice of the peace, or owing to any other reasonable cause, be brought before a justice of the peace within such twelve hours as aforesaid, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions herein-after mentioned, as if no such apprehension had taken place."

Sect. 32. contains provisions, imposing a penalty of 5*l.* with costs of conviction where any persons, to the number of five or more together, shall be found on any land, or in any of his majesty's forests, parks, chases, or warrens in the daytime in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, any of such persons being then and there armed with a gun, and such persons or any of them shall then and there, by violence, intimidation, or menace, prevent or endeavour to prevent any person authorised before mentioned from approaching such persons so found, or any of them, for the purpose of requiring them or any of them to quit the land whereon they shall be so found, or to tell their or his christian name, surname, or place of abode respectively.

To justify the apprehension of a person under stat. 1 & 2 Will. 4. c. 32. s. 31., he must have been required to quit the land, and to tell his name, and the "wilfully continuing or returning upon the land," to justify an apprehension, must be upon the same land, and for the purpose of pursuing game there. (1)

By sect. 33., "if any person whatsoever shall commit any trespass by entering or being in the daytime upon any of his majesty's forests, parks,

(1) *Rex v. Long*, 7 C. & P. 314.

chases, or warrens, in search or pursuit of game, without being first duly authorised so to do, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction.

By stat. 1 & 2 Will. 4. c. 32. s. 35. the provisions as to trespassers are not to apply to persons hunting, &c.

By stat. 1 & 2 Will. 4. c. 32. s. 34. "daytime" is to be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.

PROCEEDINGS
AGAINST UNAU-
THORISED PER-
SONS KILLING
GAME.

Trespassing in
daytime in his
majesty's
forests.

What to be
deemed day-
time.

8. EVIDENCE.

By stat. 1 & 2 Will. 4. c. 32. s. 42. "it shall not be necessary, in any proceeding against any person under this act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, license, consent, authority, or other matter of exception or defence, shall be bound to prove the same."

Although in an action on the game laws, the plaintiff must own, that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification, for, as observed by Lord Mansfield in *Spieres v. Parker* (1), "there is a settled distinction between a proviso in the description of the offence, and a subsequent exemption from the penalty under certain circumstances."

If the defendant justify killing game as a gamekeeper, he must produce and prove his deputation from the lord of the manor, and show, that he is the lord of such manor. (2) When the defendant proved a deputation to kill game for the use of the lord of the manor, it was held, that it might be presumed, that the game which he killed, was intended for the use of the lord, there being no evidence to the contrary. (3)

The court will not allow the title to a manor (4) nor its boundaries (5) to be tried in an action for penalties, although the parties consent to do so. It is sufficient, therefore, to show a colourable title as lord of a manor, by proof of seisin in fact, or the exercise of manorial rights. (6) The enrolment books of deputation kept in the office of the clerk of the peace are admissible in evidence, without the production and proof of the deputations themselves. (7) So the holding of manor courts (8), and acts of cutting down timber on the wastes (9), are admissible in evidence for the purpose of establishing the title to the manor. But it is no defence, that the defend-

EVIDENCE.

Stat. 1 & 2
Will. 4. c. 32.
s. 42.

If defendant
justify as a
gamekeeper, he
must prove his
deputation.

Title to a
manor and its
boundaries.

(1) 1 T. R. 144. recog. *Rex v. Stone*, 1 East, 650.

(2) *Calcraft v. Gibbs*, 4 T. R. 681. *Blunt v. Grimes*, *ibid.* 682. *Spurrier v. Vale*, 10 East, 413. 2 Stark. Ev. 3d ed. 505.

(3) *Spurrier v. Vale*, 10 East, 413.

(4) *Blunt v. Grimes*, 4 T. R. 682. *Calcraft v. Gibbs*, *ibid.* 681.

(5) *Hankins v. Bailey*, 4 T. R. 681. n.

(6) *Ibid.* Evidence of reputation alone is not sufficient. *Rushworth v. Craven*, 1 M'Clel. & Y. 417.

(7) *Hunt v. Andrews*, 3 B. & A. 341. *Kinnersley v. Orpe*, Doug. 56.

(8) "A court is matter of distinct grant, and does not necessarily belong to a manor." Per Abbott C. J. in *Hunt v. Andrews*, 3 B. & A. 348.

(9) The act of felling timber is a right belonging to the owner of the soil, and may not belong to the lord of the manor. *Ibid.* 347.

EVIDENCE.

With a view to costs, it should be shewn that the trespass was malicious.

COMPETENCY OF WITNESS.

ant acted as gamekeeper under a *bond fide* belief that his principal was really entitled to the manor, there being no ground for the claim. (1)

With a view to costs it is frequently necessary to prove, as alleged, that the trespass was wilful and malicious.

An informer is not a competent witness (2), when he is to have any part of the penalty. But an inhabitant of a county under stat. 1 & 2 Will. 4. c. 32. is a competent witness, although the penalty is to be applied to a local rate.

Although stats. 9 Geo. 4. c. 69. and 57 Geo. 3. c. 90. speak of a conviction on the oath of one or more credible witnesses, a confession before a justice (3), or even upon a confession made to a third person, when proved before the justice, is sufficient evidence for a conviction. (4)

ENFORCEMENT OF PENALTIES — WHEN SESSIONS NO POWER TO QUASH CONVICTIONS — APPLICATION OF PENALTIES.

ENFORCEMENT OF PENALTIES.

Stat. 1 & 2 Will. 4. c. 32. ss. 38, 39. 43 & 44.

WHEN SESSIONS NO POWER TO QUASH CONVICTIONS.

APPLICATION OF PENALTIES.

Stat. 1 & 2 Will. 4. c. 32. s. 37.

9. ENFORCEMENT OF PENALTIES—WHEN SESSIONS NO POWER TO QUASH CONVICTIONS—APPLICATION OF PENALTIES.

By stat. 1 & 2 Will. 4. c. 32. ss. 38, 39. 43 & 44. the justices, before whom any person is summarily convicted in penalties, may adjudge, that such party shall pay the penalty immediately or at a future time, and in default of payment be imprisoned for a certain period not exceeding two calendar months, where the penalty, exclusive of costs, shall not amount to 5*l.*; and not exceeding three calendar months in any other case—but the imprisonment to cease on payment of debt and costs; and that the party convicted, may appeal to the sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction, and that no such conviction shall be quashed for want of form.

A party, summarily convicted under the foregoing statute appealed, giving notice of several objections on the merits. By the conviction, when returned to the sessions, it appeared, that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The sessions quashed the conviction on this ground, stating in their order, that they quashed it for want of form. The objection was not taken in the order of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed:—It was held, that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given. (5)

Every penalty and forfeiture (if not previously provided for) is to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, to be by such officer paid over to the use of the general rate of the county, riding, or division in which such parish, &c. shall be situate, whether the same shall or shall not contribute to such general rate of the county, &c.

(1) *Calcraft v. Gibbs*, 4 T. R. 681. 5 *ibid.*
19. *Hunt v. Andrews*, 3 B. & A. 341.
(2) *Rex v. Stone*, 2 Ld. Raym. 1545. *Rex v. Blaney*, Andr. 240.

(3) *Rex v. Hall*, 1 T. R. 320. *Rex v. Gage*, Str. 546. *Sanders's case*, 1 Saund. 262.
(4) *Ibid.*
(5) *Rex v. Boulbee*, 4 A. & E. 498.

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